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PRESUMPTION OF DUE CARE BY DECEDENT: AN ANOMALY DESTROYED

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In the recent case of *Hutton v. Martin*,[1] the plaintiff sued the defendant for wrongful death arising from an automobile collision. The factual issue was whether plaintiff's decedent was contributorily negligent by driving on the wrong side of the road at the time of the accident. There were no eye-witnesses to the accident except the defendant Martin. The trial judge gave the jury 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 and that he did all that the situation then and there presented to him required him to do to save himself from injury, when there is no credible evidence to the contrary" On appeal, it was held that giving this instruction is reversible error.

This decision overturned a great deal of case doctrine in Washington. The presumption that a decedent exercised due care and is free from contributory negligence has probably been a part of Washington law since 1905.[2] The most extreme pronouncement was in *Karp v. Herder*,[3] where, although two *disinterested* witnesses testified as to conduct of the decedent showing contributory negligence, it was held that the trial court properly instructed the jury about the presumption of due care. Retreat from this extreme position began with *Morris v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*[4] The court overruled the holding of the *Karp* case and held that the presumption entirely disappears upon the introduction of the testimony of *disinterested* witnesses as to the action of a decedent, and where such testimony is introduced, the presumption should in no event be submitted to the jury Under the dicta of the *Morris* case, however, where the only testimony introduced in opposition to the presumption is that of interested witnesses, or where there is no testimony as to the action of the deceased immedi-

[1] 41 Wn.2d 780, 252 P.2d 581 (1953).
[2] Woolf v. Washington Ry. & Navigation Co., 37 Wash. 491, 79 Pac. 997 (1905). *See also* Richardson v. Pacific Power & Light Co., 11 Wn.2d 288, 118 P.2d 985 (1945).
[3] 181 Wash. 583, 44 P.2d 808 (1935).
[4] 1 Wn.2d 587, 97 P.2d 119 (1939). See Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71 (1940).

ately prior to and at the time of the accident, the presumption is still to go to the jury.

The *Karp* and *Morris* cases differed regarding the type of testimony, whether interested or disinterested, that was sufficient to rebut the presumption. In the instant case there was no testimony whatsoever to rebut the presumption, except that given by the defendant. Thus the court by finding it reversible error to instruct the jury that the plaintiff was presumed to be in the exercise of due care destroyed the presumption entirely. The *Morris* case is expressly overruled.

The reason for abandoning the presumption of due care on the part of the deceased is that it serves no function. The conventional use for a presumption is simply to aid the party having the burden of proof. It serves in the absence of evidence and allows the party who has the benefit of it to avoid a non-suit without introducing evidence.[5] Washington has always followed the rule that the burden of proof of contributory negligence is upon the defendant.[6] This being so, the application of the presumption by the court prior to the instant case violated the conventional use of presumptions, for the presumption operated against the defendant who already had the burden of proof on the issue of contributory negligence. All that need be done is to instruct the jury that the defendant has the burden of proof.[7]

The instant case, which destroyed the anomalous presumption of due care on the part of a decedent, is consistent with other Washington cases developing the theory of presumption.[8]

Although the *Hutton* case, by withdrawing the presumption from the jury, seemed to destroy the presumption, some hint of its qualified revival appears in a subsequent case. In *Smith v. Yamashita*,[9] plaintiff sued defendant for wrongful death of a pedestrian. Plaintiff's decedent was contributorily negligent as a matter of law in that he violated a city ordinance by crossing a street between intersections. On appeal, although the court expressly sanctioned the holding of the *Hutton* case, it held that the lower court properly refused to give the defendant a non-suit because "Apellant [the plaintiff] had the benefit of the pre-

[5] 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940).

[6] Northern Pac. R. Co. v. O'Brien, 1 Wash. 599, 21 Pac. 32 (1889).

[7] Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71, 85 (1940).

[8] Scarpelli v. Washington Water Power Co., 63 Wash. 18, 114 Pac. 870 (1911); Steiner v. Royal Blue Cab Co., 172 Wash. 396, 20 P.2d 39 (1933); McGinn v. Kimmel, 36 Wn.2d 786, 221 P.2d 467 (1950); Gardner v. Seymour, 27 Wn.2d 802, 180 P.2d 564 (1947).

[9] 42 Wn.2d 490, 256 P.2d 281 (1953).

sumption of due care on the part of the decedent. . . ."[10] Apparently then the presumption of due care on the part of a deceased still exists, and it can be used by the court in denying defendant a non-suit because of contributory negligence. The narrow holding of the *Hutton* case is that it is reversible error to *instruct* the jury on the presumption, but it is clear that there is no substantial ground for distinguishing between the use of the presumption by the court or by the jury. Indeed, in the *Hutton* case, it appears that neither the court nor the jury should use the presumption. " 'The suggestion is that contributory negligence in a wrongful death action may and should be disposed of by *both the court and the jury* in terms of burden of proof alone. . . .' "[11] The presumption is anomolous whether employed by the court or the jury in Washington.[12]

[10] *Id.* at 492, 256 P.2d at 282 (1953).

[11] 41 Wn.2d 780, 789, 252 P.2d 581, 587 (1953), quoting from Falknor, *op. cit. supra* note 7, at 82.

[12] A presumption of due care on the part of a deceased *tortfeasor* is recognized by L. 1953, c. 73; RCW 4.20.045. The statute prevents abatement of an action because of the death of the tortfeasor. Under the *Hutton v. Martin* rule, instruction to the jury on the presumption will probably be error. See Richards, *Torts,* 28 WASH. L. REV. 201, 203 (1953), where the probable effect of the statute is discussed.