1008 INTOXICATION: CHEMICAL TEST RESULTS [REFLECTS CHANGES IN 2003 WISCONSIN ACT 30]

The results of a chemical test for intoxication have been received in evidence.

(NOTE: USE THE APPROPRIATE PARAGRAPH):

[If you find there was an alcohol concentration of more than 0.04 but less than 0.8 at the time of the test, you should consider that fact as relevant evidence on the issue of whether the person (was under the influence of an intoxicant) (had an alcohol concentration of 0.8 or more) at the time in question, but it is not by itself a sufficient basis for a finding that the person (was under the influence of an intoxicant) (had an alcohol concentration of 0.8 or more) at the time in question.]

[If you find there was an alcohol concentration of 0.8 or more at the time of the test, you should find from that fact alone that the person was under the influence of an intoxicant at the time in question, unless you are satisfied to the contrary from other evidence.]

[If you find there was an alcohol concentration of more than 0.00 but less than 0.8 at the time of the test, you should consider that fact as relevant evidence on the issue of whether the person was under the combined influence of alcohol and (a controlled substance) (a controlled substance analog) (any other drug) at the time in question, but it is not by itself a sufficient basis for a finding that the person was under the combined influence of alcohol and (a controlled substance) (a controlled substance analog) (any other drug) at the time in question.]

COMMENT

[REPORTER'S NOTE: This instruction reflects the changes to alcohol concentration in 2003 Wis. Act 30. This act took effect on September 30, 2003. For a case in which the prior law applies, change "0.08" to "0.1."]

This instruction and comment were originally published in 1961. They were revised in 1974, 1983, 1989, 1994, 1996, 2000, and 2003.

Evidence of chemical tests for intoxication is generally admissible if intoxication is at issue. Wis. Stat. § 885.235(1g). But if the sample (blood, breath, or urine) was taken more than three hours after the event, the analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if established by expert testimony. Wis. Stat.§ 885.235(3).

With regard to the operation of a commercial motor vehicle, Wis. Stat. § 885.235(1g)(d) indicates that an alcohol concentration of 0.04 or more is prima facie evidence that he or she was under the influence of an intoxicant with respect to operation of a commercial motor vehicle and is prima facie evidence that he or she had an alcohol concentration of 0.04 or more.

"The provisions of this section relating to the admissibility of chemical tests for alcohol concentration or intoxication shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant. . . ." Wis. Stat. § 885.235(4).

See also Wis JI-Criminal 230, 232, 234, 235, 237, 1185, 1185A, 1186 1186A, 1188, 1190, and 1191 for jury instructions dealing with chemical test results.

Prima Facie Evidence. In drafting this instruction, the question arose whether Aprima facie evidence@ was the same as presumption. Wis. Stat. § 903.01 makes clear that it is. The statute reads:

> Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. (Emphasis added.)

Wis Stat. § 885.235(1g)(c) is a statutory provision that makes a chemical test showing an alcohol concentration of 0.1 or more (the basic facts) "prima facie evidence" of being under the influence of an intoxicant (the other fact). Wis. Stat. § 903.01 makes this statutory provision a presumption. Wis. Stat. § 903.01 makes clear, also, that the introduction of the basic fact establishes the presumed fact for the jury and shifts the burden to the opposing party to overcome or rebut the presumption.

In terms of meeting the presumption, Chief Justice Heffernan's words in Kruse v. Horlamus Indus., Inc., 130 Wis.2d 357, 365-66, 387 N.W.2d 64 (1986) are instructive"

> Under Wisconsin law, presumptions do not "disappear" or "burst" when evidence to the contrary of the presumed fact is introduced. This means that, even where rebutting evidence has been produced, the inference from the presumption survived and is sufficient to support a jury verdict until the presumption is met by evidence of equal weight.

This language supports the use of "should" in the civil instruction ("you should find from that fact alone that the person was under the influence of an intoxicant") rather than the permissive "may" used in the criminal instruction; it also supports the language "unless you are satisfied from other evidence to the contrary" because the presumption shifts the burden of production.

Civil/Criminal Distinction. In drafting this instruction, the Committee recognized that there is a distinction between Wis JI-Criminal 230 and Wis JI-Civil 1008. The Committee believes that Wis. Stat. § 903.01 supports the slightly different treatment in the civil instruction. Wis. Stat. § 903.03(3) supports the criminal instruction and indicates why the criminal instruction is worded as it is. The statute provides in the most relevant section:

> (3) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt. (Emphasis added.)

The criminal instruction must use the permissive "may" and the cautionary adjunct because of the higher burden of proof. The instruction also must instruct that the jury can only rely on the presumed fact if all the evidence proves the presumed fact beyond a reasonable doubt. The instruction may not suggest that the burden shifts to the defendant to overcome or rebut the presumption.