LAW NOTE FOR TRIAL JUDGES

349 PRESUMPTIONS AND PERMISSIVE INFERENCES

The 1974 Rules of Evidence made substantial changes in the theory of presumptions:

1) All presumptions are now treated the same, whether previously characterized as common law, statutory, policy, of fact, or of law;

2) Presumptions do not "disappear, " "burst, " or drop out when evidence to the contrary of the presumed fact is introduced;

3) A presumption when established shifts the burden of persuasion (proof) as well as the burden of proceeding to the party against whom the presumption is directed.

The instructions (Wis JI-Civil 350-356) which follow illustrate the common situations which arise. Not all instructions on presumptions are collected here; others will be found located with topics to which they are related.

To understand the words used in the models which follow, it is necessary to keep in mind the meaning of "basic fact" and "presumed fact." A presumption is a device to simplify proof; it does so by letting a fact easy to establish – the basic fact – stand for the fact difficult to establish – the presumed fact. So ownership of a car may stand for (or prove) the proposition that the driver of the car was the agent of the owner.

The instructions which follow illustrate the common proof situations in which a presumption may be involved: 1) conflict as to existence of the basic fact and also evidence from which nonexistence of the presumed fact may be inferred; 2) no conflict as to the basic fact, but evidence from which nonexistence of the presumed fact may be inferred; 3) conflict as to the existence of the basic fact but no evidence from which the nonexistence of the presumed fact may be inferred. The situation in which there is no conflict as to either the

basic fact or the presumed fact is covered in the second paragraph of the comment to Wis JI-Civil 354.

The process of drawing inferences is logical. It is fundamental to litigation. From the standpoint of the judge, it is legal-scientific-common-sense. The judge says: I will let the jury find that the act of the defendant railroad company caused the fire because (for example) trains do emit sparks and the fire in the field was noticed shortly after the passage of the train, and no other cause of the fire was produced. This inference is legally permissible because it is logical and does not offend science or common sense. This is the "reasonable inference."

A presumption is an inference required by law. It may be logical or illogical. The illogical presumptions as, for example, the presumption that a deceased person was not negligent are not logically related to the basic fact (death) and are established, for policy reasons, to facilitate the bringing of a case, by shifting the burden of proof to the opponent who may be better able to produce evidence on the matter (the negligence of the deceased).

Between the reasonable inference and the presumption is the permissive inference; res ipsa is an example; see Wis JI-Civil 356. This is also an inference required by law; it differs from a presumption in that its impact on the jury, through the instruction given, is less. In the presumption instruction, the jury is told "you must give effect to the presumption unless you find the contrary of the presumed fact more probable"; in the permissive instruction, the instruction is "you may find."

COMMENT

This note was originally published in 1977. An editorial correction was made in 2015 to remove the term, "guilty of negligence." The comment was updated in 2017.

See Wisconsin Judicial Council Notes at 59 Wis.2d R41-R56. See also Blinka, Daniel, Wisconsin Evidence, 3rd (Volume 7, Wisconsin Practice Series), Chapter 903 Presumptions § 301.2 - 301.4.