

**350 PRESUMPTIONS: CONFLICT AS TO EXISTENCE OF BASIC FACT;
EVIDENCE INTRODUCED FROM WHICH NONEXISTENCE OF
PRESUMED FACT MAY BE INFERRED**

There is a conflict in the evidence as to (here state basic fact). There is evidence from which you may conclude that (state the basic fact) exists; on the other hand, there is evidence from which you may conclude that (state the basic fact) does not exist. You must resolve this conflict.

If you find the existence of (state the basic fact) more probable than not, then, by law, a presumption arises that (state the presumed fact). But there is also evidence from which you can conclude that (state the presumed fact) does not exist. You must resolve this conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that (state the presumed fact) does not exist, you must find that (state the presumed fact) exists.

COMMENT

This instruction was approved by the Committee in 1977. The comment was updated in 1984 and revised in 1991, 2010, and 2012. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

For the treatment of presumptions in civil cases, see Wis. Stat. § 903.01. See also Wisconsin Rules of Evidence, 59 Wis.2d R50-51; Westfall v. Kottke, 110 Wis.2d 86, 113, 328 N.W.2d 481 (1983).

For the use of this instruction in a trial involving a claim of self-defense under Wis. Stat. § 895.62, see Wis JI-Civil 2006.2.

Retrograde amnesia may be used as an illustration of the use of this instruction in the situation where it is claimed that the amnesia was caused by the accident involved in the litigation. This is an example of an illogical, or contrary to fact, presumption.

Example of Use of Wis JI-Civil 350

The law provides that if a person has retrograde amnesia as a result of an accident, there is a presumption that the person was not negligent at the time of the accident. There is a conflict in the evidence as to whether or not (name) has retrograde amnesia. There is evidence from which you may conclude that (name) has retrograde amnesia; on the other hand, there is evidence from which you may conclude that (name) does not have retrograde amnesia. You must resolve this conflict. If you find it more probable than not that (name) has retrograde amnesia, then, by law, a presumption arises that (name) was not negligent. But there is also evidence from which you can find that (name) was not negligent. You must resolve this conflict. Unless you are satisfied, by the greater weight of the credible evidence to a reasonable certainty, that (name) was negligent, you must find that, at the time of the accident, (name) was not negligent.

Retrograde Amnesia. To prove the basic fact of retrograde amnesia, expert medical testimony is necessary. Ernst v. Greenwald, 35 Wis.2d 763, 151 N.W.2d 706 (1967); Schemenauer v. Travelers Indem. Co., 34 Wis.2d 299, 149 N.W.2d 644 (1967); Mallare, Wisconsin Civil Trial Evidence, 1969 Supp., at 284.

While the point has not been decided, it may be possible to give the instruction where retrograde amnesia has been proved even though it was not caused by the accident.