CHAPTER 903

EVIDENCE — PRESUMPTIONS

903.01 Presumptions in general.
903.03 Presumptions in criminal cases.

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the rules for information purposes.

903.01 Presumptions in general. Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic 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.

History: Sup. Ct. Order, 59 Wis. 2d R1, R41 (1973).

This section does not apply to the presumption in favor of traveling employees under s. 102.03 (1) (f). Goranson v. DILHR, 94 Wis. 2d 537, 289 N.W.2d 270 (1980).

Conflicting presumptions should rarely present a problem. Under this section it is impossible for opposing parties to both have the burden of persuasion on the same issue. Should inconsistent presumptions be established in a case, the weight of the evidence establishing the facts upon which the presumptions are premised is for the trier of fact and not the judge with respect to the law. Marine Bank v. Taz's Trucking Incorporated, 2005 WI 65, 281 Wis. 2d 275, 697 N.W.2d 90, 03−2827.

903.03 Presumptions in criminal cases. (1) SCOPE. Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(2) SUBMISSION TO JURY. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(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.

History: Sup. Ct. Order, 59 Wis. 2d R1, R56 (1973).

A presumption in a criminal case is constitutionally impermissible if: 1) it shifts the burden of persuasion to the defendant; 2) it relieves the state of its burden of proving every element of the crime and negating every defense; or 3) it relieves the jury of its duty to find every element of the crime from its independent consideration of the evidence. Genova v. State, 91 Wis. 2d 595, 283 N.W.2d 483 (Ct. App. 1979).

Instructions on intent created a permissible mandatory rebuttable presumption that shifted the burden of production to the defendant, but not the burden of persuasion. Muller v. State, 94 Wis. 2d 450, 289 N.W.2d 570 (1980).

A jury instruction that placed the burden of proving lack of intent to kill upon the accused was improper. State v. Schulz, 102 Wis. 2d 423, 307 N.W.2d 151 (1981).

A court properly instructed a jury that it could infer from a breathalyzer reading of .13 percent that the defendant was intoxicated. Alcohol absorption rates are discussed. State v. Vick, 104 Wis. 2d 678, 312 N.W.2d 489 (1981).

An instruction on the intoxication defense did not shift the burden of proof to the defendant. State v. Hedstrom, 108 Wis. 2d 532, 322 N.W.2d 513 (Ct. App. 1982).

Jury instructions on the intoxication defense, viewed as a whole, did not impermissibly shift the burden of persuasion on the issue of intent to the defendant. Barrera v. State, 109 Wis. 2d 324, 325 N.W.2d 722 (1982).

Because driving while intoxicated is inherently dangerous, the state need not prove a causal connection between the driver's intoxication and the victim's death. State v. Caibaiosai, 122 Wis. 2d 587, 363 N.W.2d 574 (1985).

An instruction that required the jury to find that the defendant had committed an element of the charged crime violated sub. (3) and was not harmless error. State v. Dyess, 124 Wis. 2d 525, 370 N.W.2d 222 (1985).

If an element has been conceded by the defendant, error may be harmless. State v. Zelenka, 130 Wis. 2d 34, 387 N.W.2d 55 (1986).

A defendant has a burden of production to come forward with some evidence of a negative defense to warrant jury consideration. State v. Pettit, 171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992).

Under *Dyess* both directed factual and legal findings are impermissible. State v. Jensen, 2007 WI App 256, 306 Wis. 2d 572, 743 N.W.2d 468, 06−2095.

In a case in which intent is an element of the crime charged, a jury instruction stating that, "the law presumes that a person intends the ordinary consequences of his voluntary acts," unconstitutionally relieves the state from proving every element. Sandstrom v. Montana, 442 U.S. 510 (1979).

The harmless error rule may apply in cases involving a *Sandstrom* violation. Rose v. Clark, 478 U.S. 570 (1986).

A prosecutor's argument to the jury that a "man intends natural and probable consequences of his intentional acts" did not prejudice the accused. Mattes v. Gagnon, 700 F.2d 1096 (1983).

A permissive intent instruction was rational as an aid to the jury in weighing circumstantial evidence of intent. Lampkins v. Gagnon, 710 F.2d 374 (1983).

Presumptive intent jury instructions after *Sandstrom*. 1980 WLR 366.

After *Sandstrom*: The constitutionality of presumptions that shift the burden of production. 1981 WLR 519.

Restricting the admission of psychiatric testimony on a defendant's mental state: Wisconsin's Steel curtain. 1981 WLR 733.