

Presumptions of Law and of Fact

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PRESUMPTIONS OF LAW AND OF FACT

Courts speak of "presumptions of law" and of "presumptions of fact." It is the purpose of this article to analyze these terms and to set forth their function and effect in the trial of a lawsuit.

In a recent Wisconsin case¹ the jury returned a verdict for the plaintiff, having found the defendant's agent to have been negligent as to lookout, speed and failing to yield the right of way in the management of the defendant's car. The defendant contended that the trial judge committed error by refusing to instruct the jury that the deceased was presumed to have exercised due care in approaching and attempting to cross the intersection where the collision occurred. The trial court was upheld in its refusal to give the instruction because the presumption of due care on the part of a deceased is a presumption of law which disappears and ceases to have any force or effect whatsoever when credible evidence contrary to it comes into the case. The court said that the presumption is a procedural device which allocates the burden of going forward with the evidence and that when such contrary evidence is produced the office of the presumption has then been performed and the fact in question is to be established by the evidence without the presumption being thrown into the scales and weighed.

A *presumption of law* has been defined as a deduction which the *law* expressly directs to be made from particular facts.² In actuality it is a *rule of law* which declares that one fact is presumed to exist if another fact or set of facts is proved. A classic example of a presumption of law is the presumption of death that arises when a person is shown to have been continually absent from his home for seven years and has not been heard from during such period by persons who would naturally have heard from him had he been alive.³ Presumptions of law are artificial creations because while "presumptions declared by the courts should have the support of reason,"⁴ there is often no *logical* connection between the presumed fact and the proven fact. Legal presumptions usually arise from considerations of public policy; for purposes of convenience; from a desire to provide an escape from a dilemma; or to force a litigant to whom certain information is more easily accessible to make it known.⁵ Certainly, logic does not require

¹ Krefit v. Charles, 268 Wis. 44, 66 N.W.2d 618 (1954).

² Egger v. Northwestern Mut. Life Ins. Co., 203 Wis. 329, 333, 234 N.W. 328 (1931).

³ Page v. Modern Woodmen of America, 162 Wis. 259, 156 N.W. 137 (1916); Estate of Langer, 243 Wis. 561, 11 N.W.2d 185 (1943); Swenson v. Kansas City Life Ins. Co., 246 Wis. 432, 17 N.W.2d 584 (1945).

⁴ Egger v. Northwestern Mut. Life Ins. Co., *supra* note 1 at 334.

⁵ Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933).

us to conclude from the fact of death that the deceased, immediately prior thereto, exercised due care for his safety; however, it is a conclusion which accords with the judicial concept of sound social policy.⁶

A *presumption of fact* has been described as the process of ascertaining one fact from the existence of another without the aid of any rule of law.⁷ The term is used to denote the *reasoning* or fact finding process of the triers of the facts and as such it is a *logical* and not a *legal* deduction of one fact from another.⁸ The presumption is drawn from the circumstances of the case by the ordinary reasoning powers and not by virtue of any rule of law. It is "an inference which a reasonable person would as a rule draw from given circumstances."⁹ A presumption of guilt may arise from proof that the defendant, when arrested, was in possession of stolen goods and was attempting to leave the country. The presumption would be one of fact since there is no legal rule which compels the presumption to be made.

Presumptions of law differ from presumptions of fact in this essential respect: the former are fixed rules of law which compel a certain inference to be drawn from particular facts; the latter are mere logical arguments that are derived entirely and directly from the circumstances of the particular case and which depend not upon a rule of law but upon their own natural force and efficacy in generating belief.¹⁰

Both Wigmore and Greenleaf have severely criticized the term "presumption of fact" and have urged that the term be abandoned by the courts.¹¹ To these learned men "there is in truth but one kind of a presumption; and the term 'presumption of fact' should be discarded as useless and confusing."¹² To appreciate the significance of the Wigmore-Greenleaf position it is necessary to understand the effect and function of presumptions in the trial of a lawsuit.

A presumption of law states the legal effect of facts and operates to control the decision on a group of *unopposed* facts.¹³ Its *effect* is to invoke a rule of law which compels the jury to find the presumed fact so long as the facts upon which the presumption arises are not opposed by contrary evidence from the opponent.¹⁴ Because of this

⁶ For other cases involving legal presumptions whose basic facts have no probative value as to the existence of their presumed facts consider *Estate of Flierl*, 225 Wis. 493, 274 N.W. 422 (1937) (executed promissory note presumed to be supported by consideration), and *Thomson v. Thomson*, 236 Mo. App. 1223, 163 S.W.2d 792 (1942) (valid ceremonial marriage presumed from evidence of cohabitation, general repute and conduct of the parties).

⁷ 1 GREENLEAF, EVIDENCE (16th ed.), §48.

⁸ See THAYER, A TREATISE ON EVIDENCE AT THE COMMON LAW (1898) 539-550.

⁹ *Anderson v. Horlick's Malted Milk Co.*, 137 Wis. 569, 579, 119 N.W. 342 (1909).

¹⁰ 1 GREENLEAF, *op. cit.*, *supra* note 7, §44.

¹¹ 1 *Ibid.*, §14(y); 9 WIGMORE, EVIDENCE §2491 (3d ed. 1940).

¹² *Ibid.*

¹³ 9 WIGMORE, *op. cit. supra* note 11, §2490.

¹⁴ *State ex rel Northwestern Development Corp. v. Gehrz*, 230 Wis. 412, 283 N.W.

effect, the *function* of the presumption of law is to cast upon the party against whom it operates the duty to come forward with rebutting evidence if he desires to avoid a finding against him on the particular issue to which the presumption relates. Thus, where the death of X is at issue and the plaintiff has produced evidence showing that X has been absent from his home for seven years and that his friends and relatives received no tidings from him during the period of his absence, the presumption that X is dead arises as a matter of law. If the defendant fails to come forward with rebutting evidence, the court will direct the jury that X's death has been established by virtue of the legal presumption and that they are not free to find otherwise.¹⁵ Wigmore accordingly defines the presumption as "essentially a rule of law laid down by the judge and which attaches to an evidentiary fact certain *procedural consequences* as to the duty of production of other evidence by the opponent."¹⁶

Presumptions of fact do not control decision on a group of unopposed facts; instead, their effect is merely to *permit* decision. They do not affect the burden of going forward with the evidence because no rule of law attaches to them requiring the jury to find in favor of the presumed fact in the absence of rebutting evidence.¹⁷ The party against whom the presumption operates will not subject himself to an adverse ruling by the court if he fails to come forward with contrary evidence since the court cannot direct the jury to find in favor of the presumed fact. Assuming for the purpose of illustration that there is no legal presumption of death arising from the facts set forth in our example above, then, when the plaintiff establishes the same set of facts and the defendant fails to come forward with rebutting evidence, the court will not direct a verdict for the plaintiff. Instead, the issue will go to the jury who will be free to find that death has or has not occurred.¹⁸ Should the jury conclude that X is dead, the

827 (1939); *Smith v. City of Green Bay*, 223 Wis. 427, 271 N.W. 28 (1937); *McNamer v. American Ins. Co.*, 267 Wis. 494, 66 N.W.2d 342 (1954).

¹⁵ *Page v. Modern Woodmen of America*, *supra* note 2 at 263: "This entitled the plaintiff to a direction of the verdict in her favor on this issue, and it was error for the trial court to refuse to direct the jury to render a verdict accordingly."

¹⁶ 9 WIGMORE, *op. cit.*, *supra* note 11.

¹⁷ 1 GREENLEAF, *op. cit.*, *supra* note 7, §14(y).

¹⁸ Of course, in order for the case to go to the jury, the plaintiff, since he has the burden of proving the fact of death, must first produce sufficient evidence to convince the judge that a jury could reasonably draw an inference of death from the evidence. If he fails to give this showing, the case is not submitted to the jury but a non-suit or a directed verdict is given. See *Thoe v. Chicago, M.&S.P.R.Co.*, 181 Wis. 456, 460, 195 N.W. 407 (1923) where the court said that where motions for non-suit or directed verdict are made, the court is asked "to determine whether or not, admitting all the evidence against the party making the motion to be true and drawing all inferences which may reasonably be drawn therefrom in favor of the opposite party, the evidence is sufficient in law to sustain a judgment against the moving party."

process they will employ will be that of drawing an *inference* of the fact of death from the evidence introduced by the plaintiff.

Since the "presumption of fact" does not compel the jury to find in favor of the presumed fact in the absence of contrary evidence, is it really a "presumption" at all or merely a permissive inference? The Minnesota court said:

"We agree with Dean Wigmore (5 Wigmore, Evidence, 2d ed., sec. 2491) that strictly speaking, all presumptions are those of law, and that there are, in the proper sense, none of fact. When we leave law for fact, it is better to speak of inference, or deduction, or mere argument, rather than presumption."¹⁹

Since neither inferences nor presumptions of fact affect the duty of going forward with the evidence because neither of them *compel* the presumed fact to be found by the jury in the absence of contrary evidence, it would seem that "the employment here of the term 'presumption' is due simply to historical usage, by which 'presumption' was originally a term equivalent, in one sense, to 'inference'."²⁰

We have attempted to show that the effect of a presumption of law is to compel a finding in favor of the presumed fact in the absence of contrary evidence and that its function, therefore, is to require the opponent to come forward with rebutting evidence. Let us now go a step further by supposing that the opponent accepts the challenge. Two questions immediately arise: first, how much evidence need he produce to overcome the presumption, and second, upon the close of all the testimony in the case, should the judge instruct the jury that they should consider the presumption as evidence?²¹

As to the first question, the Wisconsin Supreme Court has repeatedly held that the presumption will control in the absence of any credible evidence to the contrary. That is, as soon as credible evidence is introduced which would support a finding of the non-existence of the presumed fact, the presumption is rebutted. In *Smith v. City of Green Bay*,²² the court held that the presumption that the deceased exercised due care for his safety "disappeared upon the introduction of evidence establishing as a fact the negligence of the deceased."²³ The *Smith* case was followed in a decision rendered in 1953 when the court stated that "all presumption of due care in lookout went out of the case when the evidence sufficient to support a contrary finding

¹⁹ *Ryan v. Metropolitan Life Ins. Co.*, 206 Minn. 562, 289 N.W. 557, 559 (1939); See also *Stumpf v. Montgomery*, 101 Okla. 257, 226 P. 65, 68-69 (1924) where the court in distinguishing between presumption of law and inferences observed that an "inference" is sometimes referred to as a "presumption of fact"; 95 A.L.R. 162.

²⁰ 9 WIGMORE, *op. cit.*, *supra* note 11.

²¹ It is beyond the scope of this article to discuss the effect of "conflicting" presumptions. On this point, see 9 WIGMORE, §2493.

²² *Supra* note 14.

²³ *Ibid.* at 429.

came in."²⁴ The rule that "any" evidence to the contrary is insufficient to rebut a presumption has been applied by the Wisconsin court to various presumptions. In a case involving the validity of the verification of a complaint, which appeared on its face to have been sworn to before a notary public, our court declared that the presumption which attaches in favor of the regularity and correctness of official acts could not be overcome by uncertain, unreliable and conflicting testimony.²⁵ In *State ex rel. Northwestern Development Corp. v. Gehrz*,²⁶ the Wisconsin Supreme Court held that the presumption that a condition or status once proven to exist is presumed to continue could not be rebutted save by "some uncontradicted and unimpeached, and not inherently incredible, evidence to the contrary."²⁷ While "any" evidence to the contrary will not operate to rebut the presumption, our court has recently declared that the opponent is not required to produce more than that amount of evidence which would enable the jury reasonably to find in his favor.²⁸ The result of the foregoing cases appears to be this: whenever facts giving rise to a presumption are proved, the presumed fact must be found as a matter of law unless the party against whom the presumption operates introduces evidence which will permit the jury reasonably to find against the presumed fact.

The second question arises when the opponent has successfully met the burden of going forward with contrary evidence and the case is ready to be submitted to the jury. May the jury weigh the presumption in the scale with the evidence? That is, should the artificial effect given to the facts by the presumption be given probative effect by the jury? The view that is shared by the Wisconsin court (and the majority of the courts that have had occasion to decide the matter) is that the presumption is not evidence and that it, therefore, disappears entirely from the case when the opponent has come forward

²⁴ *McCarty v. Weber*, 265 Wis. 70, 73, 60 N.W.2d 716 (1953). See also *Biersach v. Wolf River Paper & Fiber Co.*, 247 Wis. 536, 20 N.W.2d 658 (1945); *Carlson v. Hardware Mut. Casualty Co.*, 255 Wis. 407, 39 N.W.2d 442 (1949); *McNamer v. American Ins. Co.*, *supra* note 14; *Bassil v. Fay*, 267 Wis. 265, 64 N.W.2d 826 (1954).

²⁵ *State ex rel. Cleveland v. Common Council of the City of West Allis*, 177 Wis. 537, 188 N.W. 601 (1922).

²⁶ *Supra* note 14.

²⁷ *Ibid.* at 421-422.

²⁸ *Will of Donigan*, 265 Wis. 147, 150, 60 N.W.2d 732 (1953) (presumption of revocation by destruction arises from the failure to find a will last known to be in the testator's possession. The trial court was reversed because it "was in error in its expressed belief that evidence clear and strong and greater than a mere preponderance was required to overcome the presumption."); See also *In re Faulks' Will*, 246 Wis. 319, 349, 17 N.W.2d 423 (1945) where the court said: "Where some evidence to the contrary is received, that is, evidence which if uncontradicted is sufficient to support a finding, the presumption is destroyed or removed; it then has no probative force."

with evidence sufficient to support a finding in his favor.²⁹ In *McCarty v. Weber*,³⁰ the Wisconsin court announced:

"In *Reichert v. Rex Accessories Co.* (1938), 228 Wis. 425, 438, 279 N.W. 645, 651, we adopted Prof. Wigmore's rule expressed as follows: '. . . 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.'"³¹

In its application of Prof. Wigmore's rule, the Wisconsin court held that after the defendant had produced evidence sufficient to support a finding that the deceased was negligent, the plaintiff was not entitled to have the presumption that the deceased exercised due care for his safety "thrown into the scales and weighed by the jury in finding the facts. This would give the presumption standing as actual evidence. That it is entitled to no such standing is well established."³² In the *Gerhs*³³ case, it was stated that the presumption in favor of the continuance of a status or condition once proven to exist is

"not in and of itself in the nature or character of actual evidence . . . and it disappears and is of no weight or significance whatsoever when . . . there is some uncontradicted and unimpeached, and not inherently incredible, evidence to the contrary."³⁴

The view of the majority opinion on this problem has been quaintly expressed by the Missouri court when it suggested that presumptions should be regarded as "the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts."³⁵

The majority view has been criticized on the ground that it fails to invest the presumption with sufficient weight and dignity.³⁶ The advocates of the minority view maintain that the reasons which cause the creation of presumptions should not be so weak that they will vanish in the face of contrary evidence which might *not be believed by the jury*. Since the presumption rules the case if the facts which give rise

²⁹ 95 A.L.R. 878; 9 WIGMORE, *op. cit.*, *supra* note 11, §§2490-2491.

³⁰ *Supra* note 24.

³¹ *Ibid.* at 73.

³² *Smith v. City of Green Bay*, *supra* note 14 at 430.

³³ *Supra* note 14.

³⁴ *Ibid.* at 421-422; See also the quotation from *In re Faulks' Will*, *supra* note 28, and *McNamer v. American Ins. Co.*, *supra* note 14.

³⁵ *Machowik v. Kansas City, St. J.&C.B.R.Co.*, 196 Mo. 550, 94 S.W. 256, 262 (1906).

³⁶ *McBaine, Presumptions: Are They Evidence?* 26 CALIF. L. REV. 519, 532-534 (1938); *Morgan, Instructing the Jury Upon Presumptions and Burden of Proof*, *supra* note 5.

to the presumption are unopposed, it should continue to control the decision if the evidence advanced against the presumed fact is *disbelieved* by the jury.³⁷ Evidence that is disbelieved is equivalent to no evidence at all and the facts against which disbelieved evidence is advanced are just as strongly "unopposed" as they would be had no contrary evidence at all been introduced. The proponents of the minority view further point out that under the majority position a socially desirable presumption could be easily defeated by the testimony of a witness who had no qualms about giving false testimony.³⁸ An illustration will best serve to demonstrate the basic distinction between the two views: Let us assume that the death of X is at issue and that the plaintiff has proven the facts which give rise to the presumption that X is dead (*viz.*, that X has been absent from his home for seven years and has been unheard from during such period). Let us further assume that the plaintiff then rests his case and that the defendant comes forward with witnesses who testify that they recently saw X and that he was alive and healthy. Under the majority opinion, the presumption vanishes from the case and the jury is free to find for the plaintiff or for the defendant. Under the minority view, the presumption does not vanish. Instead, the jury is instructed that should they believe the defendant's witnesses they must find for the defendant but that should they *disbelieve* them they must then find for the plaintiff by virtue of the presumption.

A further weakness in the treatment of presumptions under the Wigmore-Greenleaf view is revealed in a case which involves the doctrine of *res ipsa loquitur*. Courts have floundered in a sea of confusion in deciding whether to treat the doctrine as raising a presumption or merely an inference of negligence.³⁹ If it is regarded as giving rise to a presumption, it disappears in the face of contrary evidence and the court cannot instruct the jury on the doctrine. If, however, it is treated as creating a permissible inference, at the close of all the testimony the court must instruct the jury on the doctrine. This situation results in a paradox in that it assigns greater weight to an inference than it does to a presumption.⁴⁰

Much of the confusion attending the procedural effect of *res ipsa loquitur* that is found in the earlier cases stems from a failure to properly analyze the functions of presumptions and inferences. In the more recent cases wherein the courts have noted the legal distinction between a presumption and a permissible inference, the conclusion

³⁷ See *Beggs v. Metropolitan Life Ins. Co.*, 219 La. 24, 257 N.W. 445 (1934); *Gillett v. Michigan United Traction Co.*, 205 Mich. 410, 171 N.W. 536 (1919).

³⁸ *McBaine*, *supra* note 36.

³⁹ 53 A.L.R. 1494; 167 A.L.R. 658.

⁴⁰ Of course, in the absence of rebutting evidence *res ipsa loquitur* would result in a directed verdict for the plaintiff if it were regarded as a presumption.

reached is that *res ipsa loquitur* merely permits the jury to find the defendant negligent⁴¹ and that "it makes a jury question out of an issue which otherwise would fail for lack of proof."⁴² Failure to note the true distinction between presumptions and inferences led the Wisconsin court in 1904 to state that *res ipsa loquitur* raised a rebuttable presumption of negligence. If this were true, the plaintiff would be awarded a directed verdict unless the defendant produced rebutting evidence. In that case,⁴³ however, the court went on to *treat* the doctrine as creating an inference because it said that "The proof was sufficient, therefore, when the plaintiff rested her case, to take the question of defendant's negligence to the jury."⁴⁴ In 1930, the Wisconsin court suddenly departed from its traditional position by holding that *res ipsa loquitur* gave rise to a presumption of negligence which would result in a directed verdict for the plaintiff if the defendant did not come forward with contrary evidence.⁴⁵ In a decision rendered in 1944, the court admitted that "the doctrine of *res ipsa loquitur*, as expounded by the Wisconsin cases, offers some difficulties."⁴⁶ Recent cases have affirmed the earlier cases thereby bringing Wisconsin into the ranks of the majority opinion on this problem.⁴⁷ In *Ryan v. Zweck-Wollenberg Co.*,⁴⁸ the court said:

"in spite of possibly inconsistent statements on the question in some decisions of this court, it is the established law of this state that the procedural effect to be given to *res ipsa loquitur* is that of permissible inference rather than that of rebuttable presumption."⁴⁹

The reason for so treating the doctrine is because the plaintiff, in the vast majority of cases, is wholly unable to offer any evidence to rebut the contrary evidence of the defendant.

While it is settled that *res ipsa loquitur* gives rise to an inference of negligence, a further problem arises as to whether the plaintiff may take advantage of the general inference of negligence which the doc-

⁴¹ 167 A.L.R. 659; Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 245.

⁴² *Mayer v. Boynton Cab Co.*, 267 Wis. 486, 489, 66 N.W.2d 136 (1954).

⁴³ *Klitzke v. Webb*, 120 Wis. 254, 97 N.W. 901 (1904).

⁴⁴ *Ibid.* at 257. Subsequent cases expressly held that *res ipsa loquitur* creates an inference rather than a presumption of negligence. See *Lipsky v. C. Reiss Coal Co.*, 136 Wis. 307, 117 N.W. 803 (1908) and *Rost v. Roberts*, 180 Wis. 207, 192 N.W. 38 (1923) ("In such cases it is held that the plaintiff makes a case for the jury to infer negligence from the fact that the injury or accident occurred.")

⁴⁵ *Dehmel v. Smith*, 200 Wis. 292, 227 N.W. 274 (1930). In this case, Justice Eschweiler wrote a dissenting opinion which was joined in by Chief Justice Rosenberry and Justice Fritz in which he contended that the majority erroneously departed from the doctrine stated in the *Rost* case (*ibid.*).

⁴⁶ *Koehler v. Thiensville State Bank*, 245 Wis. 281, 286, 14 N.W.2d 15 (1944).

⁴⁷ *Ryan v. Zweck-Wollenberg Co.*, 266 Wis. 630, 64 N.W.2d 226 (1954); *Mayer v. Boynton Cab. Co.*, *supra* note 42.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* at 649.

trine raises if in his complaint he alleges two causes of action one of which is based on the doctrine of *res ipsa loquitur* and the other on specific acts of negligence. If the plaintiff fails to prove his specific allegations, should he be permitted to rely on the general inference of negligence? A learned writer in this area of the law feels that

“this is not a question of evidence, for the inference is there; it is a question of the policy of the court as to the effect of specific allegations in the pleading in limiting the issue.”⁵⁰

The American courts have taken the following four positions on this question:⁵¹ (1) that the plaintiff by his specific allegations has waived his right to rely on the doctrine; (2) that he may take advantage of it if the inference of negligence to be drawn supports the specific allegations; (3) that it may be applied only if the specific allegations are accompanied by a general allegation of negligence; and (4) that it is available without regard to the form of the pleadings. While the issue has not yet been decided by the Wisconsin Supreme Court, it has recently arisen in the Circuit Court of Milwaukee County. In an opinion filed on February 25, 1955 Judge Francis X. Swietlik ruled that the specific allegations of negligence in the plaintiff's complaint did not remove the doctrine of *res ipsa loquitur* from the case.⁵²

SUMMARY

A presumption is essentially a rule of law which compels a certain finding of fact when a specified group of unopposed facts is proven. It casts upon the party against whom it operates the procedural duty of going forward with evidence sufficient to warrant a jury to find against the presumed fact. The term “presumption of fact” should be discarded since it does not impose any duty as to the production of evidence; it is a deduction from the facts of the particular case which the jury is permitted, but not compelled, to draw and is therefore merely another name for “inference of fact.”

A presumption is rebutted (i.e., ceases to control the decision) when the opponent introduces credible evidence which would support a finding of the non-existence of the presumed fact. While the majority opinion, which is illustrated by the *Kreft* case,⁵³ states that a rebutted presumption disappears from the case entirely, the author is of the opinion that the majority view unduly restricts the office of the presumption and submits that the better position is to allow the presumption to rule the case if the evidence advanced against the presumed fact is disbelieved by the trier of the facts.

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⁵⁰ PROSSER, *supra* note 41 at 263-265.

⁵¹ 79 A.L.R. 40, 48; PROSSER, TORTS (1941) 307-308.

⁵² *Calla v. Mandella*, Circ. Ct. Milwaukee County, Wis., No. 233-505.

⁵³ *Supra* note 1.