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THE PRESUMPTION OF DUE CARE AND THE LAW OF COMPARATIVE NEGLIGENCE

I. BACKGROUND

The term "presumption" has caused confusion in its application to the law of evidence, yet authorities agree that the purpose of a presumption is generally to allow a logical inference of one fact or set of facts from the existence of another. These inferences are usually created by establishing a relationship between proven or admitted facts and a fact or factual conclusion which is sought to be proven. Thus, circumstances which are likely to yield a particular result are elevated to the stature of "presumption," and are thereby attributed considerable importance for reasons of convenience and fairness to the parties in a case.

Once such a relationship is established, a presumption may then be used to allocate the burdens of proof and production in a case. Put differently, the ultimate effect of a presumption is to allocate the respective responsibilities and duties between parties in a lawsuit. Despite the degree of reliance placed upon presumptive inferences, it is generally agreed that presumptions may not attain the same level of importance as ordinary evidence. Significantly, however, because of its burden allo-

1. MCCORMICK ON EVIDENCE § 342, at 965 (E. Cleary 3d ed. 1984); see also J. KAPLAN & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 761 (6th ed. 1987).
2. J. KAPLAN & J. WALTZ, supra note 1, at 761.
3. See generally J. KAPLAN & J. WALTZ, supra note 1, at 761-63; MCCORMICK ON EVIDENCE, supra note 1, § 342, at 965 (some courts treat standardized inferences as presumptions).
4. J. KAPLAN & J. WALTZ, supra note 1, at 762. Thus, "[i]f B is presumed from A, then on a showing of A, B must be assumed by the trier in the absence of evidence of non-B. To put it another way, if A is shown, then the party who asserts non-B has the production burden on the issue of B vel non . . . ." Id. According to some authorities, "a true presumption should not only shift the burden of producing evidence, but also require that the party denying the existence of the presumed fact assume the burden of persuasion on the issue as well." MCCORMICK ON EVIDENCE, supra note 1, § 342, at 965.
5. See, e.g., Hodge v. Me-Bee Co., 429 Pa. 585, 590-91, 240 A.2d 818, 821 (1968) (presumptions are not evidence; presumption of interest was rebutted as matter of law where uncontroverted testimony was introduced as evidence); Allison v. Snelling & Snelling, Inc., 425 Pa. 519, 525, 229 A.2d 861, 864 (1967) (presumptions act at best as mere arguments); Richmond v. A.F. of L. Medical Serv. Plan. 421 Pa. 269, 271, 218 A.2d 303, 304 (1966) (use of presumption would create impermissible thought in jury's mind that defendants were entitled to benefit of probative force of presumption); Lescznski v. Pittsburgh Rys., 409 Pa. 102, 105-06, 185 A.2d 538, 539-40 (1962) (rebuttable presumption that decedent was exercising due care did not constitute proof that defendant negligently caused decedent's death); Waugh v. Commonwealth, 394 Pa. 166, 173 n.8, 146 A.2d 297, 302 n.8 (1958) ("[a] presumption is neither evidence nor a substitute for evidence"); MacDonald v. Pennsylvania R.R., 348 Pa. 558, 566-67,

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cating function, a presumption’s lack of evidenciary value does not diminish its weighty consequences for each of the parties to an action.

This article focuses upon the continued viability of the enigmatic presumption of due care which has recently become the subject of extensive litigation in Pennsylvania. Generally, the presumption of due care comes into play when a deceased or otherwise incapacitated party becomes unable to testify as to the particular incidents which gave rise to a liability producing occurrence.6 In a series of recent decisions in this area the appellate courts of Pennsylvania examined the reasoning behind the existence of the presumption of due care and attempted to clarify its continued vitality in light of the commonwealth’s recently adopted comparative negligence statute.7 The issuance of two supreme court decisions, both decided in the same year and each reaching apparently opposite conclusions, thrust the concept of presumption of due care into an abyss of confusion.8 Until recently, these conflicting court decisions remained unchallenged. However, in 1988, the Superior Court of Pennsylvania was handed the task of reconciling these decisions in the case of Vihlidal v. Braun.9

The presumption of due care is premised upon man’s natural instinct for self-preservation, and is couched in the theory that an individual will not purposefully expose himself to the possibility of serious bodily harm.10 Simply stated, the presumption of due care proposes

6 A.2d 492, 496 (1944) (presumption of common carrier’s negligence in train accident served only to shift burden of proof); Watkins v. Prudential Ins. Co. of America, 315 Pa. 497, 504-06, 173 A. 644, 648 (1934) (“Presumptions are not fact suppliers; they are guide-posts indicating whence proof must come . . . . No presumptions ever take the place of proof.”). But see Waddle v. Nelkin, 511 Pa. 641, 650, 515 A.2d 909, 914 (1986) (Larsen, J., concurring) (agreed that new trial should be granted due to trial judge’s failure to instruct jury as to presumption of due care, but urged that such presumption be given weight of evidence).

7 The three most important and most recent cases in this series, which will be the focus of this article, are Waddle v. Nelkin, 511 Pa. 641, 515 A.2d 909 (1986), Rice v. Shuman, 513 Pa. 204, 519 A.2d 391 (1986) and Vihlidal v. Braun, 371 Pa. Super. 565, 538 A.2d 881 (1988). For the applicable provisions of Pennsylvania’s comparative negligence statute, see infra note 21.

8 Waddle v. Nelkin was decided on October 8, 1986, while Rice v. Shuman was decided on December 16 of the same year. Waddle, 511 Pa. at 648, 515 A.2d at 913 (upholding vitality of presumption of due care within comparative negligence system); Rice, 513 Pa. at 214, 519 A.2d at 396 (characterizing presumption of due care in case of deceased or incapacitated defendant as “useless appendage” in light of state’s adoption of comparative negligence). For a complete discussion of the holdings of each case and the apparent contradictions found within the rulings, see infra notes 18-50 and accompanying text.


10 Rice, 513 Pa. at 213, 519 A.2d at 396; see also Keasey v. Pittsburgh & Lake Erie R.R. Co., 404 Pa. 63, 69, 170 A.2d 328, 331 (1961) (commenting on
recent developments

that

where a [party's] mind is a blank as to an accident and all its incidents, the presumption is that he did all that the law required him to do and was not guilty of contributory negligence. The presumption, however, is a rebuttable one and must give way when the facts as established by [a party's] evidence shows that he was guilty of contributory negligence.11

The presumption was originally formulated for the benefit of the plaintiff and was designed to overcome the burdens of the former common-law rule in Pennsylvania which required the plaintiff to present a case free from his own negligence as a precondition to having his case reach the jury.12 The presumption relieved an incapacitated plaintiff who was unable to testify of the responsibility of presenting evidence of his own due care. The effect of the presumption was to shift the production and persuasion burdens to the defendant to prove a plaintiff's contributory negligence.13 Significantly, the presumption alone could not supply affirmative evidence of due care; it merely shifted the burdens in a case, thus creating a question of fact and allowing the case to proceed past summary judgment.14 For reasons of fairness, the presumption was later applied to defendants in an effort to prevent a surviving competent plaintiff from taking advantage of the death or incapacitation of a defendant.15

self-preservation instincts, court stated that "although it is inevitable that everyone must eventually turn in his bat and glove, no one actually wants to hasten the end of the ball game"); Moore v. Esso Standard Oil Co., 364 Pa. 343, 345, 72 A.2d 117, 119 (1950) ("When a person is killed in an accident a presumption arises that he exercised due care, based upon the assumption that there is, in man, an instinct of self preservation and the natural desire to avoid pain and injury to himself."); Morin v. Kreidt, 310 Pa. 90, 97-99, 164 A. 799, 801 (1933) (due to general presumption of natural instinct for self-preservation, court refused judgment n.o.v. on issue that deceased was contributorily negligent where he stood directly in path of oncoming truck).}


12. Rice, 513 Pa. at 213, 519 A.2d at 396; see also Good v. City of Pittsburgh, 382 Pa. 255, 260, 114 A.2d 101, 103 (1955) (plaintiff must set forth case free from contributory negligence or recovery is barred).


14. Rice, 513 Pa. at 213, 519 A.2d at 396. Without such a shift in burden, the cases often would be summarily dismissed since it would be nearly impossible for a deceased plaintiff's estate to prove the complete absence of negligence by the deceased on his behalf.

15. Id.; see also Hawthorne, 352 Pa. Super. 359, 508 A.2d 298; Waddle, 511 Pa. 641, 515 A.2d 909; Kmetz v. Lociatto, 421 Pa. 363, 219 A.2d 588 (1966); Wil-
Until quite recently, few courts questioned the use of the presumption of due care, and no Pennsylvania court had ever analyzed the status of the rule in light of the adoption of a comparative negligence system. In 1986, however, the state supreme court was confronted with two such cases in a span of several months. This paper will critically examine those two cases, along with the recent superior court decision in Vihlidal, in light of Pennsylvania’s adoption of a comparative negligence statute. This examination will disclose that the presumption of due care is merely a vestigial remain of Pennsylvania’s contributory negligence era.

II. THE PENNSYLVANIA SUPREME COURT AND THE PRESUMPTION OF DUE CARE: THE EFFECT OF COMPARATIVE NEGLIGENCE

The first Pennsylvania Supreme Court case to address the presumption of due care after the adoption of comparative negligence was Waddle v. Nelkin. In Waddle, an action was brought by an individual who had been struck and injured by a motor vehicle. The plaintiff had no


17. For a discussion of these cases, see infra notes 18-50 and the accompanying text.


19. Waddle, 511 Pa. at 643, 515 A.2d at 910. The facts of the incident indicated that on June 8, 1979, the plaintiff was struck by a vehicle operated by the defendant while in the course of the defendant’s employment. Id. The plaintiff testified that around noon on the day of the occurrence, he had made a service repair call for one of his trucks. Id. However, as to the incident, plaintiff had no recollection. Id.

Perhaps significant to the ultimate outcome of this case was the Pennsylvania Supreme Court’s finding that the defendant’s testimony was “suspect at best.” Id. at 645, 515 A.2d at 912. The court stated:

The [defendant] testified that at the time she observed Waddle she was traveling between 20 to 25 miles per hour, yet, she was unable to bring her vehicle to a stop prior to striking Waddle when he was 20 feet in front of her. She further testified that she did not blow her horn to alert Waddle of her presence. Finally, she testified that she did not remember a dent in either her automobile or the pickup truck, even though she was driving a rented automobile which is always subject to inspection for damages. Thus, it is clear that under all the facts the trial court could not determine as a matter of law that Waddle was contributorily negligent.

Id. at 645-46, 515 A.2d at 912.
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recollection of the occurrence itself, although he was able to testify con- 20 cerning facts prior to and after the accident. After presentation of the evi- 20 dence at trial, the jury determined that the plaintiff was sixty percent at fault while the defendant was only forty percent negligent, thus re- 21 quiring that a judgment be entered in favor of defendant in accordance with Pennsylvania’s comparative negligence statute. 21 On appeal the superior court vacated the judgment and remanded for a new trial, bas- 21 ing its reversal on the trial judge’s refusal to instruct the jury that the plaintiff was entitled to a presumption of due care because he lacked recollection of the accident. 22

The supreme court affirmed the superior court’s decision, and upon ascertaining that no evidence had been presented which would rebut the presumption of due care, a sharply divided court ruled that the trial

20. Id. at 643, 515 A.2d at 910. The plaintiff remembered the fact that the pickup truck he was driving before the accident had no dents, whereas after the occurrence, two dents existed behind the driver’s door. Id. The plaintiff also offered the testimony of a bystander who did not actually observed the impact, but did hear a thud and observe the plaintiff “flying through the air.” Id. Testimony showed that the plaintiff’s pickup truck and his disabled vehicle were parked “partially on the curb, one in front of the other, such that the rear of the pickup truck was facing the front end of the disabled tractor trailer.” Id. The bystander also observed that after completing his repairs, the plaintiff walked around to the front end of the pickup truck, closed the hood, and proceeded toward the driver’s side of the vehicle. Id.

21. Id. at 644, 515 A.2d at 911. The comparative negligence statute pro- 42 vides in relevant part:

(a) In all actions brought to recover damages for negligence res- 42 ulting in death or injury to person or property, the fact that the plain- 42 tiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sus- 42 tained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

42 PA. CONS. STAT. ANN. § 7102(a) (Purdon 1982).

22. Waddle, 511 Pa. at 644-45, 515 A.2d at 911. The plaintiff argued that the jury instruction should have stated that “[w]here a plaintiff’s mind is blank as to an accident and all its incidents the presumption is that he did all that the law required him to do and was not guilty of negligence.” Id. at 644, 515 A.2d at 911. At the trial level, however, the defendant successfully argued that the instruction of presumption of due care was unnecessary since there was testimony regarding the circumstances immediately prior to the accident. Id.

The supreme court found on appeal that since it was uncontested that the plaintiff was suffering from amnesia, the only issue presented was whether the evidence offered by the plaintiff rebutted the presumption. Id. at 645, 515 A.2d at 911. The court found that since the plaintiff did not call the defendant as a witness to establish the facts of the occurrence, and since the testimony of the one witness called by the plaintiff only established facts prior to and subsequent to the actual occurrence, no evidence to rebut the presumption of due care was present in the case. Id. at 645, 515 A.2d at 911-12. The court did not view the question of whether an instruction on the presumption of due care should have been given as a significant issue on appeal. Id. at 648, 515 A.2d at 913.
judge had erred in failing to give the requested jury instruction. The court also held that the trial court’s error was not harmless, since the error was not obviated by the trial court’s jury instruction which placed the burden of establishing the plaintiff’s contributory negligence on the defendant. In accordance with this finding, the supreme court rejected the argument that the adoption of comparative negligence in Pennsylvania negated the necessity for a presumption of due care instruction.

To support its holding that the presumption instruction was necessary, the court maintained that the presumption of due care serves a separate purpose from that of an instruction allocating the burden of proof in a case. The court concluded that while the presumption of due care acts to supply the jury with a needed legal basis upon which to conclude a party acted reasonably, an instruction allocating the burden of proof does not. According to the court, an allocation of burdens merely establishes the parties evidentiary duties without any legal finding of reasonableness. The court stated that “[t]he presumption of due care was created to provide a legal conclusion that if a plaintiff could

23. Id. at 648-49, 515 A.2d at 913. Justice Zappala wrote the opinion of the court; Justice Larsen filed a concurring opinion joined by Justice Papadakos; Justice McDermott filed a concurring opinion; Chief Justice Nix filed a dissenting opinion which was joined by Justices Flaherty and Hutchinson; and Justices Flaherty and Hutchinson filed separate dissenting opinions. Id.

24. Id. at 646-48, 515 A.2d at 912-13. Interestingly, both the trial court and the defendant agreed that if any error occurred due to the judge's failure to instruct the jury as to the presumption of due care, such error would be harmless since the court had properly instructed the jury that the burden of proving contributory negligence was to fall upon the defendant. Id. at 644-45, 515 A.2d at 911. The supreme court, however, did not agree. Id. at 648, 515 A.2d at 913.

25. Id. For a discussion of the reasoning behind the court’s decision, see infra notes 26-32 and accompanying text. For an argument that the court did not persuasively address the issue of the effect of the comparative negligence statute on the presumption of due care, see infra notes 63-67 and accompanying text.


In the deliberations of the jury there are permissible inferences (sometimes miscalled “presumptions”) rooted in general human experience and which have weight when the evidence, respectively, for and against a fact in issue leaves the jury in a “twilight zone” of doubt as to that fact. Such “presumptions may be looked upon as legally recognized phantoms of logic, flitting in the twilight, but disappearing in the sunshine of actual facts.”

Id. at 512, 173 A. at 651 ("Presumptions...may be looked on as the rats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts.") (quoting Mockowik v. Kansas City, St. J. & C.B.R. Co., 196 Mo. 550, 571, 94 S.W. 256, 262 (1906)).

27. Waddle, 511 Pa. at 647, 515 A.2d at 912.

28. Id.
testify as to the events in question he would have substantiated that a
defendant acted unreasonably in comparison to his own actions. As
a result of these different purposes, the court found that a change in the
law from barring recovery for a plaintiff who acts negligently to evaluat-
ing the extent of a plaintiff's own negligence, does not change the con-
cerns of an unavailable plaintiff, nor does it defeat the purpose of the
presumption. The majority reasoned that the new comparative negli-
gence statute only alters the method for evaluating liability and not how
an injury is established. Thus, the court concluded that the presump-
tion of due care is still a necessary device for supplying the jury with a
basis for establishing a party's innocence.

Less than three months later, in apparent contradiction to the holding in Waddle, the supreme court handed down the decision of Rice v. Shuman. In this decision another sharply divided court held that an incapacitated defendant was not entitled to a jury charge stating that he should be presumed to have been using due care for his own safety. Of particular importance was the reasoning behind the court's holding. The court noted that the limited benefit derived from the use of the presumption of due care running in favor of a deceased or incapacitated defendant was no longer present as a result of the adoption of a system of comparative negligence in Pennsylvania.

Similar to Waddle, the Rice case also arose as the result of injuries sustained by parties in an automobile accident. At the conclusion of

29. Id. at 647, 515 A.2d at 912-13.
32. Id.
34. The Rice majority opinion was written by Chief Justice Nix and was de-cided by a narrow four to three vote, with Justices Larsen, McDermott and Zappala filing dissenting opinions. Id. at 204-05, 519 A.2d at 391-92.
35. Id. at 211, 519 A.2d at 395.
36. Id. at 210, 519 A.2d at 394. For a discussion of the court's analysis, see infra notes 44-50 and accompanying text.
37. Rice, 513 Pa. at 207, 519 A.2d at 393. This suit resulted from a collision which occurred on August 21, 1979 in Philadelphia. Id. Just prior to the acci-dent the defendant and one passenger were in a vehicle traveling in a southerly direction. Id. The other driver, the plaintiff, along with one passenger, had been proceeding in a northerly direction on the same street and was making a left-hand turn to proceed in a westerly direction. Id.
As a result of the accident, the defendant's passenger sustained multiple injuries to her extremities and forehead, rendering her unable to work and sub-
the presentation of evidence, the jury found that both the plaintiff and the defendant were responsible in varying degrees for the accident. The defendant was assigned seventy percent of the fault, while the plaintiff was found to be only thirty percent negligent. The trial court had instructed that the defendant’s absence was due to incompetence resulting from injuries sustained in the accident and that no adverse inference should be drawn from his failure to testify. On appeal, the defendant’s primary claim was that the trial court refused to give a requested point of charge providing for a presumption of due care to run in his favor.

In deciding whether the presumption of due care was appropriate

stantially diminishing the quality of her life. The passenger in the plaintiff’s vehicle suffered fractures that permanently rendered her right leg shorter than her left. The plaintiff himself incurred injuries to the right knee and left hand resulting in permanent disability. Most importantly for the issue facing the court, the defendant sustained severe head injuries which rendered him incompetent to testify at the time of the jury trial.

38. Id. at 208, 519 A.2d at 393. The jury’s damage award, after the trial judge molded the verdict to reflect the apportionment of negligence and to reflect the settlement that had been reached by the plaintiff and the defendant prior to trial, amounted to the following final judgments entered against the defendant: 1) in favor of the defendant’s passenger for $429,800; 2) in favor of the defendant’s passenger’s spouse in the amount of $35,000; 3) in favor of the plaintiff’s passenger in the amount of $280,000; and 4) in favor of the plaintiff for $175,000. Id. at 209, 519 A.2d at 394.

39. Id. at 210-11, 519 A.2d at 394-95.

40. Id. at 208-09, 519 A.2d at 394. The requested point of charge asking the judge to raise the presumption of due care on behalf of the defendant was phrased as follows:

When a person injured in an accident is rendered incompetent by his injuries or has lost his memory as a result of his injuries so that he is unable to testify as to how the accident occurred, the law presumes that at the time of the accident that person was using due care for his own safety.

Id. at 209, 519 A.2d at 394.

After denial of the requested charge, the trial judge gave the following jury instructions applicable to the respective burden of proof and the effect of comparative negligence:

First off, Dr. David Shuman can’t be here today and no inference should be taken adversely to him because he can’t be here today. You’ve heard that he had been declared to be incompetent by the Court of Common Pleas, of which this is a part, and therefore, his [non]appearance is unavoidable. Comparative Negligence is primarily involving adjustment of the figures where two people are involved in an accident and there’s a different degree of negligence, a different weight to be given to the negligence, both of them. Consequently, the comparative negligence will apply to all the plaintiffs in this case if you find that there was negligence on the part of Kurt Rice. But again, that does not change and it does not affect your dollar figures. All adjustments are made by the court once you put down what you believe the verdict should be. If you find that there was some negligence, then you determine whether or not the weight of that negligence is to be defined percentagewise. You must do that, and when you do that the Court will then adjust the verdict according to what you’ve
under these facts, the Pennsylvania Supreme Court was required to pass upon the viability of the presumption in light of the adoption of comparative negligence in Pennsylvania. In undertaking this task, the court first focussed upon the perceived role of the presumption under the prior Pennsylvania law, and then examined its success in achieving this role in light of the revised law which had been adopted.

In its analysis, the court stressed that presumptions are designed merely to allocate the respective responsibilities of parties in a lawsuit by directing parties to assume the burdens of persuasion and proof in a case. Presumptions are not, the court commented, intended to act as evidence. In light of these conclusions, the court reasoned that the presumption of due care serves no purpose when applied to a defendant, since the presumption may not be used as evidence to offset negligence introduced by the plaintiff against the defendant. For the same reason, the defendant also may not use a presumption to establish evidence of the plaintiff's contributory negligence. Additionally, the court stated that the presumption of due care does not serve to allocate the burden of proof when applied to defendants, since the plaintiff always has this burden where the defendant's negligence is alleged, regardless of the defendant's presence or absence in the proceeding.
Thus, according to the majority, the only remaining concern is that a jury might improperly draw an adverse inference from a party's absence in a proceeding.\textsuperscript{49} The court quickly dismissed this issue, however, since the trial judge had already properly addressed these concerns and since the use of a presumption in the case of a defendant would act to obfuscate, rather than clarify, the issue for the jury.\textsuperscript{50}

III. \textit{Vihlidal v. Braun}

The apparent inconsistencies of \textit{Waddle} and \textit{Rice} remained unchallenged for over a year until the Pennsylvania Superior Court was finally called upon in \textit{Vihlidal v. Braun}\textsuperscript{51} to interpret the prior supreme court decisions. In \textit{Vihlidal}, the plaintiff, in a wrongful death action resulting from an automobile collision, appealed from a jury verdict for the defendant.\textsuperscript{52} Among the issues raised by the appeal was a claim that the trial court erred in refusing a request for a jury instruction of presumption of due care for the plaintiff's decedent.\textsuperscript{53}

Because there were no witnesses to the collision, both sides presented expert witnesses who differed in opinion as to the point of impact of the parties' automobiles.\textsuperscript{54} To complicate matters, neither party involved was capable of providing testimony as to the circumstances of the collision.\textsuperscript{55} As a result, each side sought to have the jury instructed that due care should be presumed to have been used at the

417 Pa. 448, 449, 208 A.2d 243, 244 (1965); Cushey v. Plunkard, 413 Pa. 116, 117-18, 196 A.2d 295, 296 (1964)).

49. \textit{Id.} at 212-13, 519 A.2d at 396.

50. \textit{Id.} at 212-14, 519 A.2d at 395-96. According to the supreme court, the respective burdens as to production and persuasion are easily explained to a jury, and thus, the imposition of the presumption of due care is a useless appendage and may serve to confuse, rather than to clarify the issues for the jury. \textit{Id.} at 212, 519 A.2d at 395. The court noted that the present case represented an excellent illustration of how a clear jury instruction, with respect to the burden of each of the parties, was adequate under the law of comparative negligence without resort to the presumption of due care. \textit{Id.} at 210, 519 A.2d at 394. Moreover, the court emphasized that the same objectives accomplished by presumption could be accomplished by an appropriate instruction without the increased confusion which would accompany the use of a presumption. \textit{Id.}


52. \textit{Id.} at 566, 538 A.2d at 881. The record revealed that an automobile accident occurred when the truck driven by the plaintiff's decedent collided with the automobile driven by the defendant. \textit{Id.} at 566-67, 538 A.2d at 881. Prior to the accident, both drivers had been traveling in opposite directions along the same road. \textit{Id.}

53. \textit{Id.} at 566, 538 A.2d at 881.

54. \textit{Id.} at 567, 538 A.2d at 881. At trial, the plaintiff's expert testified that the defendant's vehicle traveled across the center line and collided with the deceased's truck. \textit{Id.} The opposition's expert was of the opinion, however, that the point of impact occurred in the northbound lane, indicating that it was the other party which had crossed over the center line. \textit{Id.}

55. \textit{Id.} As a result of the accident the plaintiff suffered injuries which caused his death the next morning, and the defendant testified that he was un-
time of the accident.\textsuperscript{56} The trial judge refused both requests, and his ruling was appealed.\textsuperscript{57} On appeal, the defendant argued that the supreme court’s holding in \textit{Rice} should deprive the plaintiff of a presumption of due care charge.\textsuperscript{58} According to the defendant, a proper interpretation of the \textit{Rice} decision would command that the due care instruction be disallowed “for any deceased or incapacitated party.”\textsuperscript{59} Because of defendant’s contentions, the superior court was finally faced with the task of interpreting the prior conflicting supreme court rulings in the area of presumption of due care.

Despite the potential importance of its decision, the \textit{Vihliidaal} court resolved the apparent conflicts in the law without tackling many of the toughest questions presented. Rather than choose between the conflicting supreme court rulings and run the risk of being overturned, the superior court took a safer approach, attempting to reconcile \textit{Rice} and \textit{Waddle} by distinguishing them on their facts. Because the facts of \textit{Rice} involved a defendant rather than a plaintiff, as in \textit{Waddle}, the superior court opined that the Pennsylvania Supreme Court only intended its prohibition against the presumption of due care to extend to defendants, while leaving intact the presumption for plaintiffs.\textsuperscript{60} The \textit{Vihliidaal} court able to recall the events of the accident as a result of the injuries he sustained.

\textit{Id.}

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.} at 567, 538 A.2d at 881-82.

\textsuperscript{58} \textit{Id.} at 568, 538 A.2d at 882. The defendant’s contention was in response to the plaintiff’s reliance on \textit{Waddle} in support of his claim of presumption. \textit{Id.} at 568, 538 A.2d at 882. The \textit{Vihliidaal} court found it significant that the \textit{Waddle} court: 1) found no evidence to rebut the presumption of due care and ruled that the trial court erred in failing to give the requested jury instruction; 2) concluded that the error by the trial court was not harmless error; and 3) rejected the argument that the adoption of the doctrine of comparative negligence in Pennsylvania negated the necessity for the presumption of due care instruction. \textit{Id.} at 568, 538 A.2d at 883.

\textsuperscript{59} \textit{Id.} at 568, 538 A.2d at 882. The plaintiff in \textit{Vihliidaal} argued that the supreme court’s decision in \textit{Waddle} was tempered by its ruling one month later in \textit{Rice}. \textit{Id.} According to the plaintiff’s interpretation of the case, \textit{Rice} found that only incompetent defendants were not entitled to a charge on the presumption of due care. \textit{Id.} The defendant, on the other hand, argued that a reading of \textit{Rice} as disallowing use of the presumption only to deceased or incapacitated defendants was too narrow and that \textit{Rice} abolished the presumption for all parties. \textit{Id.}

\textsuperscript{60} \textit{Id.} at 570, 538 A.2d at 883. As to the use of the presumption of due care, the \textit{Rice} court had stated:

The obvious motive for the application of the presumption to a defendant was to prevent a surviving competent plaintiff from taking advantage of the death or incapacitation of the defendant. However, the recognized effect of the presumption does no more than prevent a defendant’s absence from lessening the burden upon the plaintiff of establishing the defendant’s negligence. Since the burden upon the plaintiff has been established without regard to the availability of the defendant to personally defend, it serves no purpose in this context.

\textit{Rice}, 513 Pa. at 212, 519 A.2d at 396. In conclusion, the court remarked that “[i]n any event, it is apparent under present law that the presumption of due
IV. ANALYSIS AND IMPACT

It is submitted that the language of the Rice decision indicates that the Pennsylvania Supreme Court intended to preclude the use of the presumption of due care for all parties, and not just where the incapacitated litigant happens to be a defendant. In addition, it is submitted that, regardless of whether the Rice court intended to preclude the presumption for all parties, the concept of a presumption of due care has been rendered useless in light of the adoption of a comparative negligence system in Pennsylvania. Thus, in light of each of these theories, it is further contended that the Vihlidal case wrongly retains the presumption of due care for plaintiffs. Finally, because Rice should be read to bar the use of the presumption of due care for all parties, it is submitted that until the Pennsylvania Supreme Court has an opportunity to review Vihlidal, it has an opportunity to review Vihlidal case wrongly retains the presumption of due care running in favor of a deceased or incapacitated defendant a useless appendage which is likely to obfuscate rather than clarify the issues to be resolved in the lawsuit.  

V. CONCLUSION

The Pennsylvania Supreme Court has an opportunity to resolve the issues presented by the Vihlidal case. The court should overrule the presumption of due care in favor of a deceased or incapacitated defendant and adopt a comparative negligence system in Pennsylvania. This would clear the confusion and obfuscation that has resulted from the Vihlidal case and provide a fair and just resolution to the issues presented in the lawsuit.  

61. Vihlidal, 371 Pa. Super. at 570, 538 A.2d at 883. The court ruled that Waddle entitles a deceased plaintiff to receive the presumption of due care, while Rice declined to provide the presumption to a deceased or incapacitated defendant. Id. at 570, 538 A.2d at 883. The Vihlidal court concluded that since the supreme court had both cases before it for simultaneous consideration, yet did not specifically overrule Waddle by restricting its holding in Rice to the use of presumptions by defendants, the court in the present case was required to do the same. Id. In support of its position, the court pointed out the following facts regarding Waddle and Rice:

The Opinion announcing the Judgment of the [Waddle] Court was written by Justice Zappala. Justice Larsen filed a Concurring Opinion in which Justice Papadakos joined and Justice McDermott filed a Concurring Opinion. Chief Justice Nix filed a Dissenting Opinion in which Justices Flaherty and Hutchinson joined and each of them filed separate Dissenting Opinions. The case was argued on March 5, 1986 and decided on October 8, 1986.

In Rice v. Shuman, Chief Justice Nix wrote the Opinion of the Court in which he was joined by Justices Flaherty, Hutchinson and Papadakos. Justices Larsen, McDermott and Zappala each wrote Dissenting Opinions. That case was argued on April 15, 1986 and decided December 16, 1986.

Id. at 569-70, 538 A.2d at 883.
The majority in *Rice* clearly indicated its belief that *Waddle* had not finally decided the viability of presumptions of due care in light of the adoption of comparative negligence in the state. The *Rice* court began its opinion by stating that *Waddle* had not “definitively resolved … the impact of comparative negligence upon the continuing viability of the presumption of due care in [the] jurisdiction” and that the question had “heretofore proven elusive” in any of the supreme court’s prior decisions. Despite the *Waddle* court’s further statement that “comparative negligence has no effect on the use of the presumption of due care,” the majority in *Rice* contended that this was not a definitive resolution of the matter because the prior court had failed to “focus upon the role that the presumption was perceived to fulfill and … to examine its success in achieving the anticipated result.” The *Rice* court apparently viewed the *Waddle* court’s discussion of comparative negligence as merely dictum because it was not the deciding factor for the court in that case. Presumably because the issue had received only passing attention, the *Rice* court found that *Waddle’s* effect as the definitive holding on the question of presumption of due care after the adoption of comparative negligence was minimal.

It is evident from the *Rice* opinion’s language that the supreme court believed the facts of *Rice* presented a unique question which had never before received adequate attention from the judiciary. By finding that the decision presented a question of first impression, the court relieved itself of the obligation of explicitly overruling *Waddle*, although that case was decided only a few months earlier in a seemingly contradictory manner. The *Rice* court reasoned that because no prior decision

64. *Waddle*, 511 Pa. at 648, 515 A.2d at 913.
66. Id. at 209, 519 A.2d at 394. For a discussion of the court’s reasoning in *Rice* which lead to its conclusion that the impact of comparative negligence had not been definitively addressed by the prior decisions, see supra the text accompanying notes 63-65. In its decision, the *Waddle* court reserved only one paragraph at the very end of its decision for the question of the viability of the presumption of due care in light of the adoption of contributory negligence:

As previously stated a jury instruction on the presumption of due care serves a different purpose from that of a comparative negligence instruction allocating the burden of proof. The change in our law from barring recovery for a plaintiff who acts negligently to evaluating the extent of a plaintiff’s own negligence in determining the substantial factor in causing the injuries does not obviate the concerns of a plaintiff suffering from amnesia. Comparative negligence only altered how an injury is evaluated not how it is established. Therefore, the adoption of comparative negligence has no effect on the use of the presumption of due care.

had applied the presumption of due care in light of the effect of comparative negligence, its decision was unique.\(^{68}\) Thus, the court viewed its opinion as promulgating new law, rather than reinterpreting or overruling a pre-existing rule of law.

Even assuming that the *Waddle* court did adequately address the issue of comparative negligence, it remains evident that the conclusions of the *Rice* court effectively overruled any such prior decision on the same issue. Significantly, after analyzing the purpose of the presumption of due care under Pennsylvania’s prior law and examining the presumption’s utility under the new system of comparative negligence, the *Rice* court concluded:

> Utilizing such an analysis it becomes obvious that the limited benefit derived from the use of the presumption [of due care] under prior law is clearly no longer present as a result of the adoption of a system of comparative negligence within this jurisdiction. The instant appeal provides an illustration of a fair and clear instruction to the jury with respect to the burden of the respective parties without resort to the presumption of due care.\(^{69}\)

Implicitly, such broad sweeping language leaves no doubt as to the court’s intention to have its holding conclusively decide the issue of the presumption of due care under the system of comparative negligence.

Likewise, there can be no doubt that the court intended the scope of its holding in *Rice* to include all parties who formerly had been entitled to receive an instruction on the presumption of due care—both incapacitated plaintiffs and defendants. In stating that *Rice* provided an illustration of a fair and clear instruction to the jury without resort to the presumption of due care, the court was clearly using the facts of the case before it simply as one example (one which was presently available) of the obsolescence of the presumption of due care, and not as an ultimate limitation denying the presumption only to defendants.\(^{70}\) As the court’s specific language did not distinguish between plaintiffs and defendants, the fact that the case involved a defendant rather than a plaintiff should be viewed as irrelevant to the court’s ultimate ruling.

Irrespective of the *Rice* court’s holding, it is evident that the presumption of due care no longer performs an indispensable function under a system of comparative negligence and thus, as intended by *Rice*, should be abolished for all parties. It is also clear that instructing a jury on presumption of due care is not vital to the jury’s functioning and in fact, may even hinder the decision-making process by creating confusion.

Viewed in an historic context, the arguments for precluding a de-

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\(^{68}\) See id.

\(^{69}\) Id. (emphasis added).

\(^{70}\) Id.
fendant from receiving the presumption of due care seem quite strong. Although at first glance use of the presumption for defendants unable to testify at trial may appear to provide a degree of protection,71 such insulation proves illusory under Pennsylvania law since courts have unanimously held that presumptions may not function as evidence in cases.72 As set forth previously, presumptions serve only to allocate the respective burdens in a case and may not be introduced as evidence to prove a defendant's innocence or to establish a plaintiff’s contributory negligence.73 Thus, in the absence of its function to allocate the burdens of persuasion and production, the presumption has little or no utility.

As to defendants, the presumption of due care has little utility in allocating the burdens of a case since these burdens automatically fall upon plaintiffs during the usual course of litigation.74 Even under the old law of contributory negligence, the burdens of a case were upon the plaintiff.75 Thus, aside from the illusory objective of "fairness," the utility of the presumption as applied to defendants appears tenuous even under the prior contributory negligence system.76 To presume that a defendant used due care in an accident would shift the burden of proving the legal cause of the accident away from the defendant who never had this duty, to the plaintiff who always had the duty, thereby creating a circuitous route to a preordained conclusion.

Denying the presumption of due care to a plaintiff is a more complicated issue. As stated previously, the presumption of due care was origi-

71. See id. at 212, 519 A.2d at 396. As the Rice court stated, "[t]he obvious motive for the application of the presumption to a defendant was to prevent a surviving competent plaintiff from taking advantage of the death or incapacitation of the defendant.” Id.

72. See id. The Rice court readily discredited the value of the presumption of due care to a defendant in preventing a competent plaintiff from taking advantage of the defendant's death or incapacitation:

[T]he recognized effect of the presumption does no more than prevent a defendant's absence from lessening the burden upon the plaintiff of establishing the defendant's negligence. Since the burden upon the plaintiff has been established without regard to the availability of the defendant to personally defend, it serves no purpose in this context. Id.

73. For a discussion of the weight to be attributed presumptions generally, see supra note 5 and accompanying text.

74. Rice, 513 Pa. at 211, 519 A.2d at 395.


76. Rice, 513 Pa. at 213-14, 519 A.2d at 396. “The purpose . . . [the presumption of due care] served for the defendant, even under prior law, is questionable since it was recognized that the plaintiff always had the burden of proving defendant's negligence and it was accepted that the presumption did not supply evidence.” Id. at 213 n.6, 519 A.2d at 396 n.6.
nally developed to overcome the former rule under contributory negligence which required plaintiffs to present a case completely free from their own negligence.\footnote{Id. at 213, 519 A.2d at 396. For a discussion of the origins of the presumption of due care, see supra notes 10-15 and accompanying text.} Obviously, a plaintiff who was unable to testify would find it difficult to meet this burden. In order to avoid the inequitable result of disqualifying a critically or fatally injured plaintiff who may have been completely free from fault, the presumption of due care acted to shift the burden to the defendant to come forward with evidence of the plaintiff's negligence.\footnote{Rice, 513 Pa. at 213, 519 A.2d at 396.}

With the adoption of a comparative negligence system, the requirement that a plaintiff establish complete non-negligence in order to sustain a cause of action disappeared, and along with it disappeared the need for a presumption of due care. The court in \textit{Waddle} was incorrect in asserting that a comparative fault system does not obviate the concerns of plaintiffs.\footnote{See \textit{Waddle}, 511 Pa. at 648, 515 A.2d at 913 ("The change in our law from barring recovery for a plaintiff who acts negligently to evaluating the extent of a plaintiff's own negligence in determining the substantial factor in causing the injuries does not obviate the concerns of a plaintiff suffering from amnesia. Comparative negligence only altered how an injury is evaluated not how it is established.").} The adoption of comparative negligence changed both the method for evaluating an injury and the method for establishing that injury. In a system of comparative negligence, a plaintiff can be negligent to varying degrees and still sustain a cause of action.\footnote{42 Pa. Cons. Stat. Ann. § 7102(a) (Purdon 1982 & Supp. 1989). For the applicable provisions of the comparative negligence statute which allows fault in varying degrees, see supra note 21 and accompanying text.}

Under comparative negligence, the burden of proving a plaintiff's negligence falls upon a defendant from the very beginning of an action, thereby negating the need to shift the burden to him.\footnote{Rice, 513 Pa. at 211, 519 A.2d at 395; \textit{see also} \textit{Helernan v. Rosser}, 419 Pa. 550, 555, 215 A.2d 655, 657 (1966) (defendant has burden of establishing contributory negligence); \textit{Stegmuller v. Davis}, 408 Pa. 267, 269, 182 A.2d 745, 747 (1962) (same); \textit{Brown v. Jones}, 404 Pa. 513, 516, 172 A.2d 851, 833 (1961) (same); \textit{McKinn v. Wilson}, 404 Pa. 647, 652, 172 A.2d 801, 803 (1961) (same).} Additionally, even if a plaintiff were presumed to have exercised due care, such a presumption is of little utility under comparative negligence. The presumption cannot be used to absolve the plaintiff from a showing that he was negligent due to the general restriction against using a presumption as evidence.\footnote{Fegely v. Costello, 417 Pa. 448, 449, 208 A.2d 243, 244 (1965). For a discussion of the weight to be afforded the presumption of due care, see supra note 5 and accompanying text.} Thus, this new method for evaluating negligence renders the utility of a presumption of due care questionable in light of the automatic shifting of burdens which occurs under comparative fault's system of "give and take negligence." It is increasingly difficult under comparative negligence to see a difference between the presumed care of a plain-
tiff and the rule that the burden of proving contributory negligence falls upon the defendant. In sum, under the common law principle of contributory negligence, the presumption of due care did not establish the negligence of the defendant. Instead, it simply shifted the burden of proving the plaintiff's lack of due care to the defendant. Likewise, under the present system of comparative negligence, a presumption of due care would not establish the negligence of either party. Although the newly adopted system of comparative negligence requires a comparison of the relative actions of both parties in determining fault, such does not act to enhance the evidentiary powers attributed to presumptions in any way. Instead, negligence on the part of the defendant or the plaintiff must still be established by some external evidence of the incident or by some other mechanism specifically designed to accomplish this objective.

V. CONCLUSION

With the adoption of comparative negligence in Pennsylvania, the death knell has been sounded for the continued application of the presumption of due care. In light of the above discussion, the presumption should only be used to exculpate a plaintiff in the context of the prior law of contributory negligence in which the presumption was created. The recent holding of Vihlidal, disallowing application of the presumption to defendants, yet preserving the right for plaintiffs, has acted merely as an artificial barrier to the removal of this presumption and is prolonging the life of a doctrine which has effectively been a dead letter for many years. Moreover, in the interest of keeping the judicial process

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This presumption of due care does not constitute proof that the defendant was negligent. Neither does the mere happening of an accident prove negligence of either party. Evidence sufficient to warrant recovery must describe, picture or visualize what actually happened sufficiently to enable the fact-finding tribunal reasonably to conclude that the defendant was guilty of negligence and that his negligence was the proximate cause of the accident.

Id. (citations omitted); see also Mapp v. Wombecker, 421 Pa. 383, 385, 219 A.2d 681, 682 (1966) (mere happening of accident does not establish negligence by either presumption or inference); Fegely, 417 Pa. at 449, 208 A.2d at 244 ("[I]t is well established that the mere happening of an accident, even when a moving vehicle strikes a pedestrian lying on the road, does not establish negligence by either presumption or inference.").

84. One court stated that "[n]egligence . . . may be inferred from the circumstances attending an accident," such as the distance a car travels after a collision, since these types of circumstances are evidence of negligence and may bear on matters such as the car's speed, as well as on the matter of control over the vehicle. Scholl v. Philadelphia Suburban Transp. Co., 356 Pa. 217, 222-23, 51 A.2d 732, 735-36 (1947) (quoting Delmer v. Pittsburgh Rys., 348 Pa. 147, 149-50, 34 A.2d 502, 504 (1943)). For a discussion of the weight to be given presumptions, see supra note 5 and accompanying text.
free from confusion and clear from useless legal mechanisms, it is urged that the holding of *Vihlidal* be reexamined by the Pennsylvania Supreme Court in light of the holdings in *Rice*, which were intended to revitalize Pennsylvania's law in this area. Due care and man's natural instinct of self-preservation need not be completely written out of Pennsylvania law by this proposal. Instead, a suggested compromise may be found in *Rice*, where the court urged that such considerations might be retained as one factor for the jury's consideration in evaluating evidence of negligence.\(^\text{85}\) In any event the presumption of due care has long since outlived its usefulness. Because *Vihlidal* erroneously retains the presumption of due care, practitioners should be wary of relying on the case's impact until the Pennsylvania Supreme Court is afforded an opportunity to re-evaluate the breadth of its holding in *Rice*.

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\(^{85}\) *Rice*, 513 Pa. at 213, 519 A.2d at 396; *see also Waddle*, 511 Pa. at 651, 515 A.2d at 914 (Nix, C.J., dissenting) (treat presumption of due care merely as factor for consideration by jury evaluating negligence).