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PATTERN JURY INSTRUCTIONS: SOME SUGGESTIONS ON USE AND THE PROBLEM OF PRESUMPTIONS

GEORGE NEFF STEVENS*

Professor Stevens' article had its genesis as a book review of the New York Pattern Jury Instructions—Civil, Vol. 1 and 2 (temporary) (1965); it soon became apparent, however, that the project was of larger dimensions than most book reviews. Accordingly, and to facilitate proper indexing, the editors decided to publish the manuscript as an article. Professor Stevens critically appraises the New York pattern instructions and compares them with those of California, Illinois and other states. Because of the imminent publication of similar instructions for Washington, Professor Stevens offers some practical proposals such as appending federal annotations to pattern instructions for use in diversity cases, and changing present Washington rules and statutes so as to allow trial court judges more time to consider proposed instructions by requiring their submission in advance of the time they must be given, with opportunity for changes and amendments as the circumstances may warrant. Finally, Professor Stevens offers some suggestions on the use of presumptions and makes some concrete proposals toward a solution of the problems they present to Washington courts and attorneys.

The appearance of *New York Pattern Jury Instructions—Civil* and the imminence of publication of similar instructions for the State of Washington presents the opportunity to stress some suggestions on the use of instructions and to propose a solution to the problem of presumptions.

The *New York Pattern Jury Instructions—Civil*, Volumes 1 and 2, were prepared by a Committee on Pattern Jury Instructions of the Association of Supreme Court Justices of that state. The project was begun in 1962, at the suggestion of Chief Judge Desmond of the New York Court of Appeals. As stated by the Committee: "Primarily New York Pattern Jury Instructions is a working tool for use by counsel in preparing requests and by the trial judge in preparing his charge. Its contents, while prepared with the cooperation of the Judicial Conference, bear no imprimatur. In this respect, the New York approach is in line with California.¹ Illinois, on the other hand, by Supreme Court

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¹ CALIFORNIA JURY INSTRUCTIONS—CIVIL (4th ed. 1959 Supp.) [hereinafter cited as BAJI]. (This was the first of the present wave of pattern jury instructions. For the history of the development of pattern jury instructions in California, see BAJI, at 35-46.) BAJI, although widely used throughout the State of California, has been officially adopted for use only in the Superior Court of California in and for the County of Los Angeles.

Rule requires the use of *pattern instructions* when and where applicable.²

Volume 1 of the *New York Pattern Jury Instructions—Civil* (hereafter referred to as 1 NY PJI) contains an excellent statement on "How to Use These Volumes." A careful reading of this introductory material is essential to an understanding, not only of how to use the prepared instructions, but also of the approach and philosophy of the committee in preparing the content of each instruction. The format in the body of the book consists of a black letter charge, followed by a *Comment*, and in a few instances footnotes. As stated by the committee:

The purposes of the Comment are to (1) present the case authority on which the charge is based and the secondary authorities to which the user can turn for a broader view of the subject, (2) orient the user to the relation of the charge to the general topic with which it deals and to other charges with which it should be or may be used, (3) inform the user of the assumptions made in the preparation of the charge, (4) point up when the question dealt with is for the court and when for the jury, (5) indicate what the commonly encountered variations in the factual complex are and state in what way a particular variation will require the pattern charge to be changed (in some instances, as above noted, the revision or alternative form of charge is included and signalled by black letter printing). In those instances where the Coordinating Committee of United States District Court Judges felt that it might be of value to have a separate statement of the federal authorities, a separate paragraph, headed Federal Annotation, is set forth at the end of the Comment.

Because of the potential for use of pattern jury instructions in diversity cases, the federal annotation to the Comment is an innovation worthy of emulation.³

The Illinois format differs in that the "How To Use" portion of the comment is placed in a *Note on Use* which is set forth below the instruction and above a *Comment* which covers the authorities, assumptions and possible variations. I prefer the Illinois approach for the reason that a properly prepared *Note on Use* should save the time of both lawyers and judges by making it unnecessary to read the Comment in order to ascertain use.

In preparing the content of the pattern instructions the New York committee was guided by the same considerations which have in-

² ILLINOIS PATTERN JURY INSTRUCTIONS, xiv-xix (1961) [hereinafter cited as IPI]; Illinois Supreme Court Rule 25-1(a), Instructions in Civil Cases.

³ Devitt, *Ten Practical Suggestions about Federal Jury Instructions*, 38 F.R.D. 75 (1965).

fluenced this movement generally: to state the governing principles accurately, but in lay language; to omit matters which the jury is not required to know; to avoid the appearance of favoring either side; and to charge affirmatively rather than negatively.⁴ Substantive law teachers, as well as lawyers and judges with cases governed by the law of a sister state, would do well to follow the suggestion of the New York committee—to look at the sister state's pattern jury instructions and supporting comments as a way of saving a great deal of research effort in finding the law of the sister state.

Typically, the first series of pattern jury instructions in New York covered general charges (Division 1), negligence actions (Division 2), and landlord and tenant (Division 6). Yet to come are torts other than negligence (Division 3), contracts (Division 4), divorce (Division 5), and will contests (Division 7). Of particular interest to lawyers elsewhere is the excellent treatment of Products Liability, 1 NY PJI 2:120 through 2:146. A host of specific negligence actions, such as motor vehicle accidents, liability for condition or use of land, malpractice, and public utilities, are included in volume 1, as are vicarious responsibility and third-party-liability-over situations. The coverage is thorough and the *Comments* indicate homework exceedingly well-done.

The draftsmen of NY PJI have made a start towards implementing recent proposals which advocate the giving of appropriate charges prior to trial, in NY PJI 1:1 through 1:14. Ample support for not only the proposed preliminary instructions, but also for a more extensive pretrial charge, including substantive aspects of the particular case, is cited in the Introductory Statement.⁵ The need for and validity of such instructions is clearly stated by the Illinois Supreme Court in *People v. Izzo*:

No litigant has a right, constitutional or otherwise, to have his case tried before ignorant jurors. To acquaint the juror with his duties and

⁴ For a more complete discussion of this aspect of pattern jury instructions, see Corboy, *Pattern Jury Instructions—Their Functions and Effectiveness*, 32 INS. COUNSEL J. 57 (1965); Dooley, *Jury Instructions: An Appraisal by a Plaintiff's Attorney*, 1963 U. ILL. L.F. 586; Fowler, *Jury Instructions: An Appraisal by a Defendant's Attorney*, 1963 U. ILL. L.F. 612; Hannah, *Jury Instructions: An Appraisal by a Trial Judge*, 1963 U. ILL. L.F. 627; Yerkes, *Illinois Pattern Jury Instructions—Civil*, 47 A.B.A.J. 505 (1961); Yerkes, *Standardized Jury Instructions in California*, 5 ST. LOUIS U.L.J. 347 (1959); Note, *Pattern Jury Instructions*, 40 N. DAK. L. REV. 164 (1964).

⁵ 1 NY PJI 8. See *People v. Izzo*, 14 Ill. 2d 203, 209, 151 N.E.2d 329, 334 (1958), cert. denied, 362 U.S. 403 (1960); Annot., 89 A.L.R.2d 197; Backer, *Instructions to the Jury at the Commencement or End of the Trial*, 1961 N.Y.L.J. 4; Prettyman, *Jury Instructions—First or Last?*, 46 A.B.A.J. 1066 (1960).

responsibilities in a new environment and to increase his understanding of the processes of a trial can hardly be objectionable. . . .⁶

To accomplish this very worthy improvement in cases tried to a jury some states, as for example, Washington, may have to make some changes in the wording of controlling rules or statutes.⁷

Attention should be given by the draftsmen of pattern jury instructions to the inclusion, either in the *Notes on Use* or in the introductory material on how to use pattern jury instructions, of information as to those specific instructions which should or could be given during trial. This possibility was recognized by the New York committee,⁸ and implemented rather half-heartedly in the first paragraph of the Comment to NY PJI 1:65. Why this reluctance to suggest the giving of appropriate information or cautionary instructions during the trial? For example, why should not NY PJI 1:90, General Instruction—Expert Witness, be given the first time an expert witness is called in the case?⁹ This is, both logically and practically, the time when the jury needs the instruction in order to evaluate correctly the testimony of the witness.¹⁰

The development of pattern jury instructions should lead to a further improvement in the administration of justice. Under existing practices proposed instructions and requests to charge are normally submitted to the judge at the close of the evidence.¹¹ All too frequently the attorneys, understandably, wait until the very last minute to make

⁶ 14 Ill. 2d 203, 209, 151 N.E.2d 329, 334 (1958).

⁷ Presently in Washington, requirements with respect to instructions are embodied in WASH. R. PLEAD., PRAC., PROC. 51.04W, 51.08W and 51.16W. The language of rule 51.08W requires the court to reduce the charge to be given to the jury to writing and to read the written charge to the jury *at the conclusion of the evidence*. A modification of the rule is clearly indicated if the proposal for giving appropriate instructions prior to or during trial is found advisable, as I trust it will be. As to whether preliminary and interim instructions should be reduced to writing, it is suggested that they should be, for, although the Washington Supreme Court has held that oral instructions are not improper insofar as ordinary admonitions to the jury are involved, written instructions are required with respect to the substantive aspects of the case. *Greene v. Rothschild*, 60 Wn. 2d 508, 512, 374 P.2d 566, 569 (1962). A requirement that instructions, regardless of when given, be reduced to writing would eliminate the necessity of litigating whether a particular instruction was merely admonitory or involved substantive law.

⁸ 1 NY PJI 1, in the quotation from the third provisional draft of the Trial Judge's Code, now in the course of preparation by the National Conference of State Trial Judges: "... and provide appropriate instructions before, during as well as after the evidence."

⁹ Rather than, at the close of the case, giving an instruction which starts out: "You will recall that the witness(es) [state name(s)] . . ." which in a long and complicated case might well create some problems of accurate recollection. Other examples may well be found among the General Instructions Not Applicable to All Cases. NY PJI 1:50-93.

¹⁰ Winslow, *The Instruction Ritual*, 13 HASTINGS L.J. 456 (1962).

¹¹ Under N.Y. CPLR 4017, requests to charge must be made "before the jury retires to consider its verdict."

their requests. As a result, the trial judge, under pressure to get the case to the jury so that he can take another assignment, has little time to give the submitted instructions the careful attention they deserve, and very little time and stenographic help to prepare his written instructions for delivery to the jury. Pattern jury instructions, where available and used, will help to eliminate, at least in part, this present weak spot in the trial of jury cases. But, this very availability of pattern jury instructions offers the opportunity for further improvement by either requiring or encouraging *the submission* of proposed instructions well in advance of the time when the judge must act.¹² Chief Judge Devitt of the United States District Court, District of Minnesota, has suggested the possibility of accepting well-prepared and documented instructions as a substitute for a trial brief.¹³ An opportunity to submit further instructions, made necessary by trial developments, should, of course, be provided. This could be accomplished with a minimum of effort and inconvenience at a conference on instructions at the close of the evidence.

The draftsmen of pattern jury instructions, inevitably, must face the problem of what to do with presumptions. As every legally trained person knows,¹⁴ the courts, the lawyers, and legal scholars have been arguing about the purpose and function of presumptions for years.¹⁵

Because of the fascination of the problem, perhaps, the legal pro-

¹² See FED. R. CIV. P. 51; Ill. Supreme Court Rule 25-1(b): "At any time before or during the trial, the Court may direct counsel to prepare designated instructions . . ." Speaking of this rule, in discussing the trial judge's role, in *Foreword to Illinois Pattern Jury Instructions*, at xvii, the Illinois committee states:

The rule contemplates the following:

1. At the close of the Plaintiff's case or such other convenient time as the Court may select ("at any time . . . during the trial") the Court may direct counsel to prepare designated instructions.

2. As early as the pre-trial hearing ("at any time before . . . trial") the Court may direct counsel to prepare designated instructions.

3. The practical problem of having the Court's instructions prepared is solved by making it the duty of counsel to provide this stenographic service. Given sufficient notice, the lawyers are equipped to provide this stenographic service, while few courts can do so.

¹³ Devitt, *Ten Practical Suggestions about Federal Jury Instructions*, 38 F.R.D. 75 (1965).

¹⁴ Readers of the *Washington Law Review* need go no further for source material: Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71 (1940); McCormick, *What Shall the Trial Judge Tell the Jury About Presumptions*, 13 WASH. L. REV. 185 (1938); Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937); Wiehl, *Instructing a Jury in Washington*, 36 WASH. L. REV. 378 (1961); Note, 35 WASH. L. REV. 249 (1960).

¹⁵ The *Thayer view*—that a presumption is a preliminary assumption of fact that disappears from a case upon the introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact. THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 313-25 (1898); 9 WIGMORE, *EVIDENCE* §§ 2485-91 (3d ed. 1940); adopted by MODEL CODE OF EVIDENCE rule 704 (1942).

The *Morgan-McCormick view*—that a presumption should shift the burden of

fession seems to have overlooked the damaging effects of its failure to resolve the issue. Litigants should not be put to the expense of providing a forum for either further consideration of these well-known and thoroughly debated views or for the case to case classification of particular presumptions. The improvement of the administration of justice calls for an end to the debate. Lower court judges and lawyers should be able to determine with relative ease what the law permits and requires with respect to instructions on presumptions, and thus be able to avoid costly and unnecessary reversible error. The time has come for the promulgation by the supreme court, under its rule making power,¹⁶ of a set of rules defining and classifying all known presumptions in a practical and meaningful manner, keeping in mind that the problem springs from the jury system and that the solution should assure the most practical and intelligent use of the jury that can be devised.¹⁷

The absence of a workable, easily understood definition and classification of presumptions is readily apparent in the pattern jury instructions on presumptions prepared by the New York group. For example, the Comment to 1 NY PJI 1:63, General Instructions—Burden of Proof—Effect of Presumption, warns that care must be taken to analyze the particular presumption under consideration to ascertain whether (1) it aids the person who has the burden of proof by shifting to the opposing party the burden of going forward with evidence (producing evidence), or (2) it is simply another way of stating upon

proof to the adverse party. MORGAN, SOME PROBLEMS OF PROOF 81 (1956); McCORMICK, EVIDENCE § 317, at 671-72 (1954); note 14 *supra*.

The *Bohlen* or *Pennsylvania view*—that the Thayer view is correct as to some presumptions, and the Morgan-McCormick view is right as to others. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920); UNIFORM RULES OF EVIDENCE 13-16 and comments. The classification of presumptions in the new *California Evidence Code* is based on this view. CAL. LAW REVISION COMM'N, RECOMMENDATION PROPOSING AN EVIDENCE CODE 95 (1965).

¹⁶ In Washington, see WASH. REV. CODE §§ 2.04.190, .020, 3.30.080 (1954). For the inherent power of the Washington Supreme Court, see *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1, 267 Pac. 770 (1928). See generally American Judicature Society Information Sheet No. 28, *The Rule-Making Power of State Supreme Courts* (April 21, 1964).

¹⁷ Washington has the agency at hand to perform this difficult task—the Washington Judicial Council. It will find a great deal of the spade work done in the collection of cases involving presumptions in Professor Meisenholder's new book, *WASHINGTON PRACTICE—EVIDENCE* chs. 31 & 32 (1965). For a start and an excellent example of what can and should be done, see CAL. LAW REVISION COMM'N, *op. cit. supra* note 15, at 93-113. The recommendations, with several unfortunate changes, were adopted by the California legislature, and will become effective January 1, 1967. Cal. Sess. Laws 1965, ch. 299. It should be noted that the California proposal came by way of their Law Revision Commission because California is one of the three western states where the rule-making power is still exercised by the legislature. See note 16 *supra*.

whom rests the burden of proof, or (3) it actually shifts the burden of proof (burden of persuasion). With respect to (2) above, the Comment suggests that there is no need for an instruction on such a presumption since the burden of proof charge is sufficient.¹⁸ Yet, the proposed instruction set forth in 1 NY PJI 2:11, covering the common law standard of care—negligence defined—where plaintiff is under disability, is nothing more than another way of stating plaintiff's burden of proof with respect to that particular aspect of the case; and thus, it is a departure from the position taken in the Comment to NY PJI 1:63.

The Comment to NY PJI 1:63 also discusses a very important and practical problem in applying the Thayer theory of presumptions. Should the jury be instructed, and if so how, on what might be classified as a rebuttable mandatory presumption,¹⁹ which affects the burden of going forward (the production of evidence),²⁰ where the opponent has produced evidence sufficient to sustain a finding of the non-existence of the presumed fact, but where the weight of such evidence is for the jury? The Thayer followers, presumably, would say that no instruction should be given.²¹ The Comment to the New York proposal, wisely in my opinion, suggests that, because of the right of the jury to weigh the contrary evidence and not to believe it, there should be an instruction where these conditions are present.²² NY PJI 1:63 includes a sensible instruction both as to what the jury is to do if it *does not believe* the evidence offered to disprove the presumed facts and what it is to do if it believes that the evidence offered *reasonably tends to disprove* the presumed facts.

Finally, the Comment to NY PJI 1:63 contains a list of presumptions which shift the burden of going forward (producing evidence),²³ and of presumptions which shift the burden of proof.²⁴ The Comments

¹⁸ *Accord*, Wiehl, *supra* note 14, at 391-92. See also *Graving v. Dorn*, 63 Wn. 2d 236, 386 P.2d 621 (1963).

¹⁹ See McCORMICK, EVIDENCE § 308 (1954).

²⁰ *Id.* § 306 (1954).

²¹ See *Bates v. Bowles White & Co., Inc.*, 56 Wn. 2d 374, 353 P.2d 663 (1960).

²² *Accord*, Wiehl, *supra* note 14, at 395-96. Interestingly, the possibility of an issue of fact as to the age of a child under 4 was not mentioned in the Comment to 1 NY PJI 2:23. If such an issue is raised, it would seem that a NY PJI 1:63 instruction would be in order.

²³ (1) *Because of social policy*: a presumption of undue influence arises from illicit sexual cohabitation; (2) *because the evidence is more readily available to the opponent*: NY PJI 1:63 and the presumption arising in bailment cases, from proof that property was in good condition when delivered to the bailee and when returned was damaged in a way that could not result from wear and tear, that the damage was occasioned through the fault or neglect of the bailee.

²⁴ *Because of probabilities predicated on the general conduct of mankind*: the presumption against suicide and in favor of sanity; the presumption of receipt of a

following other pattern instructions contain references to other presumptions which shift the burden of going forward (producing evidence),²⁵ to presumptions which the Comments do not attempt to classify,²⁶ to a few examples of those presumptions which are just another way of stating upon whom rests the burden of proof,²⁷ and to examples of judicial denials of, or refusal to recognize, the existence of a claimed presumption.²⁸

The *New York Pattern Jury Instructions—Civil* contain specific instructions on the presumptions which may be drawn from the failure to produce witnesses: in general,²⁹ from the failure to produce witnesses—claim of privilege,³⁰ from the failure to produce documents,³¹ on *res ipsa loquitur*,³² on owner-passenger liability for acts of driver,³³ and on the presumption of a promise on the part of a tenant to pay the reasonable value of the use and occupation of the premises,³⁴ in addition to the presumption from proof of ownership that the automobile was being operated with owner's permission,³⁵ and the presumption against suicide,³⁶ mentioned above.

Thus, the New York approach to instructions on presumptions has been by way of inclusion where appropriate in each subject matter

letter or telegram arising from proof of mailing or delivery for transmission; the statutory presumption of receipt of summons served by registered mail upon a nonresident.

²⁵ Comment to: NY PJI 2:22, that falling asleep while driving raises a presumption of negligence; NY PJI 6:3, that when a person other than the lessee is shown to be in possession, there is a presumption that the lease has been assigned to him and that the assignment was sufficient to transfer the term and to satisfy the Statute of Frauds, with a specific instruction that the instruction should be given along NY PJI 1:63 lines.

²⁶ NY PJI 2:111, presumption of permission from long continued use of public land without objection from the public authority; NY PJI 2:113, presumption that building placed on plaintiff's land increased the pressure on the soil, and burden is on the plaintiff to show otherwise; NY PJI 2:225, presumption that a pedestrian, using a sidewalk, should see what is there to be seen; NY PJI 6:36, statutory presumption of use with permission of lessee upon proof of ill-repute or ill-fame of the premises or of the inmates thereof, or of those resorting thereto.

²⁷ See text accompanying note 18 *supra*.

²⁸ NY PJI 2:23 and again in NY PJI 2:48, that a child over four and up to any particular age is not chargeable with contributory negligence; NY PJI 2:112, blasting, no presumption from the occurrence of damage that the work was negligently done; NY PJI Independent Contractor, Introductory Statement, at 425, no presumption of delegation of duty by owner or contractor to another; NY PJI 2:258, no presumption of incompetence arises from the negligent act which injured plaintiff; NY PJI 2:260, no presumption from the relationship of child and parent that child was the agent of the parent.

²⁹ 1 NY PJI 1:75.

³⁰ 1 NY PJI 1:76.

³¹ 1 NY PJI 1:77.

³² 1 NY PJI 2:65.

³³ 1 NY PJI 2:251.

³⁴ 2 NY PJI 6:2.

³⁵ 1 NY PJI 1:63.

³⁶ 1 NY PJI Comment to 1:63.

division or chapter, rather than through the preparation of a separate chapter or division devoted to adaptable pattern jury instructions on presumptions as such. The Comment to 1 NY PJI 1:63 did suggest the possibility of adapting that instruction to other Thayerian presumptions. But, the idea went no further. The Illinois pattern jury instructions, which have served as a model for pattern jury instructions elsewhere, approach the problem of instructions in the same way as did New York.³⁷ California, on the other hand, tried the pattern approach, but without the adaptability factor.³⁸

The reason for this reluctance to prepare adaptable pattern presumption instructions probably stems from the complete lack of any system of classification of presumptions in the vast majority of states upon which such instructions could be predicated with any degree of certainty as to their validity.³⁹ But, while we await the solution above suggested,⁴⁰ it is suggested that Washington experiment with pattern jury instructions adapted to a classification which is discernible in the Washington cases and which is the base upon which the new California Evidence Code was built.

Since there must be a beginning, we start by defining a presumption.⁴¹ Rule 13, *Uniform Rules of Evidence*, defines a presumption as "an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts founded or otherwise established in the action."⁴² This definition makes it clear that we are not dealing with the mental process of drawing inferences from evidence but with the legal process of presuming facts from other facts.⁴³ It would eliminate permissive presumptions,⁴⁴ with one very

³⁷ ILLINOIS PATTERN JURY INSTRUCTIONS (IPI): IPI No. 5.01, Failure to Produce Evidence or a Witness; IPI No. 10.08, Careful Habits as Proof of Ordinary Care—Death Cases; IPI No. 11.03, Presumption That Child Under Seven Years is Incapable of Contributory Negligence; IPI No. 22.01, Res Ipsa Loquitur; IPI No. 50.07, Inference of Agency—Agency and Scope of Employment Inferred from Ownership of Automobile.

³⁸ 1 CALIFORNIA JURY INSTRUCTIONS—CIVIL (BAJI) (4th ed. 1959 Supp.). Users will note subsequent changes in this approved instruction in the 1964 supplement. Furthermore, the adoption of the new *California Evidence Code* in 1965, note 17 *supra*, has rendered additional parts of this instruction improper.

³⁹ See, e.g., Wiehl, *supra* note 14, at 386-96.

⁴⁰ See text accompanying notes 16 and 17 *supra*.

⁴¹ This will be difficult in Washington. See Wiehl, *supra* note 14, 386-87.

⁴² Compare CAL. EVIDENCE CODE § 600(a).

⁴³ Comment to Rule 13, UNIFORM RULES OF EVIDENCE.

⁴⁴ *Accord*, Wiehl, *supra* note 14, at 387-90. *But see* McCORMICK, EVIDENCE 639-49 (1954). For purposes of this proposal, an instruction should not be given on permissive presumptions even though neither the basic nor the presumed facts have been challenged, for the reason that the permissive presumption has served its purpose by taking the case to the jury and making possible a finding of the presumed fact, but

important exception.⁴⁵

Next, presumptions should be classified as *conclusive*,⁴⁶ or *rebuttable*,⁴⁷ and rebuttable presumptions should be classified as either a presumption affecting the burden of producing evidence⁴⁸ or a presumption affecting the burden of proof.⁴⁹ This is, basically, the new California approach, and it is implemented by clear and concise provisions defining the effect of each type of presumption.⁵⁰

Lacking such provisions, we are, nevertheless, by using these classifications in a position to draft pattern instructions with some degree of assurance as to their validity.

A. Conclusive Presumptions:

The Instruction:

If you find [here insert the basic facts] (as for example, that the child is under six years of age), then you must find [the presumed

it is not determinative of the issue. Therefore, the permissive presumption has served its purpose by getting the case to the jury. *State v. Lew*, 26 Wn. 2d 394, 399-400, 174 P.2d 291, 293 (1946) (presumption that ownership, once proved, continues); *State v. Hatfield*, 65 Wash. 550, 118 Pac. 735 (1911) (presumption of defendant's knowledge of falsity from the mere uttering of a forged instrument).

If *res ipsa loquitur* is properly classified as a *permissive* presumption (jury may find), rather than a mandatory presumption (jury must find), then no instruction should be given on *res ipsa loquitur*, whether the basic facts are challenged or not. *Tuengel v. Stobbs*, 59 Wn. 2d 477, 367 P.2d 1008 (1962); *Chase v. Beard*, 55 Wn. 2d 58, 346 P.2d 315 (1959); *Nopson v. Wockner*, 40 Wn. 2d 645, 245 P.2d 1022 (1952). *But see Crippen v. Pulliam*, 61 Wn. 2d 725, 380 P.2d 475 (1963).

⁴⁵ The exception: rebuttable presumptions, statutory or otherwise, that establish an element of a crime. In this instance a charge that the statutory inference is mandatory upon a finding of the basic facts would be unconstitutional. *United States v. Gainey*, 380 U.S. 63 (1965); *State v. Person*, 56 Wn. 2d 283, 352 P.2d 189 (1960). For an excellent discussion of this problem, see CAL. LAW REVISION COMM'N, *op. cit. supra* note 15, at 98, 101-05.

Unfortunately, the California Legislature chose to disregard this proposal in enacting the new Evidence Code. See § 607 of the act.

⁴⁶ Conclusive presumptions are not evidentiary rules, but rather are rules of substantive law. *McCORMICK, EVIDENCE* 640, n.2 (1954); 9 *WIGMORE, EVIDENCE* § 2492 (1940). See CAL. EVIDENCE CODE §§ 601, 620.

⁴⁷ This term serves one purpose only—to indicate that the presumption may be met and overcome by competent evidence. See generally 9 *WIGMORE, EVIDENCE* § 2491 (1940).

⁴⁸ CAL. EVIDENCE CODE § 603:

A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.

⁴⁹ CAL. EVIDENCE CODE § 605:

A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of the legitimacy of children, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.

⁵⁰ CAL. EVIDENCE CODE § 604, Effect of presumption affecting burden of producing evidence; § 606, Effect of presumption affecting burden of proof. See CAL. LAW REVISION COMM'N, *op. cit. supra* note 15, at 98, 100-01.

fact] (as for example, for the child on the issue of his contributory negligence).

Note on use:

This instruction should be used only where the basic facts of a conclusive presumption are in issue, such as where the age of the child is in dispute.⁵¹

Comment:

If there is no dispute as to the basic facts of a conclusive presumption, no instruction on the presumption is required. The point will be adequately covered in instructions on the law of the case.⁵²

B. Rebuttable (*i.e.*, Non-Conclusive) Presumptions, which affect the burden of producing evidence:⁵³

1. Where neither the basic facts nor the presumed facts have been challenged:

The instruction:

If you find [the basic facts], then you must find [the presumed facts].

Note on Use:

This instruction should be given where evidence of the basic facts has been introduced and no contrary evidence has been introduced by the opponent, and yet the court is of the opinion that the jury should be permitted to decide whether or not to believe the evidence in support of the basic facts.

Comment:

Even uncontradicted evidence is not binding on a jury when

⁵¹ In Washington, a child under six cannot be contributorily negligent. *Cox v. Hugo*, 52 Wn. 2d 815, 329 P.2d 467 (1958). The new *California Evidence Code* specifically classifies the following presumptions as conclusive: § 621, Legitimacy; § 622, Facts recited in a written instrument; § 623, Estoppel by own statement or conduct; § 624, Estoppel of tenant to deny title of landlord.

⁵² *Von Saxe v. Barnett*, 125 Wash. 639, 217 Pac. 62 (1923); *Miller v. Supreme Tent of the Maccabees*, 108 Wash. 689, 185 Pac. 593 (1919); *Bullock v. Yakima Valley Transp. Co.*, 108 Wash. 413, 184 Pac. 641 (1919); *Peters v. Casualty Co. of America*, 101 Wash. 208, 172 Pac. 220 (1918).

⁵³ The new *California Evidence Code* specifically classifies the following presumptions as among those affecting the burden of producing evidence; § 631, Money delivered by one to another; § 632, Thing delivered by one to another; § 633, Obligation delivered up to the debtor; § 634, Person in possession of order on himself; § 635, Obligation possessed by creditor; § 636, Payment of earlier rent or installments; § 637, Ownership of things possessed; § 638, Ownership of property by person who exercises acts of ownership; § 639, Judgment correctly determines rights of parties; § 640, Writing truly dated; § 641, Letter received in ordinary course of mail; § 642, Conveyance by person having duty to convey real property; § 643, Authenticity of ancient document; § 644, Book purporting to be published by public authority; § 645, Book purporting to contain reports of cases.

the jury can find circumstances inconsistent with it; and a jury is not at all bound to believe interested testimony.⁵⁴

2. Where the basic facts have been challenged, but not the presumed facts:

The Instruction:

If you find [the basic facts], then you must find [the presumed facts].

Note on Use:

This instruction should be given in those instances where the existence of the basic facts is an issue for the jury.⁵⁵

3. Where the presumed facts have been challenged:

The Instruction:

The [defendant] [plaintiff] concedes [the basic facts], but has introduced evidence challenging [the presumed facts]. From the concession of [the basic facts], the law presumes [the presumed facts]. You must find [the presumed facts] unless you believe evidence which you find reasonably tends to prove that [the presumed facts are not so]. If you believe evidence which you find reasonably tends to prove that [the presumed facts are not so], then you will disregard the presumption and decide whether, on such portion of the whole evidence introduced by both sides as you accept, [plaintiff] [defendant] has established by [the appropriate burden of proof instruction] the [presumed fact].

Note on Use:

This instruction is proper where the presumed facts have been challenged by the introduction of evidence contrary to the presumed facts and the weight to be given to this evidence is for the jury. It should not be given if the evidence is so overwhelming as to warrant a reversal if it were disregarded.

Comment:

The proposed instruction is adapted from 1 NY PJI 1:63.⁵⁶ It is a sensible compromise between the Thayer view and the right of the jury to disbelieve evidence. There is Washington authority which supports this approach.⁵⁷ There is also Washington author-

⁵⁴ Wichl, *supra* note 14, at 396, n.98.

⁵⁵ See, *c.g.*, *Shaw v. Prudential Ins. Co.*, 158 Wash. 43, 290 Pac. 694 (1930).

⁵⁶ See text accompanying notes 19-22 *supra*.

⁵⁷ *Chaloupska v. Cyr*, 63 Wn. 2d 463, 466-67, 387 P.2d 740, 742-43 (1963) (presumption of negligence when property not perishable is delivered to a bailee in

ity for the proposition that a presumption disappears entirely from the case as a matter of law when the opponent introduces competent evidence from either interested or disinterested witnesses *and* where the testimony is uncontradicted, unimpeached, clear and convincing.⁵⁸ These two positions are not in conflict, but rather, are simply a positive and a negative way of stating the same rule—that if the weight of the evidence is a jury question, the instruction should be given. On the other hand, if the evidence is uncontradicted, unimpeached, clear and convincing, it would be reversible error to permit the jury to disregard it. So, where a question arises as to whether testimony is uncontradicted, unimpeached, clear and convincing, a question is raised for jury determination; the presumption is not dispelled as a matter of law and the proposed instruction should be given to the jury.⁵⁹

C. Rebuttable (*i.e.*, Non-Conclusive) Presumptions, which affect the burden of producing evidence, but which are *permissive* rather than mandatory:⁶⁰

1. Where a presumption, statutory or common law, aids the state in a criminal case:

The Instruction:

If you find [the basic fact] (as for example, that defendant was present, in a hunting area, after sunset, with gun and flashlight), then you may but you are not required to find [the presumed fact].

good condition and is returned damaged or not returned at all); *Burrier v. Mutual Life Ins. Co. of N.Y.*, 63 Wn. 2d 266, 387 P.2d 58 (1963) (presumption against suicide) (*But see* the concurring opinion in *Burrier v. Mutual Life Ins. Co. of N.Y.*, *supra*, which raises the point discussed in the text accompanying note 22 *supra*.) *Kay v. Occidental Life Ins. Co.*, 28 Wn. 2d 300, 183 P.2d 181 (1947) (presumption that false statements knowingly made on an application for insurance were made with the intent to deceive); *Bradley v. Savidge, Inc.*, 13 Wn. 2d 28, 63-64, 123 P.2d 780, 795 (1942) (presumption that driver of car involved in an accident was agent of the owner and acting within the scope of his authority upon a showing of ownership); *Gillingham v. Phelps*, 11 Wn. 2d 492, 119 P.2d 914 (1942) (presumption that title to personal property passes to buyer when contract is made and in pursuance of that contract the goods are delivered to the buyer).

⁵⁸ See, *e.g.*, *Callen v. Coca Cola Bottling Co.*, 50 Wn. 2d 180, 310 P.2d 236 (1957); *Bradley v. Savidge, Inc.*, *supra* note 57, at 63; collection of cases in *MEISENHOLDER, WASHINGTON PRACTICE—EVIDENCE*, chs. 31 & 32 (1965).

⁵⁹ See, *e.g.*, *Burrier v. Mutual Life Ins. Co.*, 63 Wn. 2d 266, 387 P.2d 58 (1963); *In re Shaner's Estate*, 41 Wn. 2d 236, 248 P.2d 560 (1952); *Hanford v. Gochry*, 24 Wn. 2d 859, 167 P.2d 678 (1946); *Bradley v. Savidge, Inc.*, 13 Wn. 2d 28, 64, 123 P.2d 780, 795-96 (1942); collection of cases in *MEISENHOLDER, op. cit. supra* note 58, chs. 31 & 32.

⁶⁰ See note 45 *supra* and accompanying text.

Note on Use:

This instruction which must be permissive in form, may be used where the defendant offers no evidence challenging or explaining basic facts.⁶¹ It should be accompanied by a further instruction directing the jury to consider the above instruction in the light of presumption of innocence of the accused.⁶²

*Comment:*⁶³D. Rebuttable (*i.e.*, Non-Conclusive) Presumptions, which affect the burden of proof:⁶⁴

1. Where neither the basic facts nor the presumed facts have been challenged:

The Instruction:

If you find [the basic facts], then you must find [the presumed facts].

2. Where the basic facts have been challenged, but not the presumed facts:

The Instruction:

If you find [the basic facts], then you must find [the presumed facts].

3. Where the presumed facts have been challenged:

The Instruction:

If you find [the basic facts], then you must find [the presumed facts], unless you are convinced by [clear and convincing] [a preponderance of the] evidence that [the presumed facts] [do not exist] (or) [are not so].

⁶¹ United States v. Gainey, 380 U.S. 63 (1965) (presumption of statutory illegal operation of still arising from unexplained presence); State v. Person, 56 Wn. 2d 283, 352 P.2d 189 (1960) (statutory illegal hunting presumption); State v. Lew, 26 Wn. 2d 394, 400-02, 174 P.2d 291, 293-94 (1946) (presumption of guilt from flight). *But see* State v. Hatfield, 65 Wash. 550, 118 Pac. 735 (1911) (presumption of defendant's knowledge of falsity from the mere uttering of a forged instrument). See also note 45 *supra*.

⁶² State v. Person, *supra* note 61.

⁶³ See notes 45, 60 and 61 *supra*.

⁶⁴ The new *California Evidence Code* specifically classifies the following presumptions as among those affecting the burden of proof: § 661, Legitimacy (contrast with the conclusive presumption in § 621); § 662, Owner of legal title to property is owner of beneficial title; § 663, Ceremonial marriage; § 664, Official duty regularly performed (except as to an issue of lawful arrest); § 665, that a person is presumed to intend the ordinary consequences of his voluntary acts (except to prove specific intent in criminal cases); § 666, Judicial action, lawful exercise of jurisdiction; § 667, Death of person not heard from in seven years; § 668, unlawful intent presumed from doing an unlawful act (except to establish specific intent in criminal cases).

or, in the alternative:

In determining the existence of [the presumed facts] you should consider the evidence against its existence, the inferences that can reasonably be drawn from [the basic facts] if you find [the basic facts], and any other fact bearing on this issue, and you should find [the presumed facts] unless the evidence to the contrary [is clear and convincing] [preponderates].

Note on Use:

This instruction should be used in all cases where the presumed facts of a presumption affecting the burden of proof have been challenged by evidence.

Comment:

Although the language of a number of Washington cases would, apparently, support the position that the Washington Supreme Court has classified certain presumptions as shifting the burden of proof on the issue of the presumed facts of the presumption if the basic facts are found by the jury,⁶⁵ the uncertainty of the law is a clear indication of the need for the authoritative classification of all known presumptions above suggested.⁶⁶

In conclusion, the draftsman of pattern jury instructions on the subject of presumptions would do well, as unfortunately I did not, to heed the words of Judge Hale:

We hesitate to go into the legal area where presumptions abound, for it is a place fraught with danger—in some areas an almost impenetrable jungle, in others a mistladen morass—where more than one academician has been known to lose his way and, once returned, is never quite the same again.⁶⁷

⁶⁵ *E.g.*, *Steiner v. Royal Blue Cab Co.*, 172 Wash. 396, 20 P.2d 39 (1933) (presumption of agency from ownership of a motor vehicle; burden on the opponent to overcome the presumption by a fair preponderance of all the evidence). *But see* *Bradley v. Savidge, Inc.*, 13 Wn. 2d 28, 123 P.2d 780 (1942). In fraud cases, the presumption of honesty and fair dealing must be rebutted by evidence that is clear, cogent and convincing. *Luna de la Peunta v. Seattle Times Co.*, 186 Wash. 618, 59 P.2d 753 (1936); in criminal cases, the presumption of innocence attends the defendant until overcome by the evidence, and guilt is proven beyond a reasonable doubt. *State v. Tyree*, 143 Wash. 313, 255 Pac. 382 (1927); in a suit to recover on a policy of life insurance, defense-suicide, presumption against suicide remains in the case until it is overcome by evidence to the contrary. *Burrier v. Mutual Life Ins. Co.*, 63 Wn. 2d 266, 387 P.2d 58 (1963). Yet, note that in each of these examples the presumption operates against the party who has the burden of proof, and only in the first example in, possibly, a different degree.

⁶⁶ See text accompanying notes 14-17 *supra*.

⁶⁷ *Burrier v. Mutual Life Ins. Co.*, 63 Wn. 2d 266, 274, 387 P.2d 58, 62 (1963).