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Evidence: Inference Remaining After Presumption

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By these two decisions, Wisconsin has placed strict limitations on the application of assumption of risk. It appears that this was necessitated by the nature of the particular areas involved, where past experience had shown resulting injustice to an injured party whose fault was based on a theory of implied consent. It remains questionable whether these decisions will open the door to future amelioration of the doctrine in other areas. One of these areas that is especially noteworthy relates to the plight of a spectator who sustains injury upon attendance at a sporting event. The language of a recent case[27] appears to make the doctrine applicable in barring recovery if the injury is caused by a known hazard that is incident or natural to the sport. —JEROME E. GULL

Evidence: Inference Remaining after Presumption Rebutted— The plaintiff, Herman Schlichting, was an eighty-four year old widower who lived on his homestead farm with four of his sons; John, Christian, Carl and Ulrich. John took care of much of the business affairs of both his aged father and his brother Christian, handling the money and supplying the information for income tax returns. On November 24, 1958, Herman had a married son, August, appointed as his conservator.

On December 1, 1958, Herman conveyed his homestead to Christian without any consideration. Thereafter, a family dispute arose over the conveyance, and on December 15, 1958, Christian conveyed the tract to John, again without consideration.

The Supreme Court affirmed the trial court's finding that John, in handling Herman's business affairs, stood in a relationship of trust and confidence, dominating both Herman and Christian. Under these circumstances, the Court felt that the intermediate transfer to Christian was of no consequence, and a presumption that John exercised undue influence over Herman arose out of the transaction.[1]

The Court discussed rebuttable presumptions, dividing them into two basic categories. The first type includes those presumptions which are "invoked by the law for reasons of public policy without regard to whether the presumption thus invoked is likely to bear any reasonable relationship to the actual fact presumed." The second classification includes those presumptions "in which the facts upon which [they are] based reasonably give rise to an inference of the ultimate conclusion embodied in the presumption."

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[27] Lee v. National League Baseball Club, 4 Wis. 2d 168, 176-78, 89 N.W. 2d 811 (1958).

[1] Schlichting v. Schlichting, 15 Wis. 2d 147, 112 N.W. 2d 149 (1961).

The presumption of undue influence is within this second category. In regard to this category the Court stated:

> . . . there is no perceivable reason grounded on policy or logic why the inference should not continue after some evidence has come into the case which tends to rebut the presumption.[2]

The decision in favor of the plaintiff, setting aside the conveyance, was based on such an inference after the presumption had been rebutted.

The importance of this decision lies in the discussion of the court regarding presumptions, which indicates that there arises a right to an instruction informing the jury of the existence of an inference after some evidence has been introduced to rebut the presumption. This instruction would state merely that there is an inference and that the jury may indulge in it if they wish.[3]

Previously in Wisconsin the law regarding presumptions and inferences has been confused and unsettled. This case represents a clarification rather than a change of the existing law.[4] In the past the court has confined itself to the consideration of how to overcome a presumption.[5] This was accomplished when "[t]here [was] some uncontradicted and unimpeached, and not inherently incredible evidence to the contrary."[6] In the principal case the decision stated that "[t]he court could reasonably conclude that the evidence adduced to rebut the presumption of undue influence was too weak to overcome the inference embodied in the presumption."[7]

Thus, it becomes apparent that in considering whether an inference has remained in a particular case, two important factors must be taken into account; first, what is the basis or the reason which gives rise to the presumption, and second, what is the nature

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[2] *Schlichting v. Schlichting, supra.*

[3] The court cited Morgan, *Instructing the Jury on Presumption and Burden of Proof,* 47 HARVARD LAW REVIEW (1933), 59, 75, for an example of the proper way to phrase such an instruction.

[4] There have been many prior Wisconsin cases in which a presumption has been successfully met and overcome, yet the decision was rendered in favor of the party relying on that presumption, thus indicating that an inference remained. See, for example, Egger v. Northwestern Mut. Life Ins. Co., 203 Wis. 329, 234 N.W. 328 (1931).

[5] Prior decisions have frequently cited 5 WIGMORE, EVIDENCE §2491 (2d. ed. 1923): "It must be kept in mind that the peculiar effect of a presumption 'of law' . . . is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary [sufficient to satisfy the judge's requirement of some evidence], the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule. . . ." It is interesting to note that this paragraph continues to state, "[b]ut the legal consequences being removed, the inferences, as a matter of reasoning, may still remain. . . ."

[6] State ex rel. Northwestern Dev. Corp. v. Gehrz, 230 Wis. 412, 422, 283 N.W. 827, 832 (1939).

[7] *Schlichting v. Schlichting, supra* note 1, at 158.

and strength of the rebutting evidence. A presumption has been defined as "a deduction which the law expressly directs to be made from particular facts," or as "consequences which the law or the judge draws from a known fact to a fact unknown."[8] An inference, on the other hand, is "a permissible deduction from the evidence before the court which the jury may accept or reject or accord such probative value as it desires. . . ."[9] The distinguishing characteristic of an inference is that it "must be drawn from established facts which logically support the same."[10] Consequently, for an inference to remain after the presumption has been rebutted, the presumption must be one that is based upon the relevancy of the facts adduced in the case; and these facts, independent of any legal fiction or presumptive legal quality, must have a rational potency or probative value of their own. Some examples of presumptions based on probability are: Official actions by public officers, including judicial proceedings, presumed to have been regularly and legally performed; when a condition, ordinarily continuing, is shown to exist, it is presumed to continue as long as is usual for such a condition; a letter properly addressed, stamped and mailed is presumed to have been duly delivered to the addressee; when a plaintiff is injured by an automobile and he proves that the defendant is the owner of the car, there is a presumption that the driver was acting within the scope of his employment and in the course of the business of the defendant; when there is an unexplained violent death there is a presumption against suicide; and the presumption of death after an unexplained absence for seven years.[11] This classification should perhaps also include the presumed acceptance of a thing beneficial to the grantee,[12] and the presumption of ownership of personal property by the party in possession.[13]

On the other hand, presumptions such as due care[14] and the presumption against fraud[15] arise at the very inception of the case without the necessity of proving facts which would act as their basis. They are based on public policy and leave the case completely at the introduction of "some evidence" to the contrary, without leaving any inference in their wake.[16]

The presumption of innocence in criminal cases is unique in that it remains in the case as a presumption until the State has proven

[8] Egger v. Northwestern Mut. Life Ins. Co., 203 Wis. 329, 333, 234 N.W. 328, 329 (1931).
[9] 20 AM. JUR., *Evidence*, §162.
[10] Smith v. Chicago & N.W. R. Co., 246 Wis. 628, 632, 18 N.W. 2d 352, 353 (1944).
[11] MCCORMICK, EVIDENCE §309 (1954).
[12] Kolber v. Steinhafel, 190 Wis. 468, 209 N.W. 595 (1926).
[13] In re Bean's Estate, 261 Wis. 26, 51 N.W. 2d 558 (1952).
[14] *Schlichting v. Schlichting, supra* note 1.
[15] Neas v. Siemens, 10 Wis. 2d 47, 102 N.W. 2d 259 (1959).
[16] *Schlichting v. Schlichting, supra* note 1.

the guilt of the accused "beyond a reasonable doubt."[17] It does not disappear at the introduction of "some evidence" to the contrary, but remains until the jury has determined that there is no other reasonable verdict than guilty.

In regard to evidence brought forward to rebut a presumption, the Court in the principal case stated that the presumption of undue influence would remain "when no evidence to the contrary [was] introduced" but that the inference underlying this presumption would not disappear "after some evidence has come into the case which tends to rebut the presumption."[18] To substantiate this statement, the Court cited another Wisconsin case which involved the application of the doctrine of "res ipsa loquitur." The relevant section of this decision is:

> a presumption, defined as the plaintiff's right to a directed verdict in the absence of contrary evidence, is defeated when the defendant puts in evidence which will permit the jury reasonably to find in his favor . . . [but that] circumstantial evidence is entitled to consideration so long as reasonable men might base a conclusion on it.[19]

It seems, then, that so long as the rebutting evidence is of no stronger weight than the evidence giving rise to the presumption, so that it operates only to raise a "doubt" in the minds of the jury, an inference will remain even though the presumption has disappeared. The problem then resolves itself into a question of the quantum and weight of the evidence, and there is no fixed formula available to determine a party's right to an instruction on the presence of an inference.

Evidence which is intended to rebut a presumption may do so in several different ways. It may directly attack or contradict either the presumed fact or the facts giving rise to the presumed fact, or it may itself amount to circumstantial evidence which would give rise to a contrary inference. If the rebutting evidence directly contradicts the presumed fact or the basis for the presumption and the trier of fact finds this evidence to be the correct statement of fact, both the presumption and any underlying inferences must of necessity be eliminated from the case. In this situation the trier of fact will have found either that the presumed fact positively does not exist, or that the basis for inferring or presuming the existence of that fact is erroneous.[20]

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[17] Holback v. State, 200 Wis. 145, 227 N.W. 306 (1929).
[18] *Schlichting v. Schlichting, supra* note 1, at 157.
[19] Ryan v. Zweck-Wollenberg Co., 226 Wis. 630, 647, 64 N.W. 2d 226, 235 (1954).
[20] Smith v. Green Bay, 223 Wis. 427, 430, 271 N.W. 28, 30 (1937), involved the presumption of due care (by a deceased driver), in which the defendant had established the plaintiff's negligence. This case affirmed the trial judge's refusal to instruct the jury on the presumption: "This would give the presumption

If, however, the evidence rebutting the presumption is itself circumstantial in its nature and gives rise to a conflicting inference, it merely raises a question or a doubt as to what the real fact is. In this situation there is "some evidence" so the procedural effects of the presumption are eliminated; but the facts which originally established the presumption remain, and their probative value has not been destroyed. Consequently, the inference remains.[21]

Therefore, to be entitled to an instruction regarding a presumption grounded on a reasonable inference, these factors must be present: First, the presumption must be based upon the inherent probabilities of the facts adduced in the trial; and second, the evidence which has rebutted this presumption must be only so strong as to raise a question or doubt as to the existence of the presumed fact. It must not be such evidence as positively establishes the nonexistence of the presumed fact or of the facts which are the basis for the presumption.

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standing as actual evidence. *That it is entitled to no such standing is well established.*" (Emphasis added)

[21] Kietzmann, v. Northwestern Mut. Life Ins. Co., 245 Wis. 165, 169, 13 N.W. 2d 536, 538 (1944), involved the presumed death after seven years absence. This decision affirmed the finding of the insured's death: "It is, of course, possible . . . for a jury to reject these factors as explaining or accounting for a disappearance extending for the full seven years and to conclude in spite of them that insured was dead after seven years."