

Memorandum 67-56

Subject: Study 63 - The Evidence Code

Professor Madden, Hastings College of Law, writes as follows:

The proposed new section 646 of the Evidence Code [res ipsa loquitur] requires the Court, upon request, to instruct the jury about inferences. Would this provision not be proper and helpful with regard to all of the sections from 631 to 645. If so, could it not be stated once and for all in a separate section.

The Commission did recommend the enactment of Section 646 which would have required the court, upon request, to instruct the jury about the inferences that can be drawn when the res ipsa presumption has been rebutted by the party against whom it operates. However, when the Evidence Code was drafted, the Commission considered including a provision along the lines suggested by Professor Madden but omitted such a provision because of substantial objections. We are, of course, here concerned only with a presumption affecting the burden of producing evidence. (If the presumption is a presumption affecting the burden of proof, the jury must--except in rare cases--be instructed that the burden of proof has shifted to the party against whom the presumption operates.) Section 604 and the Comment to that section make it clear that when a presumption affecting the burden of proof has been rebutted by contrary evidence, the jury must weigh the inferences arising from the facts that give rise to the presumption against the contrary evidence and resolve the conflict. In appropriate cases, the judge should give an instruction as to the inferences that may be drawn. It is quite another thing, however, to require that such an instruction be given in every case upon request. Such a requirement would often require the drafting of exceedingly complex instructions that would confuse--rather than enlighten--the jury and might result in reversals.

If the staff view on this matter is not persuasive to the Commission, we suggest that the Judicial Council be contacted for its views on this matter before any conclusions are reached by the Commission. You will recall that the Judicial Council objected to the inclusion of such a provision in the Evidence Code and also objected to the mandatory instruction, upon request, on res ipsa loquitur.

Respectfully submitted,

John H. DeMouilly
Executive Secretary