MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 2 | Issue 1 Article 4

1976

Presumptions and the New Rules of Evidence in Minnesota

Peter N. Thompson

PRESUMPTIONS AND THE NEW RULES OF EVIDENCE IN MINNESOTA

By PETER N. THOMPSON†

I. INTRODUCTION

The enactment of the Federal Rules of Evidence[1] promises to have far reaching impact on trial practice throughout the country in both the federal and state courts. As was the case with the Federal Rules of Civil Procedure, the Federal Rules of Evidence are serving as a model for codification in the states.[2] Accordingly, Minnesota is presently in the process of codifying rules of evidence, using the federal rules as a guide.[3] As the Federal experience illustrates, one of the more troublesome questions facing the drafters of the Minnesota rules is the effect to be given evidentiary presumptions.

The questions relating to presumptions mark an area of evidence law that is in need of codification on the federal and state level. Notwithstanding the great wealth of literature and case law analyzing the relationship between presumptions, inferences, and burden of persuasion, the controversies in this area are largely unresolved.[4] Although codification of a rule dealing with presumptions will not eliminate the problems per se, the adoption of a well-drafted rule can serve as a

†A.B., DePauw University, 1969, J.D. University of Michigan, 1972. Professor Thompson is an Associate Professor of Law at the William Mitchell College of Law. He is also the Reporter for the Minnesota Supreme Court Advisory Committee for Uniform Rules of Evidence. The views expressed in this article are the author's views and not necessarily the views of the Advisory Committee.

1. *See* FED. R. EVID. The Rules became effective July 1, 1975. *See* 28 U.S.C. app. (Supp. V, 1975). For a concise statement of the procedural history of the Federal Rules of Evidence, see S. REP. NO. 1277, 93d Cong., 2d Sess. 4-6 (1974), *reprinted in* 28 U.S.C.A. FED. R. EVID. 799-800 (1975).

2. *See* NEV. REV. STAT. § 47.020 (1973); ME. R. EVID., *reprinted in* 8 ME. REV. STAT. ANN. at 269 (Supp. 1975); N.M.R. EVID., *reprinted in* 4 N.M. STAT. ANN. at 115 (Supp. 1975); WIS. R. EVID., *reprinted in* 40L WIS. STAT. ANN. at 1 (1975). *See also* UNIFORM RULES OF EVIDENCE (1974).

3. With legislative authority under MINN. STAT. § 480.0591 (1974) the Minnesota Supreme Court appointed an advisory committee to consider and to recommend a set of evidentiary rules for promulgation by the court. The committee has been meeting regularly since August, 1974. In June, 1976, the committee's preliminary draft along with committee comments were circulated to the bench and bar for public comment and debate. The committee used the recently enacted Federal Rules of Evidence as a model. In the absence of a strong conflicting state policy, the federal rule was recommended. PROPOSED UNIFORM RULES OF EVIDENCE FOR MINNESOTA STATE COURTS, preliminary comment (1976).

4. One commentator "ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms, except for its first cousin, 'burden of proof.' " C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 342, at 802-03 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

starting point. The appropriate considerations that must be addressed in dealing with the issues raised can be identified and the bar's attention can be directed to the proper vehicle for resolving the problems. The purpose of this article is not to join in the debate between the advocates of the "flitting bats" as opposed to the "non-bursting bubbles," but rather to relate in a straightforward manner the status of both the statutory and common law of presumptions in Minnesota and the practical effects that would accompany the adoption of the federal rule by the Minnesota Supreme Court.

II. THE FEDERAL EXPERIENCE

The conflict and debate in the area of presumptions is demonstrated in the history of the enactment of federal rule 301. In the process of drafting the federal rule, the United States Supreme Court Advisory Committee, the House of Representatives, and the Senate each advocated a different position as to the proper effect to be given evidentiary presumptions. The Senate version, which represents a codification of the Thayer[5]-Wigmore[6] theory of presumptions, eventually prevailed. The enacted rule provides:[7]

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

The rule limits the role of presumptions to an undramatic procedural mechanism for allocating the burden of producing evidence.[8] The presumption satisfies the duty to produce evidence on an issue and, if unrebutted, necessitates a directed verdict. As a procedural mechanism it affects the outcome of the litigation only when the other

5. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, ch. 8 *passim* (1898) [hereinafter cited as THAYER].

6. *See* 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2491(2) (3d ed. 1940) [hereinafter cited as WIGMORE].

7. FED. R. EVID. 301.

8. For a discussion of the distinction between the burden of producing evidence and the burden of persuasion, see MCCORMICK, *supra* note 4, at § 336; THAYER, *supra* note 5, at ch. 9. An understanding of this distinction is essential to the proper application of presumptions. Since the burden of producing evidence relates only to the question of whether a judge should direct a verdict or allow the issue to go to the jury, the jury need not be concerned with the burden of production nor the presumptions which affect the burden of producing evidence. The burden of persuasion becomes relevant only if both parties have satisfied the burden of producing evidence. The jury is then instructed as to which party bears the burden of persuasion.

party fails to satisfy its burden of producing evidence. If, however, substantial evidence is produced rebutting the presumed fact, the presumption disappears and has no further function. Hence, presumptions of this sort are described as "bats of the law flitting in the twilight, but disappearing in the sunshine of actual facts,"[9] or perhaps more commonly as "bursting bubbles."[10] In theory, most states have adopted this view of presumptions. However, among those jurisdictions that claim to follow the Thayer-Wigmore theory, there are numerous variations in the application of the rule.[11]

The major criticism of the "bursting bubble" theory is that too little emphasis is given to the underlying policy reasons that established the presumption.[12] The policy reasons for allocating the burden of persuasion, principles of fairness, probability, and public policy often overlap or are identical with the policy reasons for the creation of a presumption. It is argued, not altogether illogically, that the existence of a presumption should have some effect on or determine the burden of persuasion on a given issue.[13] Limiting the application of a presumption to the rare situation in which the presumed fact is uncontradicted by the opposing party, gives too little weight to the policy reasons that resulted in the creation of presumptions.[14]

Accordingly, the Thayer-Wigmore theory was rejected by the United States Supreme Court Advisory Committee in favor of a rule which treats presumptions as affecting the burden of persuasion. The rule proposed by the Committee provided:[15]

> In all cases not otherwise provided for by Act of Congress or by these rules a 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.

However, although the Advisory Committee's draft marked the culmination of thirteen years of study, public comment, and debate,[16]

9. *See* Mackowik v. Kansas City, St. J. & C.B.R.R., 196 Mo. 550, 571, 94 S.W. 256, 262 (1906).

10. *See* MCCORMICK, *supra* note 4, § 345 at 821.

11. *Id.* at 823-26.

12. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity,* 12 STAN. L. REV. 5, 18 (1959); Morgan & Maguire, *Looking Backward and Forward at Evidence,* 50 HARV. L. REV. 909, 913 (1937). *See* Gausewitz, *Presumptions,* 40 MINN. L. REV. 391, 408, 410-11 (1956); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof,* 47 HARV. L. REV. 59, 77-83 (1933).

13. *See* Gausewitz, *supra* note 12, at 410; Morgan, *Some Observations Concerning Presumptions,* 44 HARV. L. REV. 906, 931-32 (1931).

14. *See* authorities cited in note 12 *supra.*

15. 56 F.R.D. 183,208 (1972).

16. *See* note 1 *supra.*

and was approved by the Supreme Court,[17] the proposal never became operative. Congress, harboring reservations with regard to the new rules, promptly enacted legislation requiring its approval before the rules could be applied in the federal courts.[18] The rules were referred to the House of Representatives for more hearings and debate.

The House of Representatives drastically altered the proposed rule 301, substituting a compromise between the Thayer-Wigmore theory of vanishing presumptions and the theory that presumptions should govern the burden of persuasion. The rule proposed by the House provided:[19]

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with the evidence and, even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of the facts.

Thus, according to the House proposal a presumption is to be evidence from which the jury could draw inferences. This approach to presumptions has some support in case law[20] and is adopted in Minnesota Statutes Section 602.04, which presumes due care on the part of the deceased in a wrongful death action.[21] However, the theory has been strongly criticized as presenting an impossible situation for a jury since they are required to weigh sworn testimony against an evidentiary presumption to determine which prevails.[22] As indicated previously, the House amendment was rejected by the Senate.[23]

Surprisingly, none of the proposed rules defines presumption. In the absence of an express definition, it might be appropriate[24] to refer to the definition provided in the Uniform Rules of Evidence:[25]

---

17. *See* Order Promulgating the Federal Rules of Evidence, 56 F.R.D. 184 (1972).

18. *See* Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

19. H.R. Res. 5463, 93d Cong., 2d Sess., 120 CONG. REC. H546 (daily ed. Feb. 6, 1974).

20. *See* Annot., 5 A.L.R. 3d 19, 35-39 (1966).

21. See notes 96-105 *infra* and accompanying text.

22. Speck v. Sarver, 20 Cal. 2d 585, 594, 128 P.2d 16, 21 (1942) (Traynor, J., dissenting); 1 JONES ON EVIDENCE § 3.6 (6th ed. S. Gard 1972); Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 333-34 (1952); McBaine, *Presumptions; Are They Evidence?*, 26 CALIF. L. REV. 519, 520 (1938); Morgan, *supra* note 12, at 73-74. *See* TePoel v. Larson, 236 Minn. 482, 491, 53 N.W.2d 468, 473 (1952); Ryan v. Metropolitan Life Ins. Co., 206 Minn. 562, 569, 289 N.W. 557, 560-61 (1939).

23. *See* S. REP. NO. 1277, 93d Cong., 2d Sess. 9(1974), *reprinted in* 28 U.S.C.A. FED. R. EVID. 803-04 (1975).

24. Fornoff, *Presumptions—The Proposed Federal Rules of Evidence*, 24 ARK. L. REV. 401, 405 (1971).

25. UNIFORM RULE OF EVIDENCE 13 (1953 version). *See also* MODEL CODE OF EVIDENCE rule 701 (1942).

> Rule 13. A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in an action.

Upon the establishment of the basic facts, the presumed fact is to be assumed. Thus, upon establishing that a letter was properly addressed, stamped, and mailed, it is assumed that the letter was delivered.[26] The problems of who must assume the fact of delivery and the effect of such an assumption give rise to the controversy. If the opponent of the presumption fails to introduce evidence to rebut the assumed fact of delivery the presumption would require that a directed verdict be entered under each of the proposals discussed above.

If, however, the opponent introduces evidence supporting the claim that the letter was not delivered the trial would take different directions, depending upon which rule of evidence was applicable. Under the Advisory Committee's approach, the jury would be instructed that the burden of persuasion on the issue of delivery rested on the party who claimed that the letter had not been delivered. The House version would not affect the burden of persuasion, but would require the jury be instructed that there is a presumption in law and the jury must weigh the presumption against the sworn testimony in determining which preponders. The Senate version would minimize the impact of the presumption because upon the introduction of the rebutting evidence the presumption would have no further function at the trial. Jury instructions, including the instruction as to the burden of persuasion, would not be influenced by the presumption.

In addition, despite the divergent approaches of the three versions, none of them expressly deals with the problems that arise if the basic facts are controverted. If there is proof that the letter was not placed in the mailbox, a controversy arises as to the presence of the basic facts. If the assumed fact of delivery is not contested, a consistent result would be reached under all three rules. The jury would be instructed that if they find that the letter was duly mailed they must also find that the letter was delivered. However, if both the basic fact of mailing and the assumed fact of delivery are contested, there would be a divergence among the three theories in the treatment of the presumption.

The Advisory Committee rule would require an instruction that the proponent has the burden of persuasion both as to the underlying fact

---

26. *In re* Estate of Nelson, 180 Minn. 570, 572-73, 231 N.W. 218, 219-20 (1930). This presumption probably originated because of the difficulty involved in proving delivery coupled with the high probability that the mail service acted efficiently and delivered the letter properly. *See* MCCORMICK, *supra* note 4, § 343 at 807-08. *See generally* WIGMORE, *supra* note 6, at § 2519.

of proper mailing and the presumed fact of delivery. However, if the jury decides the letter was properly mailed then the burden of persuasion on the issue of delivery shifts to the opponent. In essence, the burden of persuasion as to delivery is in limbo until the threshold issue — proper mailing — is resolved. An instruction reflecting this view can be composed but it is unlikely it would be fully understood by the jury.[27]

The jury instruction under the House version would be almost as complex. If the jury finds the letter to have been properly mailed it is to presume delivery. The presumption, however, may be rebutted by the opponent's credible evidence. On the other hand, if the jury finds the mailing to have been improper they are instructed that no presumption arises. The enacted rule, of course, would not affect the burden of persuasion. The presumption, once rebutted, would disappear and no jury instruction is required.

As these examples illustrate, the most workable rule seems to be rule 301 adopted from the Senate version, which embodies the Thayer-Wigmore theory. This rule can be easily applied by the trial court without instruction. The jury is not required to engage in the confusing process of weighing the presumption against sworn testimony; nor must they perform the mental gymnastics required by a shifting burden of persuasion. However, this rule could have the impact of minimizing the underlying policy reasons that create the presumption.

III. Application Of Presumptions In Minnesota

The Minnesota Supreme Court Advisory Committee for Uniform Rules of Evidence has considered each of the various proposals in its deliberations[28] on a rule dealing with presumptions. The Committee is

27. *See* Morgan, *supra* note 12, at 76-77.

28. The committee also considered the approach of the *Model Code of Evidence* (1942), the *Uniform Rules of Evidence* (1953 version) and the *Cal. Evid. Code* §§ 603-06 (West 1966), *as amended*, (West Supp. 1976). The *Model Code* codifies the Thayer-Wigmore theory with the exception of the presumption of legitimacy which was to directly govern the burden of persuasion. Model Code of Evidence, ch. 8 (1942). The 1953 version of the *Uniform Rules of Evidence* lumped presumptions into two categories: those presumptions based on probative value and those presumptions based solely on social policy. The former operate to shift the burden of persuasion onto the opposing party. The latter shift only the burden of producing evidence. In adopting the *Uniform Rules of Evidence* the National Conference of Commissioners on Uniform State Laws abandoned their previous approach and adopted a rule identical to the rule proposed by the United States Supreme Court Advisory Committee, rule 301(a).

California also divides presumptions into two categories. However, in California a presumption based on probative value affects only the burden of producing evidence. Presumptions based on social policy, *inter alia* those favoring the legitimacy of children, validity of marriage, and the stability of titles, on the other hand, control the burden of persuasion. Cal. Evid. Code §§ 603-06 (West 1966), *as amended*, (West Supp. 1976).

recommending that the Minnesota court adopt the enacted federal rule 301.[29] In recommending this rule the Committee did not intend to discredit the underlying policy considerations giving rise to presumptions, but rather urged that these considerations be effectuated by other means.[30]

Before the impact of the adoption of the federal rule 301 can be predicted the status of the present practice in Minnesota must be determined. In theory, this inquiry appears to be a simple task. On numerous occasions the supreme court has announced the rule of law in Minnesota to be in accord with the Thayer-Wigmore rule. In practice, however, the application of the rule has been inconsistent, as is indicated by the frequency with which the issue has been raised on appeal. The inconsistent application may be the result either of confusion as to the definition of a presumption or of improper use of evidentiary presumptions to effectuate some underlying policy. In any event the adoption of the approved rule should at least result in a more uniform application.

The modern source of the law of presumptions in Minnesota stems from the supreme court opinion in *Ryan v. Metropolitan Life Insurance Co.*[31] In *Ryan,* the plaintiff appealed adverse decisions in consolidated actions against several insurance companies for accidental death. The insurance companies defended on the ground that the insured died as a result of suicide. Under the provisions of the accidental death policies, plaintiffs had the burden of proving that the death was accidental rather than suicidal. The trial court's refusal to give an instruction on the presumption against suicide was asserted as error on appeal.

The Minnesota Supreme Court acknowledged that its prior decisions addressing the role of presumption were inconsistent[32] and attempted to resolve the confusion. After weighing the competing theories, the court adopted the Thayer-Wigmore theory which views presumptions as mere procedural devices for allocating the burden of producing evidence. The court ruled that if the presumed fact is unopposed, the party benefiting from it is entitled to a directed verdict on the issue; however, once the presumption is met by competent evidence, it disappears and the case goes to the jury without mention of

29. PROPOSED UNIFORM RULES OF EVIDENCE FOR MINNESOTA STATE COURTS (1976).

30. PROPOSED UNIFORM RULES OF EVIDENCE FOR MINNESOTA STATE COURTS, preliminary comment (1976).

31. 206 Minn. 562, 289 N.W. 557 (1939).

32. *Id.* at 571, 289 N.W. at 561.

the presumption.[33] Thus, the court held that the refusal of the trial judge to instruct on the presumption against suicide was proper.[34]

Had the court stopped there the difficulties in applying presumptions and the inconsistencies of prior decisions might have been resolved. Instead, the court chose to add dictum that a jury instruction may be proper which directs the jury to apply the presumption if it rejects the evidence rebutting the presumption as not credible.[35] The immediate effect was to perpetuate the confusion.

Generally a jury is entitled to accept or to discredit the evidence produced during the course of a trial. This is fundamental to the fact-finding function. The Thayer-Wigmore view of presumptions as a procedural device only requires that the opposing party put forward proof rebutting the presumption, at which time the presumption vanishes. The rebutting proof need not be conclusive. If the jury rejects the evidence rebutting the presumed fact, and there is no other credible evidence supporting the presumed fact, the positions of the parties are in equilibrium and the decision must be against the party having the burden of persuasion. Yet the *Ryan* court stated that in the above circumstance the party benefiting from the presumption prevails. Thus, presumptions may be determinative of the burden of persuasion as was advocated by the United States Supreme Court Advisory Committee.

This conflict within the *Ryan* decision led to continued controversy. In the thirteen years following *Ryan,* the supreme court considered the propriety of instructing a jury on a presumption nearly a dozen times.[36] In all the decisions, the court acknowledged the rule enunciated

33. *Id.* at 568, 289 N.W. at 560.

34. *Id.* at 569-70, 289 N.W. at 560-61.

35. *Id.* at 570, 289 N.W. at 561.

36. In five cases the court found the failure to instruct on a presumption not erroneous because the presumption had been rebutted. *See* Ammundson v. Falk, 228 Minn. 115, 121-23, 36 N.W.2d 521, 525 (1949); Roberts v. Metropolitan Life Ins. Co., 215 Minn. 300, 306-07, 9 N.W.2d 730, 733 (1943); Ralston v. Tomlinson, 207 Minn. 485, 488, 292 N.W. 24, 26 (1940); Hoelmer v. Sutton, 207 Minn. 140, 143, 290 N.W. 225, 227 (1940); Standard Accid. Ins. Co. v. Minnesota Util. Co., 207 Minn. 24, 27, 289 N.W. 782, 784 (1940). In several others, the court found instructions to the jury on a presumption were non-prejudicial. *See* Donea v. Massachusetts Mut. Life Ins. Co., 220 Minn. 204, 212-15, 19 N.W.2d 377, 382-83 (1945); Ogren v. City of Duluth, 219 Minn. 555, 563-64, 18 N.W.2d 535, 539-40 (1945); Bimberg v. Northern Pac. Ry., 217 Minn. 187, 197-98, 14 N.W.2d 410, 415 (5-2 decision), *aff'd per curiam on reargument,* 217 Minn. 206, 14 N.W.2d 419, *cert. denied,* 323 U.S. 752 (1944) (not error to instruct as to applicable law); Lang v. Chicago & N.W. Ry., 208 Minn. 487, 494-95, 295 N.W. 57, 61-62 (1940). And in Moeller v. St. Paul City Ry., 218 Minn. 353, 360, 16 N.W.2d 289, 294 (1944), the court held an instruction on the legal effect of a presumption neither erroneous nor inconsistent with *Ryan. But see* State v. One Buick Sedan Automobile, 216 Minn. 129, 134, 12 N.W.2d 1, 3-4 (1943) (reversal in part on a determination that a presumption was not rebutted by the evidence).

in *Ryan,* but consistently declined to reverse trial court decisions where instructions had been given.

By 1952 the time had arrived for a reconciliation of the issues. The court in *TePoel v. Larson,*[37] a second landmark decision, stated the problem succinctly:[38]

> It would seem from an examination of our cases since the Ryan case that it is neither error to give nor to refuse to instruct the jury that there is a presumption . . . .

TePoel involved the application of the presumption of a decedent's due care in defense of a claim of contributory negligence. The trial court's instruction[39] had the effect of giving evidentiary weight to the presumption by calling for its rebuttal by contrary evidence which satisfied the jury. The supreme court reversed the trial court judgment, citing *Ryan* for the proposition that presumptions affect only the burden of producing evidence and once rebutted disappear. However, the court carefully limited its holding to cases in which the benefit of the presumption worked against the party having the burden of persuasion on the issue. It reasoned that the only justification for giving an instruction on the presumption in such circumstances would be that the presumption is evidence, and thus should be properly weighed against the contrary evidence submitted by the opposing party.[40] The court concluded this was not consistent with its adoption of the Thayer-Wigmore view of presumptions. The court therefore held that it was reversible error to instruct the jury on a presumption where it operated against the party having the burden of persuasion.[41]

In limiting its holding to a situation in which the presumption operates against the party bearing the burden of persuasion, the court did not foreclose the possibility of an instruction to the jury and again failed to adopt conclusively the Thayer-Wigmore theory. The limitation is curious in that the court endorses *Ryan,* which involved a presumption that operated in favor of the party who had the burden of persuasion. Nonetheless, the court in *Caballero v. Litchfield Wood-Working*

37. 236 Minn. 482, 53 N.W.2d 468 (1952), *commented on in* 37 MINN. L. REV. 629 (1953).

38. *Id.* at 490, 53 N.W.2d at 473.

39. *Id.* at 485, 53 N.W.2d at 469-70.

40. *Id.* at 491, 53 N.W.2d at 473 (dictum). The adoption of MINN. STAT. § 602.04 (1974), which presumes due care for his own safety on the part of the decedent, may be indicative of the legislative intent to overrule specifically the result in *TePoel* and *Ryan.* Comment, *Presumption of Due Care by Decedent in Wrongful Death Action,* 44 MINN. L. REV. 352, 354 (1959); *see* Roeck v. Halvorson, 254 Minn. 394, 399, 95 N.W.2d 172, 176 (1959).

41. 236 Minn. at 493, 53 N.W.2d at 474.

Co.[42] hinted in a footnote[43] that *TePoel* may not apply where the burden of persuasion coincided with the presumption. The court has failed to use available opportunities to elaborate on this distinction. In *Anderson v. City of Minneapolis*[44] it was determined that the statutory presumption that sclerosis is an occupational disease when contracted by a fireman disappears when rebutted by substantial evidence.[45] Although it was error for the Industrial Commission to draw inferences from the presumption, the court held that it was not prejudicial in light of the record.[46] Even though the presumption coincided with the burden of persuasion, it disappeared when rebutted as did the presumption in *TePoel.*[47]

A second opportunity to develop the limitation in *TePoel* was presented in *Jones v. Peterson,*[48] a wrongful death action arising out of a single-car, double-fatality automobile accident. The trustee of the deceased, Shirley Jones, claimed that Jones was a passenger in a car owned and driven by the deceased Helen Peterson.[49] Plaintiff, who had the burden of proving that Peterson, and not Jones, was the driver of the car, sought the benefit of the presumption that the owner of a car involved in a fatal car accident was the actual driver of the car.[50] Based on this presumption, the trial court instructed the jury that the defendant had the burden of proving that Helen Peterson was not the driver at the time of the accident.[51] On appeal, defendants claimed that the instruction, which shifted the burden of persuasion, was contrary to the *Ryan*[52] case and reversible error.[53] The only witnesses on the issue gave testimony that would justify a finding that Jones, not Peterson, was the driver of the car. Nonetheless, the judgment for Jones was affirmed. The court reasoned that since the jury had apparently rejected the witnesses' testimony, which had foundational weaknesses, the treatment of the presumption as controlling the burden of persuasion as opposed to the burden of producing evidence was a "distinction without prejudicial difference."[54]

42. 246 Minn. 124, 74 N.W.2d 404 (1956).
43. *Id.* at 127 n.4, 74 N.W.2d at 407 n.3.
44. 258 Minn. 221, 103 N.W.2d 397 (1960).
45. *Id.* at 227-28, 103 N.W.2d at 402.
46. *Id.*
47. *See* notes 37-41 *supra* and accompanying text.
48. 279 Minn. 241, 156 N.W.2d 733 (1968).
49. *Id.* at 245, 156 N.W.2d at 736.
50. *See* Sprader v. Mueller, 265 Minn. 111, 121 N.W.2d 176 (1963).
51. Jones v. Peterson, 279 Minn. 241, 245-46, 156 N.W.2d 733, 736 (1968).
52. *See* notes 31-36 *supra* and accompanying text.
53. Jones v. Peterson, 279 Minn. 241, 246, 156 N.W.2d 733, 736 (1968).
54. *Id.*

The court again undercut the Thayer-Wigmore view. If the rule had been properly applied, the presumption would have disappeared upon the introduction of the defendant's competent, but not necessarily conclusive, evidence on the issue of the driver's identity. If the jury rejected the defendant's evidence, there would be no evidence on this issue and the issue should properly have been resolved against the plaintiff, the party with the burden of persuasion.[55] Instead, the presumption operated to shift the burden of persuasion. Although the court attempted to limit its decision to the peculiar facts of the *Jones v. Peterson* case, its rationale seemingly is applicable to any case in which the jury is entitled to discredit the evidence rebutting the presumption and is thus a clear departure from the Thayer-Wigmore view.[56]

Subsequently, in *Krinke v. Faricy*,[57] the burden of persuasion was again shifted to a defendant, apparently because a presumption operated to the plaintiff's advantage. The plaintiffs[58] sought to establish the existence of an easement for access to their property over a part of the defendant's land. The trial court found for the plaintiffs who had the burden of establishing their claims by clear and convincing evidence.[59] On appeal, the appellant claimed the evidence was insufficient to support a finding of adverse or hostile use. In affirming the judgment, the court relied on the well-established presumption of adversity which arises from proof of open, visible, continuous, and unmolested use inconsistent with the rights of the owner of the servient estate.[60] The court stated the trial judge's finding of knowledge and acquiescence by the owner of the servient estate was amply supported by the evidence.[61] Consequently, the court concluded that the burden of proving the use was permissive rested with the defendant. This burden of proof was characterized as the burden of persuasion.[62] According to *Krinke*,

---

55. Once it is established that the owner of the car was present in the vehicle, the jury could be permitted to draw the inference that the owner was driving. Such an inference would be based on probabilities and the customary course of events. *See* Lunde v. Dwyer, 74 S.D. 559, 564-65, 56 N.W.2d 772, 775-76 (1953). *But see* Hahn v. Smith, 215 Wis. 277, 280-81, 254 N.W. 750, 751 (1934). However, the court does not permit such an inference but instead requires that the inference be drawn.

56. *See* notes 5-11 *supra* and accompanying text. *See also* E. MORGAN, BASIC PROBLEMS OF EVIDENCE 915-16 (1962).

57. ___ Minn. ___, 231 N.W.2d 491 (1975).

58. *Id.* at ___, 231 N.W.2d at 492.

59. *See, e.g.*, Engquist v. Wirtjes, 243 Minn. 502, 504 & n.2, 68 N.W.2d 412, 415 & n.1 (1955).

60. Krinke v. Faricy, ___ Minn. ___, ___, 231 N.W.2d 491, 492 (1975), *quoting* Dozier v. Krmpotich, 227 Minn. 503, 507, 35 N.W.2d 696, 699 (1949).

61. Krinke v. Faricy, ___ Minn. ___, ___, 231 N.W.2d 491, 492 (1975).

62. *Id.*

the presumption of adversity shifts the burden of persuasion to the other party.

From an historical viewpoint, the *Krinke* court's treatment of this particular presumption is interesting. As early as 1896, the Minnesota court in *Swan v. Munch*[63] recognized that continuous use of an easement for 20 years would be presumed to be under claim of right and adverse. They further recognized the presumption would be deemed sufficient to establish a right by prescription which, unless contradicted or explained by opposing evidence, would be sufficient to establish the presumption of a lost grant to the claimant.[64] The court in *Swan,* allowed the presumption of adverse and hostile use to control only if uncontradicted or unexplained—much like the operation of presumptions as found in *Ryan,*[65] *TePoel,*[66] and federal rule 301. In *Schmidt v. Koecher,*[67] however, the court deviated from this view of presumptions, allowing the presumption of adversity some effect despite direct testimony of permissive use.[68] Thirteen years later in *Dozier v. Krmpotich*[69] the court returned to the Thayer-Wigmore theory by treating a presumption as a rule of law controlling only if not rebutted. In *Krinke,* however, the court again changed its position, allowing the presumption to shift the burden of persuasion.

Based on *Jones, Krinke,* and certain language in *TePoel,* it could be said that presumptions shift both the burden of producing evidence and the burden of persuasion to the other party. This result appears to be in direct conflict with the stated purpose of presumption as represented in *Ryan* and *TePoel.* Although inconsistent treatment of presumptions prior to *Ryan* and *TePoel* can be explained because the court had not previously set forth the proper function of presumptions, the continued inconsistent treatment after *TePoel* is difficult to reconcile.

IV. The Proposed Rule

Twenty-three years after *TePoel,* the law regarding the role of presumptions is as confused and inconsistent as it was twelve years after *Ryan.* The time has come again for a reconciliation. History suggests that Minnesota's adoption of the federal rule may not be successful.

63. 65 Minn. 500, 67 N.W. 1022 (1896).

64. *Id.* at 504, 67 N.W. at 1024. *Accord,* Dean v. Goddard, 55 Minn. 290, 297, 56 N.W. 1060, 1062 (1893).

65. *See* notes 31-36 *supra* and accompanying text.

66. *See* notes 37-41 *supra* and accompanying text.

67. 196 Minn. 178, 265 N.W. 347 (1936).

68. *Id.* at 182, 265 N.W. at 348-49.

69. 227 Minn. 503, 508, 35 N.W.2d 696, 699 (1949), *citing* Donea v. Massachusetts Mut. Life Ins. Co., 220 Minn. 204, 212, 19 N.W.2d 377, 382 (1945).

The Minnesota Supreme Court has consistently voiced support for the Thayer-Wigmore view, yet departed from it in application. Nevertheless, by reducing the role of presumptions to a single, accessible rule, problems can be isolated and the various factors which give rise to these problems can be addressed and hopefully resolved.

Dean Gausewitz has suggested that inconsistent treatment of presumptions since *TePoel* is inevitable because the reasons for the creation of the presumptions, which range from mere procedural convenience to substantial social policy, vary in importance.[70] However, in analyzing a problem under the federal rule, a distinction must be made between the presumption as a procedural device and the underlying policy that gives rise to the presumption. If rule 301 is adopted, the sole function of a presumption would be to control the burden of producing evidence. This does not mean the underlying policy which gives rise to the presumption, if substantial, should not have some additional influence on the outcome of the litigation. However, this influence should not be manifested by the use of presumptions but by other procedural and substantive devices. For example, the policy which gives rise to the presumption could justify placing the burden of persuasion on the opponent of the presumption. However, if the burden of persuasion is placed upon the other party it is not because of the presumption, rather it is because the underlying policy justifies it as a matter of substantive law. Judges and legislators must analyze more carefully to distinguish between the effects and use of burden of persuasion and presumptions. Such analysis has been lacking in the past, as both the courts and legislatures have used the term "presumption" as a catchall term for inferences and assumptions, as well as burden of persuasion.

A recent example of the imprecision in the use of the term "presumption" is found in *Mineral Resources, Inc. v. Mahnomen Construction Co.*,[71] in which plaintiff sued for trespass and willful conversion of gravel. The case was tried twice in district court. The first jury found that the defendant was not a willful converter. The verdict was set aside and after the second trial the jury found defendant to be a willful converter.[72] The trial judge had instructed the jury that since there was a presumption that every trespass is willful, the defendant had the burden of persuasion on the issue of willfulness.[73]

---

70. *See* Gausewitz, *supra* note 12, at 402.
71. 289 Minn. 412, 184 N.W.2d 780 (1971).
72. *Id.* at 414, 184 N.W.2d at 782.
73. *Id.* at 416, 184 N.W.2d at 783.

The court affirmed[74] the decision, although the instruction was found to be contrary to *TePoel* since the presumption operated against the defendent who had the burden of persuasion on the issue.[75] The court did not explain why the defendant had the burden of persuasion on the issue of willfulness. The case is instructive not only because it deals with the issues raised in *TePoel,* but because it is illustrative of the manner in which the courts have confused the relationship between presumptions and burden of persuasion. In tracing the origin of the rule dealing with trespass, one finds that the courts have spoken erroneously in terms of presumption in placing the burden of proof on the defendant to show that a trespass was not willful. In *Hoxsie v. Empire Lumber Co.,*[76] the court observed:[77]

> If it appeared that the act of cutting was a trespass, the presumption, in the absence of any contrary showing, would be that it was willful, and the burden would be on the trespasser to show that it was not.

However, in *Hoxsie* the court clearly indicated[78] that the proof of good faith is in the nature of mitigation of damages and it is generally agreed that the defendant has the burden of proof on issues of mitigation of damages.[79] The burden of persuasion is placed on defendant as a matter of substantive law and not because of the presumption.

The courts have used the term presumption in other situations to deal with matters of substantive law.[80] For example, the "presumption of innocence" in a criminal case is not a presumption but a standard used by the court to explain the government's burden to prove guilt beyond a reasonable doubt.[81] The basis of the presumption of legiti-

---

74. *Id.* at 416, 184 N.W.2d at 783.

75. *Id.* at 417-18, 184 N.W.2d at 784.

76. 41 Minn. 548, 43 N.W. 476 (1889).

77. *Id.* at 550, 43 N.W. at 477.

78. *Id.* at 550, 43 N.W. at 477.

79. *See, e.g.,* Mass v. Board of Educ., 61 Cal. 2d 612, 627-28, 394 P.2d 579, 589, 39 Cal. Rptr. 739, 749 (1964); New York, Chicago & St. L. R.R. v. American Transit Lines, Inc., 408 Ill. 336, 340, 97 N.E.2d 264, 266-67 (1951); Milligan v. Haggerty, 296 Mich. 62, 72, 295 N.W. 560, 564 (1941); Barron G. Collier, Inc. v. Kindy, 146 Minn. 279, 281, 178 N.W. 584, 585 (1920).

80. Thayer refers to legal maxims or general principles of legal reasoning which are sometimes inaccurately labeled as presumptions. THAYER, *supra* note 5, at 335. For instance, the principle that ignorance of the law is not a legal excuse frequently is construed to be a presumption that everyone knows the law. Electric Short Line Terminal Co. v. City of Minneapolis, 242 Minn. 1, 7, 64 N.W.2d 149, 153 (1954). Analogous are the presumptions that a sane man intends the natural and probable consequence of his acts, State v. Mytych, 292 Minn. 248, 258, 194 N.W.2d 276, 282 (1972); State v. Weltz, 155 Minn. 143, 146, 193 N.W. 42, 43 (1923), and that public officials will do their duty. Wagner v. Township of Carlos, 182 Minn. 571, 575, 235 N.W. 27, 28 (1931).

81. *See* McCormick *supra* note 4, at § 342. *See generally* State v. Sailor, 130 Minn. 84, 153 N.W. 271 (1915).

macy for a child born in wedlock is the substantial consideration involving the protection of both the child and the marital relationship.[82] The courts have placed such importance on this underlying policy that this particular situation now constitutes a "conclusive presumption," or a matter of substantive law. Except in the situation in which parenthood can be excluded by the proof of miscegenation, impotency, or a blood test, the child is deemed to be a legitimate child of the husband if the husband was living with the mother at the time of conception.[83] Although the courts speak of the rule as one of presumption, they are in fact dealing with a matter of substantive law.

Similarly, in child custody disputes there is a "presumption" that a parent is a fit and suitable person to be entrusted with the care of the child; the burden is upon the contestant to prove the contrary.[84] The courts give great weight to intangible benefits that may be derived by the love and affection of a natural parent. As a consequence the burden is placed upon the contestant to show by satisfactory evidence that the mother is unfit. Again it should be clear that the burden of persuasion is placed upon the contestant not because of a presumption, but because the underlying policy considerations require it.

This type of analysis is not new. In *Rustad v. Great Northern Railway Co.*,[85] a fire destroyed goods that were being stored by defendant. After determining that the duty of defendant had become one of a warehouseman, the court considered the question of which party had the burden of persuasion[86] on the issue of negligence. The court's analysis is incisive:[87]

> This court has held that the burden of proof is upon the bailee to prove that he exercised the degree of care required of him. [Citation omitted.] Considerations of fairness put upon the warehouseman the

82. Haugen v. Swanson, 219 Minn. 123, 127, 16 N.W.2d 900, 902 (1944). A distinction is made, however, between cases in which conception occurs prior to rather than during the marriage. *See* Curry v. Felix, 276 Minn. 125, 130, 149 N.W.2d 92, 96 (1967). *But see* State v. E.A.H., 246 Minn. 299, 307-08, 75 N.W.2d 195, 201 (1956).

83. *See, e.g.*, State v. E.A.H., 246 Minn. 299, 306, 75 N.W.2d 195, 200 (1956).

84. *See, e.g., In re* Welfare of Barron, 268 Minn. 48, 53, 127 N.W.2d 702, 706 (1964); *In re* Dependency of Klugman, 256 Minn. 113, 118, 97 N.W.2d 425, 428-29 (1959); State *ex rel.* Platzer v. Beardsley, 149 Minn. 435, 438, 183 N.W. 956-57 (1921).

85. 122 Minn. 453, 142 N.W. 727 (1913).

86. Many jurisdictions deal with the same problem in terms of presumption; damage to the goods raises a presumption that the bailee was negligent. *See* Nutt v. Davison, 54 Colo. 586, 588, 131 P. 390, 391 (1913); Donlan v. Clark, 23 Nev. 203, 205, 45 P. 1, 1 (1896); Brooklyn Clothing Corp. v. Fidelity-Phenix Fire Ins. Co., 205 App. Div. 743, 747, 200 N.Y.S. 208, 211 (1923); English v. Traders' Compress Co., 167 Okla. 580, 581-82, 31 P.2d 588, 590 (1934); Hildebrand v. Carroll, 106 Wis. 324, 328, 82 N.W. 145, 146 (1900).

87. 122 Minn. at 456, 142 N.W. at 728.

> burden of proving his own freedom from negligence. The goods are intrusted to him. He has charge and control of them. He determines the manner of keeping them. He is in possession of such evidence as there is as to the circumstances attending the loss. The bailor trusts the warehouseman and has no proof. It is not unjust to the warehouseman to require him to sustain the burden of proving its freedom from negligence. Where the burden of proof should rest "is merely a question of policy and fairness, based on experience in the different situations." We hold that when the liability of the carrier has become that of a warehouseman, and the loss of the goods shipped is established, the burden of proof is upon it to show its freedom from negligence. [Citation omitted.]

There are other situations in which the policy that gives rise to the presumption may require special treatment in addition to the creation of the presumption. As previously discussed,[88] a letter properly addressed, stamped, and mailed is presumed to have been duly delivered to the addressee. The presumption is based in part on the probability that the post office operated efficiently and delivered the letter. From evidence of proper mailing, the jury may draw the inference that the letter was received based on that probability. Because the trial judge in Minnesota has some power to comment on evidence,[89] it should be permissible for the court to exercise that power by instructing the jury that they are permitted, but not required, to draw such an inference.[90] Such an instruction is not justified because of the existence of a presumption, but because the underlying considerations that give rise to the presumption also may permit the trial judge to exercise his power to comment on the evidence even after the presumption has been rebutted and disappears.[91] In proposing the enacted federal rule, the

88. See note 26 *supra* and accompanying text.

89. State v. Brady, 244 Minn. 455, 462, 70 N.W.2d 449, 453-54 (1955); Flick v. Ellis-Hall Co., 138 Minn. 364, 366-57, 165 N.W. 135, 136-37 (1917). *See* 4 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE, MINNESOTA JURY INSTRUCTION GUIDES, 5 G-S, Comment, (2d ed. 1974).

90. In Minnesota an inference has been defined as "a logical, permissible deduction from proven or admitted facts." Wilder v. W.T. Grant Co., 270 Minn. 259, 260, 132 N.W.2d 852, 853 (1965). The jury will normally draw inferences as a matter of common sense without express direction from the court. Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 245, 80 N.W.2d 30, 36 (1956) (failure to instruct on jury's right to draw inferences not error). Thus, the jury's right to draw reasonable inferences may not be denied. Lindgren v. Voge, 260 Minn. 262, 269, 109 N.W.2d 754, 760 (1961). *But see* Kramer v. Kramer, 282 Minn. 58, 65, 162 N.W.2d 708, 713 (1968) (where reasonable persons can draw but one conclusion, the question is one of law for the court). For a discussion of inferences see 1 JONES ON EVIDENCE § 3:2 (6th ed. S. Gard 1972); ;1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 300[01] (1975).

91. Such has been the practice in the criminal cases in Minnesota. *See* State v. Keaton, 258 Minn. 359, 363-65, 104 N.W.2d 650, 654-55 (1960); State v. Higgin, 257 Minn. 46, 51-52, 99 N.W.2d 902, 906-07 (1959). Because the recently promulgated MINN. R. CRIM. P. 26.03 subd. 18

Senate contemplated instructing the jury in terms of permissible inferences.[92] Minnesota courts frequently direct the jury's attention to inferences that may be drawn from the evidence.[93] The failure of a party to call certain witnesses to testify may permit the court to give an instruction in terms of permissible adverse inferences that may be drawn from such conduct.[94] Similarly by codification, the doctrine of res ipsa liquitor is implemented by an instruction in terms of permissible inferences.[95]

If the basis for the presumption is centered not in probability but in social policy, it may be that the judge's power to comment would not permit an instruction to the jury in terms of permissible inferences. The propriety of such an instruction may give rise to controversy. However, it must be understood that the resolution of such a problem must be with reference to the power of the trial court to comment in a given situation. The existence or non-existence of a presumption should have no effect on such an analysis.

As predicted by Gausewitz, the legislature, along with the courts, has accorded presumptions inconsistent treatment. Primarily as a response to *TePoel* the legislature amended Minnesota Statutes Section 602.04[96] to provide:

> In any action to recover damages for negligently causing the death of a person, it shall be presumed that any person whose death resulted from the occurrence giving rise to the action was, at the time of the commission of the alleged negligent act or acts, in the exercise of due care for his own safety. *The jury shall be instructed of the existence of such presumption and shall determine whether the presumption is rebutted by the evidence in the action.*

---

restricts the court's power to comment on the evidence in criminal cases, this practice may be discontinued. *See* McCORMICK *supra* note 4, § 345, at 826 & n.66. *But see* Morgan, *supra* note 12, at 68. *See also* Daltex, Inc. v. Western Oil & Fuel Co., 275 Minn. 509, 515, 148 N.W.2d 377, 382 (1967).

92. The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden of persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.

The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive. S. REP. NO. 1277, 93d Cong., 2d Sess. 9,10 (1974), *reprinted in* 28 U.S.C.A. FED. R. EVID. 804 (1975).

93. *See* note 90 *supra*.

94. Zuber v. Northern Pac. Ry., 246 MINN. 157, 165-70, 74 N.W.2d 641, 649-52 (1956). *See* 4 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE, MINNESOTA JURY INSTRUCTION GUIDES, 26 G-S, (2d ed. 1974).

95. MINN. R. CIV. P. 43.06.

96. Emphasis added.

The underlined portion represents the amendment after *TePoel* and was an attempt by the legislature to give the presumption evidentiary effect. The statute leaves the jury with the problem of weighing the sworn testimony against a legal presumption. The amendment has precipitated much litigation and confusion. Several Minnesota Supreme Court justices have urged its repeal[97] and the suggestion has been made that the statute is unconstitutional.[98] The interpretation of the statute has been inconsistent and awkward. The court has decided that the benefit of the presumption is available only to the plaintiff's deceased suing in a wrongful death action even though the defendant is also the representative of a deceased.[99] In addition, a wrongful death action can not be consolidated with claims asserted against the plaintiff's deceased[100] to avoid the possible confusion that might result when the jury is instructed that the deceased was presumed to be acting with due care in his wrongful death action, but not in the other claims for negligence. However, the decision in the wrongful death action can estop any claims against the deceased.[101]

The statute was recently considered by the supreme court in *Steinhaus v. Adamson*.[102] The court specifically overruled several previous cases and held that the trial judge must always instruct the jury as to the existence of the statutory presumption regardless of the recent comparative negligence statute. If the jury determines that the presumption has been rebutted, it is to make its assessment of comparative negligence without any consideration as to the effect of the presumption.[103]

The legislature can and should pass legislation to effectuate sound social policy in the courts; however, the use of a presumption to accomplish this task has created an unworkable situation. The social policy reasons underlying the presumption may be adequately implemented in the trial of a lawsuit by properly placing the burden of per-

97. Steinhaus v. Adamson, 294 Minn. 387, 396, 201 N.W.2d 264, 270-71 (1972); Lustik v. Rankila, 269 Minn. 515, 517, 131 N.W.2d 741, 743 (1964); Lamback v. Northwestern Ref. Co., 261 Minn. 115, 123-25, 111 N.W.2d 345, 351-52 (1961) (Knutson, C. J., concurring specially).

98. Steinhaus v. Adamson, 294 Minn. 387, 397, 201 N.W.2d 264, 271 (1972) (Todd, J., dissenting; *see* Roeck v. Halvorson, 254 Minn. 394, 399-400, 95 N.W.2d 172, 176-77 (1959). *But see* Lott v. Davidson, 261 Minn. 130, 141-44, 109 N.W.2d 336, 344-45 (1961).

99. Jones v. Peterson, 279 Minn. 241, 245, 156 N.W.2d 733, 735-36 (1968). *See generally* Lambach v. Northwestern Ref. Co. 261 Minn. 115, 111 N.W.2d 345 (1961).

100. Lambach v. Northwestern Ref. Co., 261 Minn. 115, 125, 111 N.W.2d 345, 351-52 (1961) (Knutson, C.J., concurring specially).

101. Lustik v. Rankila, 269 Minn. 515, 131 N.W.2d 741 (1964).

102. 294 Minn. 387, 201 N.W.2d 264 (1972).

103. *Id.* at 396, 201 N.W.2d at 270-71.

suasion on the defendant to prove by a preponderance of the evidence that the deceased was contributorily negligent. However, to instruct the jury that the defendant must prove contributory negligence by a preponderance of the evidence and rebut a legal presumption seems more likely to confuse the jury than help them in their deliberations.

Furthermore, in passing the amendment, the legislature apparently was concerned with the possibility that the doctrine of contributory negligence would produce harsh results. With the passage of the comparative negligence statute,[104] however, the legislature has eliminated much of its basis for concern that the deceased's representatives would be precluded from recovering by a finding of slight negligence on behalf of the deceased. Conversely, if the jury finds the deceased guilty of substantial contributory negligence, the presumption would not and should not assist the plaintiffs in recovering. Any reason for passage of the statute in the first instance appears to be no longer viable and it should be repealed.[105]

V. CONCLUSION

The questions concerning burden of persuasion, presumptions, and inferences are complex and confusing. The mere enactment of the proposed rule will not end the confusion. The rule has defined the problems outside of the realm of presumption leaving them to be resolved on other grounds. Nonetheless the rule constitutes a realistic and helpful starting point for the resolution of the very complicated and difficult problems raised. When faced with the problem of which party should carry the burden of persuasion, the decision can no longer be unthinkingly made with reference to whether or not there is a presumption. As in *Rustad* the resolution must be made based on considerations of policy, probability, and fairness. Using this approach, the result reached in *Jones* could be justified easily without regard to whether or not there is a presumption. In most instances, when an owner is being transported in one's personal car, the owner operates as the driver of that vehicle. Moreover, the owner is in the best position to foresee and to insure by purchasing insurance or otherwise, against injuries created by the use of one's car. The requirement that the trier of fact find for the plaintiff may be just and fair where there is no credible evidence on the issue or the issue is in equilibrium. Ex-

104. MINN. STAT. § 604.01 (1974).

105. Adoption of the federal rule would not affect this statutory presumption. The language in the rule makes it inapplicable when this rule conflicts with an existing statute. See note 7 *supra* and accompanying text. This is consistent with the enabling legislation which sought to limit the court's rule making power in this area. *See* MINN. STAT. § 480.0591, subd. 6(c) (1974).

haustive analysis is needed. Adoption of the proposed rule would be a major step in isolating the true factors that must be considered when making such an analysis.

Similarly, the adoption of the rule would apprise the legislature of the true role of statutory presumptions. In determining how to implement certain policy considerations, the legislature could consider which party in the litigation traditionally would carry the burden of persuasion at trial. If, as in *Steinhaus,* the person against whom the presumption operates also carries the burden of persuasion, the underlying policy for creating the presumption will be protected both at the time when the court determines whether or not a directed verdict should be entered and in the final determination by the trier of fact as to which party prevails. If, on the other hand, as is found in the *Anderson* case, the presumption accompanies the burden of persuasion, the statutory presumption will have no effect in the case where it is rebutted by substantial evidence. If the legislature deems such treatment to be an insufficient response to the policy considerations that underlie the presumption, they could fix the burden of persuasion on the other party or choose other vehicles to effectuate the policy.