The Presumption of Due Care in California

Sidney L. Weinstock
Harold J. Chase
THE "PRESUMPTION OF DUE CARE" IN CALIFORNIA

By SIDNEY L. WEINSTOCK and HAROLD J. CHASE
Members of the San Francisco Bar

The California Code of Civil Procedure expressly declares that there is a disputable presumption that a person "takes ordinary care of his own concerns."

As might be expected, this "presumption of due care" has a long and complex history as a constantly reappearing character in California negligence cases. What this presumption actually does during its many appearances is exceeded in uncertainty only by what it is supposed to do. The California law reveals confusion, vagueness and plain error in a series of cases extending over the last 50 years. In case after case, the courts have attempted to pin down the nature of this "presumption of due care"; its function; when instructions on it are proper; and when it is "dispelled" from a case. The efforts of our courts to answer these questions are notable chiefly for lack of success or for error.

The source of all the difficulty is found in section 1963 of the California Code of Civil Procedure, which provides in pertinent part as follows:

"All other presumptions are satisfactory if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: . . .

(4) that a person takes ordinary care of his own concerns."

The California Supreme Court has, on several occasions, attempted to lay down definitive rules governing the operation and effect of this presumption. Each attempt has only been a point of departure for new controversies over proper application of the "clarified" rules.

Some of the basic questions which have been considered by California courts in the area of the disputable presumption of due care are:

1. Is the presumption evidence in the case, to be considered and weighed by the trier of fact in determining whether the fact presumed to exist does exist?¹
2. Will the presumption create a conflict in evidence sufficient to justify a finding that the fact claimed and presumed to exist does exist, in spite of a preponderance of evidence against it?²
3. Is the presumption available to a party capable of testifying as to his own conduct, where the issue is whether or not his conduct amounted to "due care"?³
4. Is there a different set of rules governing the application and operation of the presumption in death cases?⁴

¹Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, 210 Pac. 269 (1922).
³Rogers v. Interstate, 212 Cal. 36, 297 Pac. 884 (1931).
⁴Westberg v. Wilde, 14 Cal.2d 360, 94 P.2d 590 (1939).
5. Where the conduct of a party or a decedent is testified to by witnesses for the party or the decedent upon whose behalf the presumption is invoked, is the presumption dispelled from the case; or must the evidence of those witnesses show a lack of due care as a matter of law on the part of the party or decedent before the presumption is dispelled?\(^5\)

In view of several recent cases, decided by the appellate courts of this state,\(^6\) it is clear that the old uncertainties regarding this presumption remain and that our Supreme Court will again be called upon to decide important questions in connection with those uncertainties.

This article will attempt to consider some of the problems involved in one phase of the controversy:

Under what circumstances is the presumption of due care, invoked by a party on his own behalf, or on behalf of a decedent, dispelled from the case and not to be considered by the trier of fact in determining whether or not a person whose conduct is in issue exercised ordinary care for his own concerns.

It is the thesis of this article that reason and general rules of law show conclusively that in any case where credible and reliable testimony shows the actual conduct of a party, a decedent, or of a third person whose conduct is in issue as to whether or not it amounted to ordinary care under the circumstances, there is no room in such a case for the operation of any "presumption of due care," as evidence or otherwise, and the trier of fact is to consider the evidence as to the conduct itself and, without the aid of any presumption, to determine whether or not the evidence of the conduct shows that it amounted to "ordinary care under the circumstances."

This article will be restricted insofar as possible to a consideration of this thesis, but it is not suggested that it is felt that the other questions listed are finally settled in our law. In fact, while the greatest uncertainty in California law centers around the question of when the presumption of due care is dispelled from a negligence case, other rules on the role of this presumption as evidence may well come up for reconsideration. Certainly there is ample reason for re-examination of many decisions which have overlooked the persuasive logic of Justice Traynor's dissent in the case of Speck v. Sarver.\(^7\)

The Nature of Presumptions and Their Role in the Law

Preliminarily it should be pointed out that legal presumptions, in the absence of statutes, are not generally considered as evidence. They are useful in the law as procedural substitutes for evidence, their main purpose

\(^7\)Note 5, supra.
being to throw a procedural burden of going forward on the party against
whom a presumption is invoked to show the non-existence of a fact presumed.

Presumptions are related to the doctrine of judicial notice and are based
on common human experience. Where certain facts are shown to exist, the
existence or non-existence of other facts may be reasonably presumed in
the absence of proof to the contrary. Their whole purpose is, either for
reasons of logical necessity or for the advancement of some social policy,
to force a party against whom a presumption is invoked to come forward
with evidence in rebuttal. A presumption is a rule of law to require the
production of evidence. It is not itself evidence.

The general rule is that where evidence to the contrary is offered, a
presumption disappears from the case. It then has no probative value. Its
function has been served and the contrary evidence is to be weighed and
considered and the presumption as a rule of law has no further operation.6

There is one circumstance under which a presumption as a rule of law
properly remains in the case after it is submitted to the trier of fact. This
is where the existence of the set of facts giving rise to the presumption is
contested. For example, as Wigmore points out, if an absence of seven years
gives rise to a presumption of death, the absence itself may be contested.
The trier of fact must, under proper instruction, determine whether or not
absence is proven. If it is so found, the presumption as a procedural rule of
law operates and requires a finding of death. There is no weighing of the
presumption as "evidence." It has no probative force. There simply is, under
this assumed state of evidence, no contrary evidence that the "decedent" is
alive and the procedural rule, under proper instruction, comes into play to
require a finding of death if the absence is found. The evidence being con-
sidered is the evidence on whether or not the person in question has in fact
been absent for seven years. Suppose, however, that evidence is also offered
to show that the alleged "decedent" is alive. As to this evidence, the pre-
sumption, under the general rule, has absolutely no weight as "evidence."
The trier of fact must determine the question on the evidence offered. The
absence of seven years can be given, as a proven fact, any weight to which
it is entitled. Evidence contrary to the presumption having been offered,
it is logically indefensible under any proper understanding of the nature
and function of a presumption, to allow the court to instruct that any
probative force is to be given to a presumption in this situation. The facts
giving rise to a presumption are to be considered only as facts, and not as
facts supported by a "presumption" that is "evidence."9 If the trier of fact

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7 See WIGMORE, EVIDENCE (3d ed.), §§ 2490-2491, where this matter is discussed and particularly
see page 290, note 5, citing California cases calling presumptions "evidence" as illustrations of a
"fallacy." See, also, page 288, note 3, where California code sections on presumptions are classified
as a borrowing of "misapplied continental terms," and representing "imperfections of transitional
theory" as tending to create confusion between presumptions of "law and fact," a useless distinction
to be abandoned.
finds the absence of seven years, it is not then to “weigh” a presumption of
death against evidence of life. The evidence to be considered is a 7-year
absence as against other testimony that the decedent is now alive.

There are many California cases construing our code sections and
holding that “presumptions are evidence” and to be weighed as such.10
The error of these cases is amply demonstrated by the unanswerable dissent
of Justice Traynor in Speck v. Sarver referred to above. That phase of this
problem is beyond the scope of this article and it is discussed here only to
assist the examination of the problem of when the presumption of due care
is dispelled from a negligence case and is not to be considered by the trier of
fact in any way, as “evidence” or as “a procedural rule of law.”

Relation of Presumptions to Burden of Proof

We are primarily concerned herein with the problem of contributory
negligence of a plaintiff or of a decedent whose representative is suing for
his wrongful death. This is so because the presumption we are considering
is the presumption that a person exercises “ordinary care for his own
concerns.” However, the presumption has been successfully invoked by
defendants as “evidence” that a certain person exercised ordinary care for
the concerns of others, in fact situations where a concern for one would appear
necessarily to involve care for the other.11 This differentiation is seldom
analyzed in the California cases and the applicability of the presumption
is assumed.

In some jurisdictions, a plaintiff in a negligence case has the burden of
proving his freedom from negligence as an ultimate fact to warrant a judg-
ment in his favor.12 It is sometimes said that it is a general rule in these
jurisdictions that due care on the part of the plaintiff will not be presumed,
but that he must prove it by evidence.13 The cases in these jurisdictions,
however, are extremely helpful in gaining a general understanding of the
problem. This is so because there the problem is recognized in terms of the
availability of evidence covering the subject of the presumption. In those
jurisdictions where it is clear that the plaintiff, under such a burden, cannot
produce evidence, he is given the benefit of the presumption.14 In the case
of Sanderson v. Chicago, etc., R.R.,15 the plaintiff was denied the presumption
where it was shown that evidence was available and not produced.

In jurisdictions such as California where contributory negligence is an
affirmative defense and where presumptions are regarded as evidence, the

10See cases cited in Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, 210 Pac. 269
(1922).
13See 65 C.J.S. 206(c).
15167 Iowa 90, 149 N.W. 188 (1914).
plaintiff is often given the benefit of the presumption as evidence where he cannot testify or does not produce witnesses covering the subject of the presumption. The logical fallacy of this approach will be discussed herein but it should be kept in mind that even this rule should never apply in any jurisdiction where the plaintiff or his witnesses cover by testimony the conduct in question, whether the testimony shows contributory negligence or not. To do so is to tend to remove the evaluation of the conduct from the trier of fact.

It is in a jurisdiction where the plaintiff is required to prove his freedom from contributory negligence that we see the only logical area for the operation of a so-called “presumption of due care” and in the cases in such a jurisdiction, we can find courts intelligently applying the rules governing the operation of a presumption as a procedural rule of law.

In such a case, the plaintiff can properly prove a prima facie case of the defendant’s negligence and rely on the presumption of due care as regards his own conduct, if he is unable to produce evidence covering the conduct in question. Then, in the absence of evidence offered by the defendant, the procedural rule of law requires a finding of the plaintiff’s freedom from contributory negligence. As soon as evidence is offered by the defendant on the issue, the rule of the presumption’s operation should be satisfied and the trier of fact should then weigh the evidence and decide whether the conduct of the plaintiff or of the plaintiff’s decedent as proven by the defendant amounts to “ordinary care under the circumstances.”

In such a jurisdiction, it is proper for a plaintiff to have a presumption of due care, in the absence of available evidence. Inasmuch as human experience tells us, in the absence of evidence, that a man tries to prevent injury to himself, we can use the presumption to require the defendant to come forward with evidence on the question. At this point, it should be noted that where a defendant already has the burden of proving contributory negligence, as in California, and the plaintiff is under no obligation to offer evidence on the issue, it is logically unsound to use a presumption of due care as a procedural rule of law to require the production of evidence by a party against whom the presumption is invoked. He already has that duty by

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66 See 65 C.J.S. 206(b).
67 See Vance v. Grohe, 223 Iowa 1109, 274 N.W. 902, 116 A.L.R. 332 (1937), where a decedent’s conduct was involved and the defendant invoked the presumption but the court discusses the case in view of its rules developed on contributory negligence of a plaintiff. The court said: “... where there is direct evidence as to the facts... surrounding the injury, the inference from the instinct for self preservation is secondary evidence and not to be considered.”

The court pointed out “it is settled” that an instruction on due care is proper when “direct evidence as to the care used cannot be had. But when there is such evidence, the instinct of self preservation cannot be given any weight by the jury... where the party who had the burden of proving care can show by direct evidence what care was exercised, he should, we think, show it by such evidence...”
reason of the burden of proof. The fallacy is highlighted when we realize that the defendant has the burden of proving contributory negligence but the plaintiff starts out with "evidence" in his favor on this issue if the plaintiff is unable to offer evidence (yet being under no duty to do so) because the plaintiff is then presumed to have "exercised due care" and such a presumption is "evidence" in the plaintiff's favor and to be considered by the jury.

We are considering a jurisdiction where the plaintiff has the burden of proving freedom from contributory negligence before we consider California. This is done because only in such a jurisdiction is there a sufficiently logical basis to discuss the true operation of a presumption of this kind in a negligence case. While in such jurisdictions the operation and nature of a presumption such as this, as a motive force in aid of the party with the affirmative of the issue and the burden of its proof, is generally well understood, these courts also abandon logical analysis in certain situations on the question of when the presumption "disappears from the case."

Let us assume such a jurisdiction and discuss what should be the role of the presumption in the four cases logically possible:

1. The defendant has witnesses to the conduct in question and the plaintiff has none.
2. The plaintiff has witnesses and the defendant has none.
3. Both plaintiff and defendant have witnesses.
4. Neither the plaintiff nor the defendant have witnesses.

In view of the generally understood rules on presumptions discussed above, how should the court resolve the problem of the role of the presumption in these cases?

(a) Consider first the case where the defendant has witnesses as to the conduct in question and the plaintiff has none. Naturally, the plaintiff has offered no evidence on the conduct in question and the defendant's evidence is all there is. The defendant does not offer evidence of the plaintiff's "negligence," which is fundamentally a legal conclusion, but rather evidence of the conduct in question concerning which a presumption is invoked by the party with the burden of proving it is conduct amounting to "due care."

Where the defendant's evidence is uncontradicted, it is the evidence in the case on the conduct in question. Who offered it is irrelevant. All the witnesses might be unfavorable to the defendant and known only to the defendant. The defendant must produce the evidence or lose on the issue because of the operation of the presumption in favor of the plaintiff, who has no witnesses. This is the evidence upon which the trier of fact, under the ideal rule, should be allowed to decide whether or not the plaintiff has sustained the burden of proving freedom from contributory negligence. It should be noted here that there is no presumption in operation. None is needed. It has served its purpose in requiring the defendant to produce
evidence referring to the existence of the fact presumed, or to its non-existence. There is now evidence to be weighed, with the risk of non-persuasion on the plaintiff. If the conduct is viewed as due care, the plaintiff wins on this issue, as the plaintiff's burden is sustained. But it is not sustained by any presumption, but rather by the evidence which the defendant was forced to produce by the operation of the rule of procedure that is the presumption.

One reason the courts overlook this analysis probably lies in their awareness that the defendant's evidence in such a situation will be evidence leading to an inference of negligence and will be fundamentally slanted in favor of the defendant. There is a fear of facing the logical necessity, under a proper operation of a presumption, of having the plaintiff who is without available evidence rely on the defendant's evidence to sustain his burden of proving himself free from contributory negligence. This fear is based upon the fact that the plaintiff has the burden of proof on the issue of contributory negligence. The courts should realize that their fundamental complaint is with the rule of the burden of proof and that there is no justification for twisting the rules on the proper operation of a presumption to protect a plaintiff put into this position by having the burden of proof.

Where evidence covering the conduct in question is actually available, it can be seen that the plaintiff has chosen to rely on the presumption. He has not produced evidence covering the conduct as to which he has the burden of proving that it amounted to ordinary care. Under a proper theoretical operation of the presumption, he cannot be non-suited at the end of his case because under the rule of the presumption, the defendant must produce evidence on the issue or lose on that issue. This rule fulfills the standard purpose of a presumption and it fills a need not present where the plaintiff need not produce any evidence on the question of freedom from contributory negligence as a part of his case. Many courts, however, deny the plaintiff the presumption even though he has the burden of proving himself free of negligence where he has failed to produce available evidence.

Under a rule allowing the presumption to operate properly, availability of witnesses to either party is not a crucial question. In the case assumed, the plaintiff need not rely on the presumption. He can call the same witnesses as the defendant calls. It is sometimes forgotten that the feudal custom of buying witnesses is no longer the basis of any rule of law. As has been well said, when a crime takes place in Hell, one cannot get angels for witnesses. Testimony as to the conduct of a person in a given set of circumstances will be provided by those people who are present to see it. For any number of reasons, they will be favorable to one side of the issue or the other. Nevertheless they are the witnesses.

It is clear that if the witness is unfavorable to the plaintiff, he will not
be called by the plaintiff. But that is the plaintiff’s choice. He should be allowed to rely on the presumption of due care and not call any witness to testify to the conduct in question. Because he has the burden of proof, he has and needs this presumption until evidence of the conduct is offered. Then, of course, the defendant will produce his witness to tell what he saw. If what he saw as a witness covers the conduct in question, and leads to an inference of negligence on the plaintiff’s part, what is the plaintiff’s complaint? Upon analysis, his complaint is with the fact that a witness exists who can testify to the conduct in question. In any event, whether the plaintiff is denied the presumption or it is dispelled by the defendant’s production of evidence, it is no longer in the case. Considerations such as these have led courts in such jurisdictions as Iowa (see Sanderson case, supra) to deprive the plaintiff of the presumption where the defendant produces the evidence which was available to the plaintiff. The reasoning is often not well worked out; actually the simple solution is to realize that the presumption has served its purpose when available evidence is produced and it therefore disappears from the case, having served its purpose.

But it is argued, suppose the witness is lying, or mistaken, or can by cross examination be shown to be partial or prejudiced. Supposing his testimony is not believed by the trier of fact, where does this leave the plaintiff?

Should not the plaintiff then prevail as to the issue, in that the presumption is in his favor? The short answer is, no. The plaintiff has offered no evidence on his freedom from negligence by proving conduct from which due care could be inferred. The defendant has offered evidence on that conduct, as required by the presumption. If the defendant’s evidence is not believed, its lack of credibility does not create evidence for the plaintiff. The plaintiff’s difficulty is not created by the defendant’s evidence but rather by the lack of his own and by his having the burden of proof on the issue of contributory negligence. The plaintiff should properly be allowed to use the presumption to force the production of evidence. By cross-examination he can draw out from the witness, who is presumed to be speaking the truth, all the details of what was observed as to the conduct in issue. The plaintiff is saved from having to call this witness and vouch for his credibility on direct examination. But the burden of proof on the issue being his, the plaintiff must produce evidence sustaining a finding on that issue, unless the defendant fails to produce evidence to the contrary.

It is this situation that has led courts astray so that they say, if the defendant’s evidence on the issue is not believed, there is no evidence contrary to the fact presumed, and the plaintiff prevails upon the issue of the existence of that fact because the presumption remains in the case even after the defendant has come forward with evidence contrary to the fact presumed.
This rule can only be based on the premise that the "evidence" offered was not available to the plaintiff.

This is the point of view that leads to bad law and confusion even in jurisdictions that otherwise understand the proper role of presumptions.\(^8\) The evidence, brought out by the presumption, is before the jury. It is uncontradicted by evidence of witnesses offered by the plaintiff. On cross-examination, it may have been attacked, to show its incredibility. And it may not be believed by the trier of fact. But the real question and the only question is whether or not the defendant has come forward with prima facie evidence sufficient to dispel the presumption. \textit{This should be a question for the court.} For example, the defendant may offer witnesses who are incompetent, or testimony that covers conduct too long prior to the time at issue, or the conduct may be such that the defendant's witnesses cannot be percipient to it (a judging or misjudging of the physical consequences of an event).

In such case the court should simply rule that the demands of the presumption have not been met as a matter of law. There is nothing there for the trier of fact on this issue. But if the defendant has offered competent and admissible evidence, in the case where the plaintiff has not, setting forth the conduct in question, there is a question for the trier of fact and it is to consider that evidence and determine if it shows conduct equal to due care on the part of the plaintiff.\(^9\) The question of availability of the evidence to the plaintiff does not clarify the situation, but only confuses the issue.

If the evidence is not believed as a representation of the conduct, that is not the fault of the presumption which called it into being, now to be corrected by a reappearance of the presumption in the role of positive evidence of the plaintiff's freedom from negligence. If it is not believed, the plaintiff still has not produced any evidence to sustain his burden of proof. The plaintiff cannot complain that the defendant deprived him of his presumption by coming forward with evidence on the conduct in question. The plaintiff should be allowed to rely on the presumption to force the defendant to produce that evidence or lose on the issue. If the court rules that competent and admissible evidence has been produced by the defendant, the plaintiff has had all the use of his presumption to which he is entitled. \textit{Note that where the plaintiff does not have the burden of proof under this analysis, he has no need of the presumption. If the defendant's evidence is not believed, the defendant has not sustained his burden of proof on the issue of contributory negligence and the plaintiff wins on this issue.}

(B) Another logical possibility is that there are witnesses who can

\(^{8}\)See \textit{84 A.L.R. 1221, 1226 f.f.}, where it is pointed out that even though the rule on direct evidence dispelling the presumption may be admitted, other cases feel that it should not be dispelled because the direct evidence may not be credible or truly competent on the question of due care. Therefore evidence and presumption alike go to jury.

testify to the conduct in issue and are favorable to the plaintiff. Here the plaintiff will call the witnesses. It is now too clear for argument that there is no need for a presumption of due care on behalf of the party with the burden of proving due care. His evidence of the conduct is not to be garnished and ballasted by a rule of law designed to force the other party to produce evidence at the risk of losing on the issue. The presumption of due care has no need to operate at all and it doesn't.

Now, suppose in this circumstance, the defendant has no witnesses and no evidence on the conduct in question. And suppose the plaintiff's witnesses are not believed in their detailed accounts of the conduct in question, all pointing unerringly to "due care." Would it be seriously contended, if the trier of fact disbelieves all the plaintiff's witnesses as liars or incompetents, simply because the defendant did not call those very witnesses to dispel a presumption of due care that is "still in the case," even though evidence on the very conduct in question has been offered by the party relying on this presumption? The only thing necessary to be done in this case is for the trier of fact to decide whether or not the plaintiff has sustained, by the evidence offered, the burden of proof of freedom from contributory negligence. If the plaintiff's evidence is believed, and if the conduct then proven is viewed as "due care" the plaintiff prevails on this question.

Here the defendant is caught without favorable witnesses, just as the plaintiff was in the discussion above. Being caught without "favorable witnesses" is often the consequence of being legally responsible or legally without remedy. It is not a circumstance upon which fallacious rules of law are to be based.

It is hard to understand the resistance to the simple logic of dispensing with presumptions wherever evidence is offered sufficient to present a question of fact for the trier of fact.

(C) Still another possibility is the case where the plaintiff has witnesses who will testify to the conduct in issue and the defendant also has witnesses who will testify as to the conduct in issue with the two versions offered leading to opposite inferences on the question of the conduct amounting to "due care." This is easily recognized as the typical negligence case. There is no confusion in the rules here, particularly where no decedent's conduct is involved. The ordinary rules and instructions on burden of proof and the effect of the belief and disbelief of testimony are easily understood and universally accepted and no one contends that either side is aided or burdened by any presumption concerning the conduct in question.

(D) There is also the possibility that there are no witnesses of any kind to the conduct in question. We are assuming the plaintiff has the burden of proving that the conduct in question amounted to "due care." The plaintiff
can logically and legitimately rely on a presumption that the person in question exercised ordinary care for his own concerns. The operation of the presumption requires that the defendant come forward with evidence as to the conduct in question or lose on the issue as a matter of law. It is eminently clear that this is the classic situation for the operation of the presumption based on the common human understanding of the instinct for self preservation. Of course, the defendant loses on the issue of contributory negligence. But his losing is consonant with justice and logic. The plaintiff may prove his case on the defendant’s negligence and he may well have no witnesses to show the conduct in issue on the question of contributory negligence to the trier of fact. There is no need to “weigh the presumption as evidence.” The defendant has not come forward to show what the conduct was and the fact of due care is presumed to exist.

The Presumption of Due Care in California

As we leave the jurisdictions where the plaintiff has the burden of proof of the issue of freedom from contributory negligence, and enter California where the defendant has the burden of proof of this issue, we enter an area of misunderstanding, confusion and error. The discussion above was designed to highlight the errors present in some of the California cases.

In the first place, in California the “presumption of due care” is treated in some cases as having none of the characteristics of a presumption, as discussed above; it is simply treated as “evidence.” Its relationship to the burden of proof and its role as a procedural rule of law requiring the production of evidence are neither analyzed nor discussed. Serious prejudice to the party against whom it is invoked is often dismissed or overlooked. This position is based upon an erroneous construction of several California statutes, which it is fallaciously contended, make presumptions “evidence” in our law.

Under this position, if followed to its ultimate fantasy, every plaintiff in every negligence case is entitled to an instruction that he is presumed under the law to have exercised ordinary care for his own concerns and that the presumption is evidence in the case and can be weighed as against contrary evidence. Thus a party could tell what he saw and did up to the time of the accident and submit his conduct to the trier of fact, buttressed by a “presumption” which the law requires, that this conduct amounted to “due care.” (Defendants could also claim the evidence of the presumption, assuming its applicability to defendants.) The other party may offer evidence showing that that party did not exercise care for his own concerns. But the trier of fact is told to “weigh” a presumption of due care against this evi-

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The role of the trier of fact is extremely difficult in such a situation. It can view the conduct and weigh it as evidence. It may feel that the conduct of the party invoking the presumption amounted to contributory negligence. Or it may not believe the testimony from which it might draw an inference of care. But it is told that there is "a presumption of due care" and to weigh it in favor of the party invoking it. Only a trained mystic can "weigh" a presumption. Further, the party against whom such a presumption is invoked must convince the trier of the fact under the law, by a preponderance of the evidence, that the conduct amounted to contributory negligence in order to win on that issue. He would have shown one version of the conduct and the other party another, but the version of the party invoking the presumption would have a deeper resource in a presumption of due care in spite of the fact that he had submitted his conduct and asked that it be viewed as ordinary care for his own concerns.

If a presumption is in fact evidence, as our cases say, this should be the law. However, it is not. Thus, rules have been developed to provide in certain cases that the presumption of due care, even though "evidence" in the case, is dispelled from the case and is not to be considered by the trier of fact in any way.

The so-called leading case on this point is _Mar Shee v. Maryland Assurance Company_. This case, while good law in itself, is the fountainhead of error in California law for the role of the presumption of due care in negligence cases and, for that reason, it deserves close analysis.

This case is cited and relied on for the rule that the rebuttable presumptions set forth in California Code of Civil Procedure, section 1963, are evidence in a case and are not dispelled from a case until facts are proven against a party invoking a presumption which shows as a matter of law the non-existence of the fact presumed. It is said in that case that a fact is proven against a party only when his own evidence, submitted without inadvertence or mistake, shows, as a matter of law, the non-existence of the fact presumed. Thus, overwhelming evidence showing the non-existence of the fact presumed offered by the party against whom the presumption is invoked will not dispel the presumption under this rule, and the presumption creates a conflict in evidence so that the issue must go to the trier of fact. Neither will evidence offered by the party invoking the presumption dispel it, even though an inference of the non-existence of the fact presumed might justifiably be drawn from that party's evidence. His evidence must show the non-existence as a matter of law. Another way of stating it is, if the party invoking the presumption offers evidence that puts him out of court, the presumption is "dispelled" from the case, assuming an ultimate fact is

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2190 Cal. 1, 210 Pac. 269 (1922).
involved whose existence is determinative of the issue of liability, and such a fact is always involved in these cases.

There are several basic aspects of the Mar Shee case that have been completely overlooked by courts relying upon it to support instructions on the presumption of due care in negligence cases.

1. The Mar Shee case was not a negligence case and the plaintiff in that case had the burden of proof on the issue with respect to which the presumption there in question was invoked.

In this case the plaintiff was seeking to recover under an insurance policy which insured the decedent Fong Wing against "... death ... effected independently and exclusively of all other causes directly through accidental means." Under such a policy the burden of proof is on the plaintiff to bring himself within its terms and prove the death was from a cause insured against.\(^2\) This policy had an exclusion to the effect that the insurer was not liable for death from murder. To prove the death resulted from a cause excluded would be the burden of the defendant insurer except that the plaintiff's burden on this issue if sustained makes the sustaining of the defendant's burden impossible.

Fong Wing was found lying on the street with two bullets in his back by a "witness" who heard the shots, and after some delay due to fear, went out to investigate. The person who fired the shots had disappeared and no weapon was found.

The presumption relied upon by plaintiff to sustain the burden of proof of accidental death was that found in California Code of Civil Procedure, section 1963(1) stating that a person is presumed "innocent of crime or wrong." This case went to the jury and a verdict for the plaintiff was returned. The defendant appealed and the Supreme Court held that the facts above as proved by the plaintiff to show death also proved murder in the first degree and precluded any possible inference of accidental death. Therefore, there was no sphere within which the presumption could operate. It was held that, as a matter of law, there was no evidence upon which a finding of accidental death could be predicated. The presumption was "dispelled."

This decision is proper but it is clear that the court was unaware of why it was proper. Whether or not there is a sphere within which a presumption can properly operate is, in the first instance, a question for the court. This is not a question of "evidence." For example, as has been discussed above, on a presumption of death from seven years absence the party with the burden of proof invoking such a presumption must prove the existence of facts from which the presumption arises. If, in such a case, the plaintiff offers no evidence of absence or evidence showing a lack of the required

\(^2\)New Amsterdam Casualty Co. v. Breschini, 64 F.2d 887 (9th Cir. 1933).
absence, the plaintiff is properly non-suited at the close of his case. There is no room for the operation of the presumption to require the defendant to proceed and offer evidence that the “decedent” is alive.

In this case, the plaintiff proved a death in such a manner that the only possible inference was a deliberate shooting of Fong Wing (it may have been a “mistake” in the sense that Fong Wing was killed but there is no room for a presumption that the assailant was “innocent of crime or wrong”). Thus the holding was proper on the ground that the plaintiff had failed to bring himself within the terms of his policy. A non-suit would have been proper.

The defendant in this case, of course, met the presumption and tried to rebut it with evidence of Fong Wing’s being involved in a particular situation in which his life was threatened and in which motive for his murder existed. The court held that this evidence was so vague as to give rise to pure conjecture and speculation. Thus it is clear that the court felt that the plaintiff had failed in his burden as far as this defendant was concerned, and that if the plaintiff had had a sphere of operation for the presumption, it is quite clear that he would have prevailed as a matter of law because the defendant was unable to offer evidence of the conduct of the assailant required by the proper operation of the presumption to prevent his losing on the issue of “accidental death” as opposed to “murder.” In many ways it is extremely unfortunate that Fong Wing was not found with a broken neck, all other circumstances remaining the same. In such case, it is entirely possible that the court would have recognized the proper role of presumptions and ended the “confusion and decisions in this State,” which the court stated then existed, as to when presumptions are to be considered as “evidence” in a case.

However, the court laid down its famous rule that a party invoking and establishing a right to a presumption is entitled to have the presumption remain in the case and be weighed as evidence except when he and his witnesses offer testimony, which as a matter of law, shows the non-existence of the fact presumed. It can be seen from a study of the case that almost all of the rule is *dictum*, inasmuch as the court’s holding is that the plaintiff actually failed to establish his right to the presumption in the first instance. The court failed to see that they were not dealing with a case involving a “dispelling” of a presumption when a party has established a prima facie right to invoke it. The presumption in this case was not “dispelled”; it simply never entered the case.

In a California negligence case, where the plaintiff offers proof of

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22Which brings up the justly famous pun, not submitted as authority for any particular point:

“We wanted Lee Yung
But we winged Willie Wong.
A sad but excusable
Slip of the Tong.”
the defendant's negligence and offers no evidence on his own conduct, he automatically (and illogically) has created a sphere of operation for the presumption of his freedom from contributory negligence. The *Mar Shee* case is of no help in deciding what the proper rule should be governing the dispelling of that presumption from the case.

2. The second point about the case is that there were no witnesses to the conduct in question. No one saw the assailant. Yet it was the assailant's conduct about which the presumption was invoked. Assuming for the moment that this was not a case of clear-cut murder, it is interesting to speculate on how the court would have faced up to the question about which later cases are still confused. Supposing Fong Wing were found with a broken neck and an eyewitness was produced by the defendant who saw a man wrestling with Fong Wing, known to the witness as one who had threatened to kill Fong Wing and who had motive for so doing. Suppose he then saw Fong Wing fall and the third party run from the scene. Suppose this eyewitness was available to and known to the plaintiff and defendant. The plaintiff would not call him. The plaintiff need only prove that Fong Wing was found with a broken neck. The plaintiff properly should have the benefit of the presumption of accidental death and needs it to get by a non-suit, having the burden of proof on showing that the policy covers. Then the defendant comes forward with the evidence set forth above. Certainly the court could then have seen the problems involved and the role of a presumption more clearly and it would have been able to end all uncertainty by holding that the presumption was dispelled and the jury was to consider the defendant's evidence and decide whether or not on that evidence the plaintiff had sustained the burden of proving accidental death by a preponderance of the evidence.

In any event the *Mar Shee* case is cited and relied on in a line of cases involving plaintiffs in negligence cases, *who do not have the burden of proof on contributory negligence*, as authority for their contention that if they do not prove by their testimony and that of their witnesses that as a matter of law the conduct concerning which the presumption of due care is invoked amounted to contributory negligence, they are entitled to an instruction that there is a presumption that the conduct amounted to due care, to be weighed as evidence in the case.

The landmark case often cited as adopting the rule of the *Mar Shee* case in a negligence case involving a presumption of freedom from contributory negligence is *Smellie v. Southern Pacific.* This was a death case and that fact is one of the sources of error in this field. For some reason it is felt in some cases that where the conduct of a decedent is in question, this presumption has greater vitality and a broader field of operation. It should be clear that the rules governing rebuttable presumptions should be no differ-

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24*Supra,* note 2.
ent simply because a decedent's conduct is in question. The principal problem in this case was whether or not the testimony of a witness called under California Code of Civil Procedure, section 2055, was such testimony offered by a plaintiff as to deprive him of the presumption of freedom from contributory negligence where such testimony showed the conduct of the plaintiff's decedent up to the time of the accident. It was held that the testimony offered by a witness called under California Code of Civil Procedure, section 2055, was not the testimony of a party or of his witness within the rule of *Mar Shee* and, in any event, that rule required the plaintiff's evidence to show the decedent's contributory negligence as a matter of law, it not being sufficient simply to describe his conduct up to the time of the accident, in order to dispel the presumption of due care from the case.

The testimony of the witness called under section 2055 of the Code of Civil Procedure was considered and it was held that because it was that of an adverse party and because of other weaknesses it did not show the decedent's conduct to be negligent as a matter of law. Therefore, it was held that there was a conflict of evidence between the "evidence" of the presumption and the evidence against it to be weighed by the jury. The trial court's directed verdict in favor of the defendant was then reversed. Actually the case is really not in point on the question of when a plaintiff's evidence will dispel a presumption of a person's freedom from contributory negligence from a case, conceding that it does expressly decide that such a presumption is evidence in a case to be weighed by the jury as against evidence offered by a party against whom the presumption is invoked. Its basic and, it is felt, erroneous holding is that when the presumption is properly in the case it is "evidence" to be weighed against the defendant's evidence tending to show contributory negligence, thus creating a conflict of evidence. It is not a case where a plaintiff has himself offered evidence on the conduct in question up to the time of the accident, inasmuch as the evidence being considered was held not to be the plaintiff's evidence. The simple solution to the case was for the court to rely on the obvious fact that the testimony of the defendant's witness called under section 2055 of the Code of Civil Procedure did not show the decedent guilty of contributory negligence as a matter of law. The presumption of due care had no connection with the weakness of that evidence. A directed verdict in favor of the defendant was improper without reference to the presumption.

Then came the leading case of *Speck v. Sarver*, which cited and relied on *Rogers v. Interstate Transit Company*, this latter case having been decided after *Mar Shee* and before *Smellie*. These cases greatly limited the applicability of the incorrect dictum of *Mar Shee* and held that where a

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25 *Supra*, note 5.
26 212 Cal. 36, 297 Pac. 884 (1931).
plaintiff or his witnesses testify to his conduct up to the time of the accident, there is no room in such a case for an instruction that a plaintiff is presumed to be free from contributory negligence, whether or not the plaintiff's evidence shows contributory negligence as a matter of law.

The case of Speck v. Sarver arose out of an automobile accident. Both parties survived, an occurrence of increasing rarity. Both parties testified. The facts showed a head-on collision and each driver claimed the other was on the wrong side of the road. The jury found that the defendant was negligent and the defendant appealed, claiming error in the giving of the standard instruction of the presumption of due care in favor of the plaintiff.

As the Supreme Court said at page 18 of the Pacific Reporter:

"Such an instruction, however, should not be given where the evidence introduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to or at the time in question."

And the court continued, quoting from the Rogers case:

"In either event [i.e., whether the jury felt that the conduct as proven by the plaintiff amounted to negligence or not] the jury, in determining whether the plaintiff was guilty of negligence, would look to, and be governed by, the evidence before the court, and not by any presumption."

In the Speck case, the giving of the instruction was held to be error but not prejudicial error, in that there was ample evidence on both sides of the question of contributory negligence and the jury was properly instructed on the question of contributory negligence. Justice Traynor dissented and wrote his opinion, already referred to, which clearly lays forth the fundamental error in considering and weighing the presumption as evidence, which rule depends for its existence upon the case of Smellie v. Southern Pacific, a case which Justice Traynor points out is in error in its contention that presumptions are evidence to be weighed as such. At page 23 of the Pacific Reporter of the Speck case Justice Traynor states a crucial truism:

"Confusion is rife, however, because presumptions have not been clearly divested of their artificial character."

That confusion will remain until such time as the real problem is clearly understood by the courts.

To state briefly the position of Justices Traynor and Edmonds as set forth in this dissent, it is their opinion that presumptions are not evidence, impossible to be weighed as such, and that it is prejudicial error to instruct a jury to weight them as evidence because such a rule enables a jury "arbitrarily" to attribute more weight to a presumption than to evidence against it, no matter how extensive or persuasive. The rule is felt to be "so arbitrary, and its consequences so mischievous that it becomes imperative to set forth to what lengths it has departed from the function and purposes

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2 Supra, note 2.
of presumptions.” They then admit that a presumption has greater vitality in California than in the majority of other jurisdictions in view of our statute, section 2061 of California Code of Civil Procedure, which provides that a judge shall instruct a jury on all proper occasions that they are not bound to decide in conformity with evidence which does not produce conviction in their minds as against a presumption.

Thus, in California, unlike most other jurisdictions (see general discussion above), it must be conceded that the mere production of evidence contrary to a presumption does not dispel it from a case. In a jurisdiction where the plaintiff has the burden of proof on the issue and is without evidence covering the conduct in question there is some small basis for the “intermediate” point of view that he should not be deprived of the presumption’s operation as a procedural rule when the defendant’s evidence is not believed. To deprive such a plaintiff of the presumption would mean his defeat by incredible testimony. Where the defendant’s evidence is competent such a deprivation would be logically correct, but a rule allowing such a defeat is often felt to be too harsh. An instruction to that effect can at least be justified in such a jurisdiction. It cannot be justified in California and, it is submitted that the statute in question giving “greater vitality” to presumptions in California than they are normally entitled to should be construed as having applicability only in a case such as Mar Shee, where the party invoking the presumption has the burden of proving the fact presumed.

However, where the party invoking the presumption offers the evidence of his or his decedent’s conduct, there should be absolutely no problem and it is clear beyond rational dispute that the analysis of Speck v. Sarver controls as set forth in the majority opinion.

*Speck v. Sarver* represents an intermediate position with respect to the role of a presumption. It deals solely with the question when it is dispelled from a case. The majority opinion does not consider the basic problem of whether or not a presumption is evidence. It is clearly said to be the rule that where a plaintiff or his witnesses offer proof of the conduct in question, the trier of fact is to consider that conduct without the aid of any presumption on the issue of contributory negligence. That conduct need not show contributory negligence as a matter of law to dispel the presumption. Thus, the *Mar Shee* rule is greatly limited and that case and the *Smellie* case are not mentioned in the majority opinion. In the *Sarver* case, there was no decedent involved and the plaintiff testified as to his own conduct.

The problem presented where the only evidence offered on the conduct in question is the defendant’s evidence is not present and not discussed. In the dissent, it is clearly stated that in such a case the presumption should have a limited sphere of operation because of California Code of Civil Procedure, section 2061. Thus, if the defendant’s evidence of the conduct is not believed,
we are then in the position of no evidence on the issue having been offered; the presumption comes into play and the finding of freedom from contributory negligence could be based upon it. How foolish this is as a reverse operation of the rules governing presumptions can be seen when we recall that the defendant has the burden of proof on the issue of contributory negligence and if his evidence on this issue is not believed he has not sustained his burden and there is no need for any presumption that the plaintiff was free of contributory negligence. The finding should properly be based on the lack of the defendant’s evidence on the issue.

However, even in that case, the proper instruction to the jury is not that it is presumed that the plaintiff, who did not offer evidence, or his decedent, was free of contributory negligence and that this presumption is evidence to be weighed against evidence to the contrary. Rather, the jury should be told that the presumption is not evidence in itself nor to be weighed as such, but that if the defendant’s evidence is not believed as a representation of that conduct and if they find that no credible evidence has been offered to show what the conduct in question was, there is then a presumption that the conduct amounted to ordinary care; and that if they believe that the conduct was as represented by the defendant, they are then to weigh that conduct and consider whether or not it shows, by a preponderance of the evidence, that the conduct in question amounted to contributory negligence and that in such a case they are not to consider any presumption of due care. Such instructions would not prejudice the defendant even though they are illogical because under this assumed state of facts the defendant would lose on the issue of contributory negligence in any case, if his evidence is not believed.

**Developments Since Speck v. Sarver**

The rule of *Speck v. Sarver* is clear. It is the law of California as declared by its highest court and states that there is no room for the presumption of due care in the case where the plaintiff or his witnesses offer evidence of the conduct in question. It does state that on the facts of that case the giving of an instruction that the presumption was to be considered by the jury was not prejudicial to the defendant. On the special facts of the case, this may well have been true. The plaintiff and the defendant in that case each claimed the other was on the wrong side of the road. A finding that the defendant was negligent almost necessarily implied that the plaintiff was on his own side of the road. In a multitude of cases, however, the plaintiff’s contributory negligence and the defendant’s negligence are not mutually exclusive in any sense of the word and where the question of a plaintiff’s or a decedent’s contributory negligence is close the presumption will fre-
quenty, if not always, turn the scales if its “weight” is added to the plaintiff’s own evidence on the conduct in question.\(^2\)

Since *Speck v. Sarver*, the problem of “dispelling the presumption” by the plaintiff’s evidence has had enough consideration to indicate that we are still plagued by faulty analysis of this problem.

It might have been assumed that the case of *Barker v. The City of Los Angeles*\(^3\) would have helped to end the confusion on this question. In that case the plaintiff was a passenger in a car driven by her husband, deceased at the time of trial. His death was not caused by the accident. The plaintiff testified to her husband’s conduct up to and immediately preceding the time of the accident. The trial court instructed the jury that the decedent was presumed to have exercised ordinary care for his own safety, with the usual admonition concerning weighing this presumption as evidence. There was no evidence offered by the plaintiff to show her husband was guilty of contributory negligence as a matter of law. On appeal, the giving of the instruction was held to be error. It was also held to be non-prejudicial error and the facts of the particular case amply justified this holding. There was absolutely no evidence of the decedent’s contributory negligence and the evidence of the defendant city’s negligence was, to say the least, substantial. The prejudice would appear to be obvious in those cases involving close questions of the plaintiff’s or his decedent’s contributory negligence.

It is interesting to note that in this case the appellate court deduced its rule from *Speck v. Sarver* and commented on the “apparently conflicting decisions” on the question in California.

The fact that this case involved a decedent’s conduct naturally brings up the old case of *Westberg v. Willde*,\(^4\) which attempted to lay down a peculiar rule that raises its head frequently to confuse attorneys and courts alike. This case antedates *Speck v. Sarver* by a considerable period of time. It was, in a sense, a predecessor for the rule of *Speck v. Sarver*, as can be seen from the part of the opinion set forth below. The court indicated in the *Westberg* case that in prior decisions it had left open the question of when a plaintiff’s testimony or that of his witnesses would dispel the presumption of due care from a negligence case.

The court was here considering an action for wrongful death arising out of an intersection accident to which there were three independent witnesses, all called by the plaintiff. The testimony of these witnesses was to the effect that the car driven by the plaintiff’s decedent entered the intersection first at a speed of anywhere from 20 to 30 miles per hour. The plaintiff’s eyewitnesses also estimated the speed of the defendant’s truck at anywhere

\(^{29}\)57 Cal.App.2d 742, 135 P.2d 573 (1943).
\(^{30}\)14 Cal.2d 360, 94 P.2d 590 (1939).
from 25 to 50 miles per hour. The defendant’s appeal from a verdict in favor of the plaintiff was based on error in instructions, it being conceded that the evidence would sustain a finding of the decedent’s freedom from contributory negligence and the defendant’s negligence. The defendant contended that it was error for the trial court to instruct the jury that there was a presumption that every man obeys the law and that it was to be presumed in that case that the decedent was driving on the right side of the street at a lawful rate of speed.

The defendant had no witnesses other than himself. There was no contention that the plaintiff’s witnesses showed the decedent’s contributory negligence as a matter of law. Therefore, the court was faced with a situation calling for an application of the rule of the Mar Shee and Smellie cases. Obviously the decedent’s conduct was shown by his own witnesses. The defendant offered a different version of the accident. The jury might believe one version or the other. Was it proper to give an instruction to strengthen the plaintiff’s evidence to the effect that he was obeying the law? It should be noted that “the presumption of due care” was not involved in the case and it can be distinguished on this basis, in that the defendant could have requested a similar instruction on his presumed obedience to the law whereas a presumption that he exercised “ordinary care for his own concerns” would not have been relevant inasmuch as his contributory negligence was not in issue. Further, he testified fully as to his own conduct. The court overlooked this and considered the case as if the usual due care presumption were involved. As can be seen from the following language, the court felt the innate logic and justice of the rule later developed in Speck v. Sarver greatly limiting Mar Shee and Smellie but the court apparently became confused over the fact that a decedent’s conduct was involved.

“We think it well to state here that in our opinion there is a substantial difference in the situation before a court where the question of the plaintiff’s negligence is in issue and both plaintiff and his witnesses testify to all his acts and conducts at the time of his alleged negligence, from a situation where the acts and conduct of a decedent are the issues before the court. In the first instance, all possible facts both in favor of and against the alleged negligence of the plaintiff are before the court, and it is difficult for us to perceive how any presumption as to his conduct can add to or detract from this evidence. . . . but if such evidence did not clearly and unmistakably clear him of the charge of negligence, then an instruction which would place his testimony in a more favorable light than it would be without such instruction would seem to be uncalled for, if not improper. In such a case the giving of any instruction as to the presumption of plaintiff’s conduct would seem to be of doubtful propriety. . . . But in the other situation, where the acts and conduct of the deceased person are a subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirement of the rule in the Mar Shee case, and other cases decided by this court following the
"PRESUMPTION OF DUE CARE" IN CALIFORNIA

Mar Shee case, an instruction that the deceased is presumed to have exercised ordinary care of his own concerns is not only proper but this court in an unbroken line of decisions, has sustained the giving of such an instruction."

It can be seen that the court is stating that in a case where a decedent's conduct is being considered, the rule of the Mar Shee and Smellie cases applies and the presumption is dispelled only if the plaintiff's witnesses prove the decedent was negligent as a matter of law. The distinction is without logical justification and the court cites no authority to support it. The mere fact that the instruction has been given in cases involving decedents does not justify a rule that it must always be given in such cases. The long established case of Mundy v. Marshall, cited by the court, clearly shows the instruction was properly refused in a case where a decedent's conduct was proven by the plaintiff's own witnesses.

A reading of this case shows that the reason for the Supreme Court's holding the presumption dispelled was not that the plaintiff's witnesses offered evidence showing that the decedent was contributorily negligent as a matter of law, although this was true. The court's reasoning was based on its prior language in the case of Paulsen v. McDuffie, which it cites after its statement that:

"The manner in which the decedent was crossing the street having been covered by the plaintiff's own evidence there is no room for the presumption that he was exercising due care . . . and it cannot be relied upon to establish a conflict in the evidence." (Emphasis added.)

The court did not cite the Smellie and Mar Shee cases. The reasoning was that the trial court could consider evidence of the decedent's conduct without considering the presumption. The case appears to make it clear that if the trial court had felt the conduct to be equivocal on the question of the decedent's negligence, the case would have been submitted to the jury by the trial court without the instruction on weighing the presumption of due care as evidence, and the Supreme Court would have approved this procedure.

In the Paulsen case the Supreme Court did mention the fact that consideration of the presumption was proper where a decedent's conduct was involved and improper and prejudicial where the plaintiff would be barred by contributory negligence and he and his witnesses testified as to his conduct (the Paulsen case arose under the Jones Act and contributory negligence was not a bar to the plaintiff's action). However, the court was, in the Paulsen case, not making the point that when a decedent's conduct is being considered, the presumption always applies. The court did refer to the Smellie case, pointing out that in that case the party whose conduct was in question was dead and

31Id. at 367, 94 P.2d 590, 594.
328 Cal.2d 294, 65 P.2d 65 (1937).
334 Cal.2d 111, 47 P.2d 709 (1935).
could not testify. But in the Smellie case there were no witnesses offered by the plaintiff covering the decedent's conduct. In the Paulsen case, the court pointed out not only the fact that the plaintiff testified but also the fact that "other witnesses observed the plaintiff and gave in detail a complete account of the whole affair which resulted in the plaintiff's injuries." The court continued:

"It is difficult to see how there was any place for a presumption as to the plaintiff's conduct. What he did on that occasion was entirely covered by the evidence in the case, and there was neither necessity nor reason for indulging in any presumption upon that subject. That instruction had no place in this case and should not have been given. Had this been a case where the contributory negligence of the plaintiff would have defeated his claim for damages, the consequences following the giving of that instruction might have been most serious, and possibly might have required a reversal of the judgment."35 (Emphasis added.)

The court does not even bother to consider whether the "other witnesses" were the plaintiff's or the defendant's witnesses. It was sufficient for the court that the plaintiff's conduct was in evidence.

It is submitted that the Jestberg case36 went astray in attempting to make a special rule on the dispelling of presumptions for death cases. Their desire to limit the Smellie and Mar Shee cases was understandable but they might have considered that the Mar Shee case itself did not involve the conduct of the decedent but rather the conduct of a stranger to which there were no eyewitnesses for either side. And in the Smellie case the plaintiff offered no witnesses on the question.

Since Speck v. Sarver some courts have attempted to get our law back on the track on this phase of the problem.

The Barker case37 is one example; another is Tice v. Kaiser Company.38 This latter case involved the conduct of a decedent who was killed by one of the defendant's workmen while working on a construction job. The plaintiff's own witnesses established the conduct up to the time of the accident, showing his knowledge of the particular danger which resulted in his death and showing his conduct in taking the particular physical position which he took in his work. There was no evidence of conduct that would amount to contributory negligence as a matter of law. In fact, the case went to the jury on all questions and the instructions on the presumption were given. This, on appeal, was held to be error and prejudicial to the defendant. Many of the cases involving this problem were reviewed and the court followed the rule laid down in Speck v. Sarver, logically not attempting to modify that rule because a decedent's conduct was involved. This is the type of case

35 4 Cal.2d 111, 119, 47 P.2d 709, 714 (1935).
36 Supra, note 30.
37 Supra, note 29.
where the evidence on the decedent's contributory negligence presents a close question. The trier of fact must decide whether or not the conduct shown was negligent. The court in this case recognized the serious prejudice which results when the trier of fact is directed that in such a situation the conduct shown is presumed to amount to due care.

The case of Cole v. Ridings is interesting because the instruction given was to the effect that both parties were entitled to presumptions that each took ordinary care of his own concerns and that each obeyed the law. The jury was told to weigh the presumptions as evidence against evidence in conflict with them. The case is particularly interesting because the plaintiff claimed that the giving of such an instruction was prejudicial error.

The case involved a pedestrian plaintiff who was struck by a motorcycle. The jury returned a verdict for the defendant. The appeal was based upon the giving of erroneous instructions. The questions of negligence and contributory negligence were close and the evidence was ample to sustain a verdict either way. The plaintiff, a child, testified, as did her witnesses, to her conduct up to the time of the accident. The defendant testified fully as to his conduct. The instruction on the presumption that each party took ordinary care of his own concerns favored both the plaintiff and the defendant. There was not the slightest question of contributory negligence as a matter of law.

The court followed the rules of logic in holding that the giving of the instructions was prejudicial error. It simply does not matter which side is invoking the presumption. The proper rule shows, in fact, that presumptions are not evidence at all. If they are evidence, they should never be dispelled from a case. In considering the problem, the court used the following language; picking up a line of cases that preceded Speck v. Sarver, and citing the Barker case, which followed Speck v. Sarver:

“No disputeable presumption is a substitute for proof of facts. It is a species of evidence that may be accepted and acted upon when there is no other evidence to uphold the contention for which it stands.” (Noble v. Key System, 10 Cal.App.2d 132, 137 [51 P.2d 887].) It may be controverted by evidence. (Code of Civ. Proc., Sec. 1961.) It is dispelled when evidence is produced by the party or his witnesses covering the subject of the presumption. (Rogers v. Interstate Transit Co., 212 Cal. 36 [297 P.2d 884].) When there is a conflict in the evidence introduced by opposing parties, there is no room for the presumption (Kelly v. Fretz, 19 Cal.App.2d 356 [65 P.2d 914], for the simple reason that one side or the other would be forced to introduce evidence to controvert other evidence, plus a presumption. (Paulsen v. McDuffie, 4 Cal.2d 111 [47 P.2d 709]; Mundy v. Marshall, 8 Cal.2d 294 [65 P.2d 65].)”
"In Barker v. City of Los Angeles, 57 Cal.App.2d 742, 749 [135 P.2d 573], the court discussed an instruction similar to that here under review, to wit: 'From apparently conflicting opinions of the appellate courts of California, the following rules may be adduced:

"'(1) It is error for the trial court to give an instruction such as that set forth above where the evidence introduced by the plaintiff disclosed the acts and conduct of the injured party immediately prior to or at the time of the accident. (Citations.)

"'(2) Whether the giving of such an instruction when the evidence of the plaintiff disclosed the acts and conduct of the injured party at the time of the accident constitutes prejudicial error depends on the circumstances of each case. (Citation.)'

"Applying the above rules to the instant cause, it was prejudicial error for the trial court to give the instruction on the presumption of due care. . . ."

A later case, Dunn v. Russell,\(^4\) presents an example of the total confusion created by a misunderstanding of the nature of a presumption. A hearing was granted in the Supreme Court in this case on September 27, 1951. Apparently the case was disposed of before decision on the hearing but a reading of the opinion indicates that if a decision had been rendered, the Appellate Court should have been reversed.

In this case the plaintiff had collided with the rear end of a truck which it was alleged was negligently parked along the highway. The plaintiff died prior to the trial, the death not being connected with the accident. On the trial, the defendant truck driver testified completely as to his conduct and the details of his conduct were submitted to the jury for their consideration on the issue of the defendant’s negligence. The decedent’s administratrix had been substituted as party plaintiff. It so happened that the administratrix had been a passenger in the plaintiff’s automobile at the time of the accident and she testified in complete detail as to the conduct of the decedent up to and at the time of the accident. The verdict of the jury was in favor of the defendant. The plaintiff appealed.

The appeal was based principally on the contention that an instruction on the presumption of due care on the part of the decedent had not been given to the jury by the court. The instruction in question was identical with the instruction used in the case of Cole v. Ridings discussed above.

The instruction stated in general form that each party to the action was entitled to the presumption of law that every person takes ordinary care of his own concerns and that he obeys the law. It was the plaintiff’s contention that the instruction did not identify the decedent by name and that she did not get the benefit of the presumption because she was not technically a "party to the action" after her death. The court indicated that the jury could not have misunderstood that the instruction applied to the conduct of the decedent.

\(^4\)234 P.2d 270 (1951).
“PRESUMPTION OF DUE CARE” IN CALIFORNIA

However, the court did find the giving of the instruction erroneous and prejudicial to the plaintiff in that it also gave the respondent defendant the benefit of the presumption of due care. The court stated that inasmuch as the defendant had testified to his conduct immediately prior to the time of the accident he was not entitled to the presumption that he exercised ordinary care for his own concerns. The court relied on the case of Speck v. Sarver. Of course it can be seen that the court completely overlooked the fact that there was no issue of the defendant’s contributory negligence and completely ignored the fact that the administratrix, as the nominal plaintiff, had testified completely and in detail to the conduct of the decedent up to and at the time of the accident. The court felt that there was a sharp conflict on the evidence of Russell’s conduct and that the presumption may have tipped the scales in his favor on the question of his freedom from negligence.

Of course it is unfair to have the defendant start off in the case with the presumption as evidence in his favor where the plaintiff has the burden of proof of showing his negligence. But for some strange reason, the court failed to see the unfairness of allowing the plaintiff to start off with a presumption in her favor on the issue of contributory negligence where the defendant had the burden of proving that contributory negligence.

Once again it would appear that the fact that a decedent’s conduct was involved in the case caused the court to miss what should have been obvious. It can only be regretted that the hearing of the Supreme Court never took place.

The recent case of Meyers v. G. W. Thomas Drayage & Rigging Co. is on sounder ground. In this case the plaintiff was injured as a result of the dropping upon him of material being hoisted in a steam shovel. The plaintiff himself testified as to his conduct up to the time of the accident and the jury returned a verdict for the plaintiff. The court had instructed the jury that it was presumed that the plaintiff was exercising ordinary care at the time of the happening of the accident. In considering the defendant’s contention that the giving of this instruction in such a case as this was prejudicial error, the court said:

“In this case the negligence of each of the parties was in issue before the jury and upon these issues of negligence the proof made presented close questions of fact. . . . By its unequivocal terms the jury were told that the plaintiff was clothed with a presumption of due care, and that this presumption would stand against direct evidence to the contrary. This instruction if followed by the jury would exclude from their consideration any evidence of negligence on the part of the plaintiff and effectively bar the defense of contributory negligence . . . in [such] case the evidence offered by the defendant of plaintiff’s negligence could not, under the admonition of the court, receive that fair consideration to which it was entitled.”


1Id. at 535, 239 P.2d 118, 122.
There is a line of cases that has added to the difficulty of proper analysis in this area. In these cases the plaintiff presents his evidence of the defendant's negligence and is then non-suited. In many of them, the plaintiff is a representative of a decedent in an action for wrongful death. Oftentimes, the plaintiff in proving the happening of the accident is necessarily required to show certain conduct on the part of himself or his decedent from which an inference of contributory negligence might be drawn. It requires no citation of authority to recognize that contributory negligence may properly be inferred from the plaintiff's own evidence. In these cases, however, the appellate court almost always reverses the trial court's granting of a non-suit and inevitably a discussion comes up concerning the presumption of due care on the part of the decedent or of the plaintiff. It is submitted that in 99 cases out of 100 of this type, there is absolutely no necessity for discussing the presumption of due care.

In the first place it is not the function of the court to weigh evidence when considering a motion for a non-suit. At the end of the plaintiff's case, the only function for the court is to consider the plaintiff's evidence of the defendant's negligence, giving it every possible favorable inference, and decide whether or not on the evidence submitted, a jury would be justified in finding the defendant negligent and the plaintiff free from contributory negligence. As has been pointed out, the plaintiff is under no compulsion to offer any evidence on his freedom from contributory negligence. It would only be in the rarest cases where the plaintiff, in attempting to make out a case of the defendant's negligence, could properly be non-suited at the end of his case. If he is non-suited, it could either be on the grounds that he had failed to make out a prima facie case of the defendant's negligence or on the ground that he succeeded in proving his own contributory negligence as a matter of law.

How rare this would be, and is, is shown by the fact that defendants seldom succeed in proving a plaintiff guilty of contributory negligence as a matter of law. For the plaintiff to do it in attempting to prove his case against the defendant is almost impossible except in those cases where the plaintiff has absolutely no case to start with.

The important point to be considered here, however, is that it is not the presumption of due care on the part of the plaintiff or his decedent that requires a reversal of the judgment of non-suit. Assuming for the moment that the presumption of due care is evidence, it is evidence in rebuttal of the defendant's case on contributory negligence and if it ever is to be weighed, it is to be weighed only when weighing the evidence on contributory negligence. Considering it or discussing it in a case involving a non-suit is illogical yet it is in these cases that the rule is often laid down that the presumption of due care (now being invoked to protect the plaintiff and prevent his non-
suit) is not dispelled from the case unless the plaintiff’s own evidence shows his contributory negligence as a matter of law.

Of course the presumption of due care is “dispelled” from the case if the plaintiff’s own evidence shows his contributory negligence as a matter of law. In fact the plaintiff himself is “dispelled” from the case because he then has no case at all. Some of the cases arising from judgments of non-suit in which the courts fail to analyze exactly what it is they are doing, are Milani v. Southern Pacific Co.,43 Seaford v. Smith,44 (In this case the plaintiff was non-suited after making out what was clearly an adequate case of the defendant’s negligence and the defendant invoked the presumption of due care on the part of his deceased agent who was killed in the accident out of which the case arose; the court of course pointed out that in considering the judgment of non-suit, a presumption of the decedent’s due care was irrelevant yet the so-called “general rule” on the dispelling of the presumption was unnecessarily discussed) and Wahrenbrock v. Los Angeles Transit Lines.45 (In this case the court again found it necessary to invoke the presumption to save the plaintiff from a non-suit. The reasoning seems to be that the plaintiff had offered evidence of his own contributory negligence. Therefore, if his evidence shows he was contributorily negligent as a matter of law, he is out of court but there is a presumption of due care. Therefore, in spite of his own evidence of his own negligence, the presumption creates a conflict in the evidence, the conflict in the evidence creates a jury question on contributory negligence.)

Thus the plaintiff has put himself out, the presumption has put him back in and all this is done without the defendant offering one whit of evidence on the issue of contributory negligence, the burden of which he must sustain. This nonsense could be avoided by simply giving the plaintiff’s evidence every favorable inference to which it is entitled, and deciding he cannot be non-suited because he has not shown himself guilty of contributory negligence as a matter of law.

In these cases, if the plaintiff’s contributory negligence is only a permissible rather than a required inference he cannot be non-suited because the jury may not see fit to draw that inference. Discussion of the rules governing the presumption of due care is unnecessary and misleading.

One of the rare cases in which the plaintiff was properly non-suited at the close of his case on the grounds that he had proven his own contributory negligence as a matter of law is the case of Levin v. Brown.46 In this case the plaintiff survived the accident and he testified to his conduct right up to the time when he was hit by a railroad train in broad daylight. His testi-

45 84 Cal.App.2d 236, 190 P.2d 272 (1948).
mony showed that he did not see the train until it was right on top of him. There was no obstruction to his vision and his vision was admittedly normal. The court properly decided that the only possible inference from such testimony was that the plaintiff was guilty of contributory negligence. There was no need for any discussion of the presumption of due care because the plaintiff had submitted his conduct to the court and testified fully to that conduct. However, the court on appeal once again cited the rule that the presumption of due care is dispelled when the plaintiff's contributory negligence is shown as a matter of law by his own evidence.

The case of Heintz v. Southern Pacific\(^4\) is somewhat unusual in that the plaintiff in a wrongful death action was non-suited on the basis that the decedent's conduct, as proven by certain evidence and necessary inferences, amounted to contributory negligence in law. It is interesting to note in the case that there actually were no eyewitnesses of any kind to the conduct of the decedent prior to the fatal accident. The evidence showed that the decedent had driven directly into a railroad car which the defendant company had left in a stationary position on its tracks where they crossed a thoroughfare. The plaintiff's witnesses testified that the railroad car was visible for at least 300 feet in the direction in which the decedent approached. There was no evidence that the decedent had either swerved or applied his brakes prior to the impact. The court assumed that there was a question of fact for the jury on the defendant's negligence. The non-suit was based on the decedent's contributory negligence as a matter of law.

As might be expected, there was a strong dissent in this case by Justice Griffin. Part of his argument was based upon the fact that there were no eyewitnesses and that the decedent was entitled to a presumption of due care. But Justice Griffin devotes most of his argument to showing that the inference of contributory negligence was not an inference that the jury was required to draw. As he says:

"I am convinced that a question of fact arose for the determination of the jury as to whether the driver was guilty of contributory negligence and that the question was not one of law."

Once it was determined that it was legally possible for the jury to find, from the plaintiff's evidence, that the defendant was negligent and that the plaintiff was free from negligence, the problem was solved. It cannot be emphasized too strongly that the presumption of due care on the decedent's part is not the evidence which made it possible for the jury to find the plaintiff free of contributory negligence. That question can only be answered upon a careful consideration of the plaintiff's evidence offered by himself or his witnesses as to his or his decedent's conduct.

The recent decision of the Supreme Court in *Scott v. Burke* appears to be destined to be somewhat of a landmark case. The case is extremely unusual in that the plaintiff's case rested entirely upon the doctrine of *res ipsa loquitur* and the defendant's case rested entirely upon the presumption of due care. The plaintiff's were passengers in an automobile driven by the defendant. The accident occurred on a straight stretch of road in the daytime, the weather being clear and dry. The physical evidence showed that the automobile had left its own side of the highway, crossed the oncoming lane, and went off the highway on the opposite side, leaving approximately 78 feet of broken and recurrent skid marks as it traveled across the highway. There were tire marks for approximately 175 feet left by the vehicle after it had gone off the highway. At the time of the accident, the plaintiff's were asleep. As a result of the accident the defendant testified that his head injuries resulted in a total loss of memory and that it was impossible for him to testify as to how the accident happened. The jury was instructed on the doctrine of *res ipsa loquitur*. They were further instructed that if they believed the defendant as a result of the shock of the accident was unable to remember and testify as to his own conduct or other facts of the accident, then a presumption arose that he was "obeying the law and was exercising ordinary care and doing such acts as an ordinary prudent person would have done in the same circumstances." The defendant had a verdict. The defendant did not dispute that this was a proper case for the application of the doctrine of *res ipsa loquitur* but the plaintiff did contend on appeal that it was prejudicial error to instruct the jury on the presumption of due care on behalf of the defendant. The court pointed out the general rule that in the absence of eyewitnesses, a party who cannot testify as to his conduct at the time of the accident because of resulting amnesia, if that fact is believed, is entitled to the presumption that he was exercising due care at the time of the accident. The court overlooked the fact that this presumption as set forth in our Code of Civil Procedure is properly applicable only on the question of contributory negligence and that the due care which is presumed is "ordinary care for his own concerns." This, however, is the least of the errors in the majority opinion. The plaintiff contended that in a case involving the doctrine of *res ipsa loquitur* on behalf of the plaintiff, it is error to instruct on the presumption of due care on behalf of the defendant. The plaintiff's were relying on California cases so holding. For our purposes here, it is interesting to note that the Supreme Court distinguished all of the cases relied on by plaintiffs on the grounds that the instruction on the presumption of due care requested by the defendants in those cases was improper in any event in that either the defendant testified to his own conduct up to the time of the accident or in that it did not appear from the cases that the defendant did not so testify.

4839 Cal.2d 389, 247 P.2d 313 (1952).
There were one or two cases supporting the plaintiff’s contention which the court could not thoroughly distinguish. By implication they are overruled.

The error of this opinion is pointed out by Justice Traynor in his dissent, concurred in by Justice Edmonds, and it goes back to the fundamental mistake of considering a presumption as evidence. The majority clearly felt that the crucial evidence before the jury was an inference of negligence and a presumption of due care to be carefully weighed by them in arriving at a verdict. Actually, this metaphysical exercise was not required even to the slightest extent.

The burden of proving the defendant’s negligence, of course, was upon the plaintiff at the outset of his case. The manner in which the accident happened made the doctrine of *res ipsa loquitur* applicable. This doctrine is based upon the fact that the defendant is presumed to be in a better position to explain the happening of the accident than is the plaintiff. The doctrine does not shift the ultimate burden of proof. If the defendant comes forward with evidence which, if believed, shows that he is in no better position to explain the happening of the accident than the plaintiff, the doctrine of *res ipsa loquitur* does not then, as Justice Traynor says, “spontaneously generate” evidence. Under such circumstances, the jury should properly be left with the physical evidence available, to be weighed by the jury in order to ascertain whether or not the plaintiff has sustained his burden of showing by a preponderance of the evidence that the defendant was negligent.

As far as the defendant is concerned, he has no need of the presumption of due care and in fact is not entitled to it. There is no presumption in California that a person is free from negligence toward another person except as is necessarily embodied in the plaintiff’s having the burden of proving the defendant’s negligence by a preponderance of the evidence, and it would be highly prejudicial to add to a plaintiff’s burden of proving a negligence case the additional burden of overcoming a presumption that amounts to evidence that a defendant is free from negligence. In reference to this problem, Justice Traynor points out:

“This additional burden was placed upon plaintiffs only because defendant was unable to remember what happened. It is true that any disparity between the parties with respect to their sources of information may justify placing the burden upon one rather than the other or creating a presumption in favor of the party with the burden of proof. *Thus if the burden had been upon the defendant to prove that he was not negligent, his inability to present evidence because of his amnesia might justify a presumption in his favor that he was exercising due care.* . . . In this case, however, defendant received all the procedural protection to which he was entitled when the burden of proof was placed upon plaintiffs. There is no general rule of law that the quantum of proof required of the party bearing the burden of proof increases beyond the usual preponderance of probability because his opponent happens to be ignorant of the facts. Even if one assumed the wisdom of such
a rule, its operation should be explained to the jury in an intelligent manner. The jury should be instructed not that there is a presumption that is evidence, but that because of defendant’s inability to testify, they should demand of plaintiffs a higher degree of proof. . . . The evidence with respect to the accident was found only in the physical facts. Plaintiffs were entitled to have the jury consider those facts and then decide, unhampered by any presumption against them, whether it was more probable than not, that the defendant’s negligence caused the accident.” (Emphasis added.)

This language clearly applies to the case where the plaintiff is invoking a presumption of due care as evidence in his case and the defendant is attempting to sustain the burden of proving the plaintiff’s contributory negligence. It remains to be seen what the fate of the case of *Scott v. Burke* will be over the years. One cannot help but feel that sooner or later the confusion that has arisen in our law from treating inferences and presumptions as substantive evidence will one day be ended by a recognition of the proper role of presumptions and inferences.

The case of *Anthony v. Hobbie* might appear at first glance to be somewhat inconsistent with *Speck v. Sarver*. In fact, however, the majority opinion indicates that the presumption of due care was not dispelled by the plaintiff’s evidence because the plaintiff in fact offered evidence which only showed that the decedent was standing approximately in the middle of a highway at night and that the defendant was driving on his right hand side of the road. The conduct of the decedent in arriving at his position in the middle of the highway was not covered by the plaintiff’s evidence in any way. How he got there or why he was there or under what circumstances he placed himself in that position is unknown from the plaintiff’s evidence. In the dissent by Justice Edmonds, concurred in by Justice Traynor, it is clear that the dissenting justices viewed the case as covered by the rule of *Speck v. Sarver*.

The case of *Anderson v. San Joaquin County* must be viewed as inconsistent in its language with the case of *Speck v. Sarver* and *Tice v. Kaiser Co.*. In this case, an action for wrongful death, the plaintiff offered evidence through two witnesses who covered the manner in which the decedent’s car was being driven prior to and up to the time of the accident, which resulted in his death.

The evidence in the case showed that the defendant County had negligently allowed the highway on which the accident occurred to become in a dangerous and defective condition. There was evidence to show the presence of a large chuckhole in the traveled portion of the highway on the curve where the accident occurred.

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49 25 Cal.2d 814, 155 P.2d 826 (1945).
50 110 Cal.App.2d 703, 244 P.2d 75 (1952).
51 Supra, note 38.
The plaintiff's witness showed that the decedent's car was being operated on the right-hand side of the road in a normal manner as it rounded the curve and that it seemed to go out of control, having veered to the right toward the pavement edge. It then came across in front of an oncoming truck on the opposite side of the highway, where the collision took place. The record indicates that the plaintiff called the driver of the truck and his helper and that their testimony showed that the decedent's car struck the chuckhole in question, at which time the car veered over into the path of the truck.

The first point to be noted about the case is that there was no substantial evidence of the decedent's contributory negligence. The real problem in the case was the negligence of the defendant in allowing the dangerous and defective condition to exist and whether or not the defendant County had had the actual or constructive notice of the dangerous condition required to establish its liability for failure to correct it. This is a case where the giving of the instruction could hardly have operated to the prejudice of the defendant. However, the court took the opportunity to criticize the case of Tice v. Kaiser Co. and to ignore the case of Speck v. Sarver upon which it relies and is based. Inasmuch as the plaintiff had a jury verdict, the implied finding of the jury that the defendant had failed to sustain his burden of proving the contributory negligence of the plaintiff was beyond criticism. This would be true regardless of any instruction on the presumption, on the facts of this case.

A hearing was denied in the Supreme Court and Justice Traynor dissented as to that denial. It is submitted that it was clear error to give the instruction and that this case properly belongs with other cases where the fact a decedent's conduct is involved has tended to mislead the court, or with the line of cases holding that the giving of the instruction was error but not prejudicial because of the particular facts of the case. This, of course, was the situation in the case of Speck v. Sarver.

In many, if not most, litigated negligence cases, the question of contributory negligence is closely contested. The real prejudice in the giving of the instruction where the plaintiff or his witnesses have accounted for the conduct in question is in the tendency thereby to extend and perpetuate the errors and misunderstandings already far too common in our law concerning the proper role of a presumption in a law suit.

An excellent example of the proper operation of a presumption in a negligence case is found in a decision by the Supreme Court of the State of Washington, Sweazey v. Valley Transport. This case is typical of many cases following what might be called the common law rule governing the operation of presumptions. This particular case was an action for wrongful death. The decedents were killed when their automobile collided head-on

\[^{56}\text{Wash.2d 324, 107 P.2d 567 (1940).}\]
with a truck driven by an employee of the defendant. The testimony was conflicting as to which vehicle was on the wrong side of the road. There were two disinterested witnesses who observed the operation of the decedent's automobile prior and up to the time of the collision. These witnesses were called by the defendant and their testimony was attacked by the plaintiff as to its credibility. The jury returned a verdict in favor of the plaintiff. The defendant appealed. One of the claimed errors was the giving of the following instruction: "You are instructed that when a person is injured and dies as a result of a collision, a presumption arises that the person killed was at the time exercising due care, when there is no credible evidence to the contrary." (Emphasis added.)

The defendant contended on appeal that the presumption of due care was overcome by the testimony of disinterested witnesses, and therefore no instruction on the presumption should have been given to the jury. In discussing the problem, this court quoted one of its own prior opinions to this effect:

"This presumption, however, being purely a conclusion, and not evidence of anything, it must follow, it seems to us, that when disinterested witnesses testify as to such actions of the deceased, even though such testimony may be in conflict or be disputed, the presumption must disappear. In other words, where there is such testimony, there is no longer any reason for the rule, and to say that, regardless of such testimony, the jury has a right to also consider the presumption, would, in our opinion, be permitting the presumption to be placed in the scale, to be weighed as evidence." (Italics by the court.)

The court then continued:

"We have consistently recognized, in death cases, that the presumption is not evidence of anything, and relates only to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. The presumption, when the opposite party has produced prima facie evidence, has spent its force and served its purpose.

"We have consistently held that where there is disinterested testimony, the presumption disappears and is no longer in the case, and that no instruction on the presumption should be submitted to the jury."

The proper rule should be a good deal more clear where the "disinterested testimony" is offered by the plaintiff or his witnesses. There is no reason in law or logic why the California courts should not one day recognize that the so-called presumption of due care is not evidence in any sense of the word and should be dispelled when competent disinterested testimony is offered by the party against whom the presumption is invoked through witnesses other than the party, his relatives, employees, servants, agents, etc.

Our courts have, as this survey of our law on this question has shown, taken steps that have indicated some progress toward this goal.

What is needed at the present time is a clear-cut recognition that the evidence of the party invoking the presumption of due care need not show that party’s contributory negligence as a matter of law before the presumption of due care is dispelled from the case. It is sufficient if the party’s evidence of the conduct in question is competent and admissible and covers the conduct up to and immediately prior to the happening of the accident. In such a case adding an instruction on the presumption of due care to the evidence of the party invoking the presumption covering the conduct in question is to prejudice the party on whom the burden of proving the non-existence of the fact presumed already rests.

Conclusion

In conclusion, attention should be called to the case of Downing v. Southern Pacific. This case is authority for the rule in California that where it is possible for a party to produce eyewitnesses to testify to the conduct in question, he is not entitled to instructions on the presumption of due care. The case was an action for wrongful death. The decedent was killed in his automobile at a railroad crossing. The plaintiff succeeded in proving an adequate case on the defendant’s negligence. The plaintiff neither had nor offered any independent evidence covering the decedent’s conduct at and prior to the time of the accident. The defendant offered evidence covering in detail the conduct of its employees and the decedent in the premises. On appeal from a verdict in favor of the plaintiff, the defendant argued that it was error for the trial court to have instructed on the presumption of due care on behalf of the plaintiff and to refuse such an instruction on behalf of the defendant. The trial court’s action was sustained and the appellate court said of the defendant’s claim to the presumption:

"Where it is possible to call eye witnesses to testify positively to the facts and circumstances surrounding the accident, the presumption is not applicable."

The court pointed out that the purpose of the presumption is to come to the aid of a party who is without “eyewitnesses,” but that the presumption is “given weight only in the absence of evidence on the subject of the deceased’s conduct.” The eyewitnesses offered by the defendant were his own employees and their testimony deprived the defendant of any presumption. The court was obviously not including a defendant or his agents or servants in its use of the term “eyewitnesses” as far as the plaintiff was concerned. The plaintiff was considered as having no available eyewitnesses.

It is submitted that this case represents a proper road to follow and

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the cases which have deviated from the principles set forth therein, and set forth in the cases following its logic discussed in this article, should be reexamined with the purpose of reconciling and harmonizing our law on this question of "dispelling" the presumption of due care from a negligence case so that it will be consistent with the rules of justice and logic.

Whether our courts will ever be able to shake the fallacy that presumptions are evidence remains to be seen. But clearly they are in the strongest possible position to develop and extend the rule of Speck v. Sarver so that the prejudice of the errors in misapplying rules governing presumptions can be completely recognized and so that a plaintiff who offers evidence covering the conduct in question, or to whom disinterested eyewitness evidence covering the conduct is available but is offered by the defendant, will not be entitled to argue he should have any presumption in his favor, as evidence that the conduct in question did not amount to contributory negligence.

It is to be hoped that the following general principles of law will receive further recognition and application in the California law on the operation of this "presumption of due care."

1. Presumptions are not evidence in themselves and cannot be intelligently weighed as such.

2. Presumptions are properly considered as procedural devices to require the production of evidence, for logical or policy reasons, by the party against whom the presumption is invoked. Presumptions operate so as to require a finding of the existence of the fact presumed in the absence of evidence. Once competent evidence is produced covering the subject matter of the presumption sufficient to present an issue for the trier of fact on the existence or non-existence of the fact presumed, a presumption should disappear from the case. The facts giving rise to the presumption are then to be considered only as evidence themselves, for whatever inferences may properly be drawn from them.

3. Presumptions can properly be used to assist a party with the burden of proof on an issue, where there is no competent and relevant evidence available to such a party covering the subject matter of the presumption. If, in such a case, competent and disinterested evidence contrary to the fact presumed is offered by the party against whom the presumption is invoked, the proper rule should be that the presumption is dispelled from the case. Even if this evidence is disbelieved, the presumption has operated in requiring its production.

4. Where a party invoking a presumption, whether or not that party has the burden of proof on the issue, offers evidence covering the subject matter of the presumption, the presumption is dispelled from the case.

5. The rules governing the operation of the "presumption of due care"
cannot logically be different simply because the conduct of a *decedent* is involved in the case. That fact in itself has no legal or logical significance.

6. Where competent and disinterested testimony covering the subject matter of a presumption is available to the party invoking the presumption, and is offered by the party against whom the presumption is invoked, the presumption should disappear from the case.

7. When a presumption of the existence of a particular fact is allowed to operate as substantive evidence in a case against competent and relevant evidence of a party having the burden of proving the non-existence of the fact presumed, serious prejudice results to the party having this burden of proof.

8. In order for the evidence of a party invoking a presumption, covering the subject matter of the presumption, to dispel it from the case, it is not required that that evidence show the non-existence of the fact presumed *as a matter of law*. It is sufficient that the evidence cover the subject matter of the presumption in question.