WHAT IS THE PROPER JURY INSTRUCTION ON THE STATE-OF-THE-ART PRESUMPTION?

By Mark A. Lienhoop

© November 6, 2013

This is a bait and switch article. It applies to instructing the jury on the continuing effect of rebuttable presumptions in all civil cases. It just so happens that one of the best examples is the presumption of no liability under Indiana's Product Liability Act. That presumption is broader than just the state of the art defense.

In a product liability action there is a rebuttable presumption that the product that caused the physical harm was not defective, and that the manufacturer or seller of it was not negligent, if before its sale by the manufacturer: 1) it conformed to the generally recognized state of the art applicable to safety of the product at the time the product was designed, manufactured, packaged, and labeled; or 2) it complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of either. Ind. Code 34-20-5-1.

As the statute indicates, the presumption is rebuttable. There has been a long-standing disagreement in the common law about a rebuttable presumption's affect once evidence to contradict it has been introduced. *See Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 982 (Ind. 2006)(excellent discussion of this disagreement).

Schultz claimed his Ford's defective roof left him a quadriplegic after a roll-over accident. A verdict for Ford was reversed by the Court of Appeals. The Court of Appeals found the jury instruction on the IC 34-20-5-1 rebuttable presumption legally incorrect because it believed the presumption should have dropped from the case once contrary evidence was introduced.

The Indiana Supreme Court granted transfer, which vacated the Court of Appeals decision, and then affirmed the defense verdict. *Id.*, at 979. It held that Indiana Rule of Evidence 301 means just what it says: a presumption shall have continuing effect even though evidence contrary to the presumption is introduced. *Id*., at 984.

[In federal civil cases, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision. FRE 302. So Indiana's state law that the rebuttable presumption has continuing effect should apply to cases based on Indiana's Product Liability Act which are filed in federal court.]

In *Shultz,* the contested instruction basically told the jury that if they found Ford proved by a preponderance of the evidence that the vehicle complied with Federal Motor Vehicle Standard 216, then they may presume the vehicle was not defective and that Ford was not negligent in its design; however, the plaintiffs could rebut this presumption by evidence tending to show that the vehicle was defective. *Id*., at 979.

What is interesting is that even though the statute uses the word presumption, even though IRE 301 uses the word presumption, and even though the presumption has continuing effect, in *Schultz* the Indiana Supreme Court found that the jury instruction regarding this presumption should not have used the words "presume" or "presumption."

The Indiana Supreme court in *Shultz* was concerned that use of the words "presume" or "presumption" might make a jury think the presumption is conclusive. That is a little perplexing since the instruction also told the jury that the presumption could be rebutted. *Id.*, at 986. The *Shultz* Court did not directly indicate that the word "rebutted" was vague, ambiguous, or needed to be defined. However, instructing the jury that the presumption could be rebutted obviously did not alleviate the danger the Court saw in using the words "presume" or "presumption."

Even though the jury instruction in *Shultz* used the words "presume" and "presumption," the Indiana Supreme Court found that the instruction was not reversible error. *Id*., at 987. This was because the words were not used in a "legal or technical sense" and because there was no language to the effect that "the law presumes…." *Id.* Instead, the *Shultz* court thought a typical juror would find use of "presume" and "presumption" in this instruction synonymous with "infer" or "assume." *Id*. Also, the Court found that the instruction was substantively "balanced, i.e. fair to both sides." *Id.* As such, the instruction gave continuing effect to the statutory presumption in I.C. 34-20-5-1 and did not unfairly prejudice the plaintiffs. *Id.*

Even though the Indiana Supreme Court upheld the defense verdict in *Shultz*, there should be no mistake that *Schultz* gave a warning against using the words "presume" and "presumption" in a jury instruction on a rebuttable presumption. *Schultz* specifically held that "a presumption is properly given 'continuing effect' under the last sentence of Indiana Evidence Rule 301 by the trial court instructing the jury that when a basic fact is proven, the jury may *infer* the existence of a presumed fact." (emphasis added) *Id*., at 985. In fact, it started the very next section with "As a general matter then, Indiana Evidence Rule 301 authorizes a court to instruct a jury on permissible *inferences* that may be drawn from the basic facts that give rise to presumptions,…."

So, just what is a proper jury instruction on the rebuttable presumption in Indiana's Product Liability Act? There does not appear to be Indiana Model Civil Instruction on it, nor on presumptions in general.

The closest Indiana Model Civil Instruction may be the one for *res ipsa loquitur*. It uses the new phrase common in the Model Instructions of "the greater weight of the evidence" instead of "by a preponderance of the evidence." While it's comments do not refer to *Shultz*, it does

follow its holding in four ways: 1) to the extent it uses "infer" instead of presume; 2) to the extent it does not use the word presumption; 3) to the extent it implies that the inference is not conclusive; and 4) to the extent it implies that the inference is continuing despite the introduction of contrary evidence.

The Indiana Model Civil Instruction on *res ipsa locquitur* provides:

> There are certain situations in which the nature of an incident and the circumstances surrounding it lead to the reasonable belief that it would not have occurred unless someone did not use reasonable care.
>
> If [plaintiff] proves all of the following by the greater weight of the evidence:
>
> (1) [plaintiff] was [injured][harmed][damaged][as a result of][when] [here insert event which plaintiff claims was a responsible cause of injury/damage/harm];
> (2) only the [defendant][defendant's agent] controlled [insert name of instrumentality]; and
> (3) under normal circumstances the [event][insert event] would not have occurred unless the [defendant][defendant's agent] was negligent,
>
> then you may *infer* that the incident resulted from [defendant]'s negligence. *You may consider this inference with all of the other evidence* in arriving at your verdict.

Indiana Model Civil Jury Instruction 325 (emphasis added).

The last line of the Model *res ipsa locquitur* instruction is a simple and elegant way to say the presumption can be rebutted but has continuing effect. At least it would let counsel advocate such when going over the instruction with the jury in closing arguments. Spelling that out more will make it wordier but might leave less chance to an incorrect interpretation by the jury.

For example, based on *Shultz,* and the Model *res ipsa loquitur* instruction as guidance, a proper instruction on the state of the art defense might be something like this:

> If you find by the greater weight of the evidence that before the [H.I. product] was sold by [H.I. the manufacturer], the [H.I. product] conformed

> with the generally recognized state of the art applicable to the safety of the [H.I. product] at the time it was designed, manufactured, packaged, or labeled, then you may infer that the [H.I. product] was not defective and that [H.I. manufacturer and/or seller] [was/were] not negligent.
>
> Evidence has been introduced that the [H.I. product] was defective [and/or] that the [H.I. manufacturer/ seller] [was/were] negligent. You must decide if plaintiff has proved by a greater weight of the evidence that such evidence of defect or negligence overcomes the inference of no defect [and/or] no negligence.

A similar instruction should apply to all Indiana rebuttable presumptions. Of course, the particular wording of the instruction depends on the substantive law regarding what in particular is presumed and what in particular is required to rebut it.

Here is one used in a recent case regarding a plaintiff whose first language was not English. The plaintiff had signed documents in his worker's compensation case that gave a significantly different version of the accident than the version he was asserting in his tort case. The basic presumption is that a person is presumed to understand and know the contents of a document he signs. The instruction was:

> A person should read and understand a document before signing it. If [plaintiff] could not read it, he should have had it read to him. If [plaintiff] could not understand it, he should have it explained to him. If you find by the greater weight of the evidence that [H.I. plaintiff] signed the [H.I. documents], then you may infer that [H.I. plaintiff] understood those documents.
>
> Evidence has been introduced to excuse or justify [plaintiff's] failure to understand those documents. You must decide if [plaintiff] has proved by a greater weight of the evidence that the evidence of excuse or justification overcomes the inference that [plaintiff] understood the documents he signed.

The take away from this article is that all Indiana rebuttable presumptions remain in the case after contrary evidence is introduced, and that instead of "presume" or "presumption" a jury instruction regarding a rebuttable instruction should use the words "infer" or "inference."

Mark A. Lienhoop is a managing partner of Newby, Lewis, Kaminski & Jones, LLP, in La Porte, IN. His e-mail is *MALienhoop@nlkj.com*. The views expressed in this article are his and not necessarily those of the Defense Trial Counsel of Indiana.