#63 12/3/68

Memorandum 69-19

Subject: Study 63 - Evidence Code (Res Ipsa Loquitur)

The Law Revision Commission submitted a recommendation to the 1967 legislative session that certain revisions be made in the Evidence Code. The recommended legislation was enacted substantially as submitted except that a section classifying the res ipsa loquitur presumption was deleted from the recommended legislation before it was enacted.

Attached is a tentative recommendation relating to res ipsa loquitur. It is based almost entirely on the 1967 recommendation. At the 1967 session, the California Trial Lawyers Association took the view that if the Commission's res ipsa recommendation were enacted, the plaintiff would not have the benefit of an inference of negligence if the defendant introduces evidence to meet the res ipsa loquitur presumption. This, of course, is based on a lack of understanding of the Evidence Code. The California Trial Lawyers Association indicated that a revised section (a long, detailed statutory statement) might be acceptable in lieu of the Commission's recommended section. The Judicial Council, on the other hand, objected to the detailed statement in the revised section and took the position that the section as recommended by the Commission was not objectionable. Because of the opposition of the California Trial Lawyers Association to the section as recommended by the Commission and the opposition of the Judicial Council to the revised section, the Assembly Judiciary Committee took the view that the matter should be given further study by the Commission.

The Commission considered this problem at its June 1967 meeting. The following is an extract from the Minutes of that meeting:

> After considerable discussion, the Commission adopted the view that the [res ipsa loquitur] section should be deleted entirely from the bill. The Commission took this view because the section as recommended appears to be unacceptable to the Legislature, because the Judicial Council objects to the revised section, and because time limitations did not permit the review of the revised section by the State Bar Committee on Evidence, and by the Conference of Judges, and by other interested persons. The Commission plans to continue its study of res ipsa loquitur with a view to developing appropriate legislation that will be accepted by all interested persons as a desirable statutory statement of the doctrine.

The staff has not made an exhaustive study of the res ipsa cases since the 1967 recommendation was submitted. However, based on our routine review of cases involving the Evidence Code, we believe that the case law has not eliminated the confusion that existed when we prepared the 1967 recommendation and when that recommendation was considered by various interested persons during the legislative session.

The Commission may wish to distribute the attached tentative recommendation to interested persons and organizations for comment and, upon review of the comments, determine whether it wishes to submit a recommendation on this subject to the Legislature.

Respectfully submitted,

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Executive Secretary

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

THE EVIDENCE CODE

Number 6—Res Ipsa Loquitur

BACKGROUND

The Evidence Code was enacted in 1965 upon recommendation of the Law Revision Commission. Resolution Chapter 130 of the Statutes of 1965 directs the Commission to continue its study of the law relating to evidence. Pursuant to this directive, the Commission submitted a recommendation to the 1967 legislative session that certain revisions be made in the Evidence Code. See Recommendation Relating to The Evidence Code: Number 1—Evidence Code Revisions, 8 Cal. L. Revision Comm'n Reports 101 (1967). Most of the revisions recommended by the Commission were enacted as law. However, one section which would have classified the res ipsa loquitur presumption was not enacted because the Commission concluded that the section needed further study.

RECOMMENDATIONS

The Evidence Code divides rebuttable presumptions into two classifications and explains the manner in which each class affects the factfinding process. See EVIDENCE CODE §§ 600-607. Although several specific presumptions are listed and classified in the Evidence Code, the code does not codify most of the presumptions found in California statutory and decisional law; the Evidence Code contains primarily statutory presumptions that were formerly found in the Code of Civil Procedure and a few common law presumptions that were identified closely with those statutory presumptions. Unless classified by legislation enacted for that purpose, the other presumptions will be classified by the courts as particular cases arise in accordance with the classification scheme established by the code.

Thus, the Evidence Code does not contain any provisions dealing directly with the doctrine of res ipsa loquitur. Because of the frequency with which the decision of cases requires the application

of this presumption, however, the code should deal explicitly with it.

¶ Prior to the effective date of the Evidence Code, the California courts held that the doctrine of res ipsa loquitur was an inference, not a presumption. But it was "a special kind of inference" whose effect was "somewhat akin to that of a presumption," for if the facts giving rise to the doctrine were established, the jury was required to find the defendant negligent unless he produced evidence to rebut the inference. *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 268 P.2d 1041 (1954).

Under the Evidence Code, it seems clear that the doctrine of res ipsa loquitur is actually a presumption, for its effect as stated in the *Sherwin Williams* case is precisely the effect of a presumption under the Evidence Code when there has been no evidence introduced to overcome the presumed fact. See EVIDENCE CODE §§ 600, 604, 606, and the *Comments* thereto. It is uncertain, however, whether the doctrine is a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence.

Prior to the effective date of the Evidence Code, the doctrine of res ipsa loquitur did not shift the burden of proof. The cases considering the doctrine stated, however, that it required the adverse party to come forward with evidence not merely sufficient to support a finding that he was not negligent but sufficient to balance the inference of negligence. See, *e.g.*, *Hardin v. San Jose City Lines, Inc.*, 41 Cal.2d 432, 437, 260 P.2d 63, 65 (1953). If such statements merely meant that the trier of fact was to follow its usual procedure in balancing conflicting evidence—*i.e.*, the party with the burden of proof wins on the issue if the inference of negligence arising from the evidence in his favor preponderates in convincing force, but the adverse party wins if it does not—then res ipsa loquitur in the California cases has been what the Evidence Code describes as a presumption affecting the burden of producing evidence. If such statements meant, however, that the trier of fact must in some manner weigh the convincing force of the adverse party's evidence of his freedom from negligence against the legal requirement that negligence be found, then the doctrine of res ipsa loquitur represented a specific application of the former rule (repudiated by the Evidence Code) that a presumption is "evidence" to be weighed against the conflicting evidence. See the *Comment* to EVIDENCE CODE § 600.

The doctrine of res ipsa loquitur, therefore, should be classified as a presumption affecting the burden of producing evidence in order to eliminate any uncertainties concerning the manner in which it will function under the Evidence Code. Such a classification will also eliminate any vestiges of the presumption-is-evidence doctrine that may now inhere in it. The result will be that, as under prior law, the finding of negligence is required when the facts giving rise to the doctrine have been established unless the adverse party comes forward with contrary evidence. If contrary evidence is produced, the trier of fact will then be required to weigh the conflicting evidence—deciding for the party relying on the doctrine if the inference of negligence preponderates in convincing force, and deciding for the adverse party if it does not.

This classification accords with the purpose of the doctrine. Like other presumptions affecting the burden of producing evidence, it is based on an underlying logical inference; and "evidence of the nonexistence of the presumed fact . . . is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence." *Comment* to EVIDENCE CODE § 608.

The requirement of the prior law that, upon request, an instruction be given on the effect of res ipsa loquitur is not inconsistent with the Evidence Code and should be retained. See *Bischoff v. Newby's Tire Service*, 166 Cal. App.2d 563, 333 P.2d 44 (1958); 36 CAL. JUR.2d *Negligence* § 340 at 79 (1957).

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to add Section 646 to the Evidence Code, relating to evidence.

The people of the State of California do enact as follows:

Evidence Code Section 646 (new)

SECTION 1. Section 646 is added to the Evidence Code, to read:

646. The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. If the party against whom the presumption operates introduces evidence which would support a finding that he was not negligent, the court may, and on request shall, instruct the jury as to any inference that it may draw from such evidence and the facts that give rise to the presumption.

Comment. Section 646 is designed to clarify the manner in which the doctrine of res ipsa loquitur functions under the provisions of the Evidence Code relating to presumptions.

The doctrine of res ipsa loquitur, as developed by the California courts, is applicable in an action to recover damages for negligence when the plaintiff establishes three conditions:

> "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." [*Ybarra v. Spangard*, 25 Cal.2d 486, 489, 154 P.2d 687, 689 (1944).]

Section 646 provides that the doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. Therefore, when the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find the defendant negligent unless he comes forward with evidence that would support a finding that he exercised due care. EVIDENCE CODE § 604. Under the California cases, such evidence must show either that a specific cause for the accident existed for which the defendant was not responsible or that the defendant exercised due care in all respects wherein his failure to do so could have caused the accident. See, *e.g.*, *Dierman v. Providence Hosp.*, 31 Cal.2d 290, 295, 188 P.2d 12, 15 (1947). If evidence is produced that would support a finding that the defendant exercised due care, the presumptive effect of the doctrine vanishes. However, the jury may still be able to draw an inference of negligence from the facts that gave rise to the presumption. See EVIDENCE CODE § 604 and the *Comment* thereto. In rare cases, the defendant may produce such conclusive evidence that the inference of negligence is dispelled as a matter of law. See, *e.g.*, *Leonard v. Watsonville Community Hosp.*, 47 Cal.2d 509, 305 P.2d 36 (1956). But, except in such a case, the facts giving rise to the doctrine will support an inference of negligence even after its presumptive effect has disappeared.

To assist the jury in the performance of its factfinding function, the court may instruct that the facts that give rise to res ipsa loquitur are themselves circumstantial evidence of the defendant's negligence from which the jury can infer that he failed to exercise due care. Section 646 requires the court to give such an instruction when a party so requests. Whether the jury should draw the inference will depend on whether the jury believes that the probative force of the circumstantial and other evidence of the defendant's negligence exceeds the probative force of the contrary evidence and, therefore, that it is more likely than not that the defendant was negligent.

At times the doctrine of res ipsa loquitur will coincide in a particular case with another presumption or with another rule of law that requires the defendant to discharge the burden of proof on the issue. See Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183 (1949). In such cases the defendant will have the burden of proof on issues where res ipsa loquitur appears to apply. But because of the allocation of the burden of proof to the defendant, the doctrine of res

ipsa loquitur will serve no function in the disposition of the case. However, the facts that would give rise to the doctrine may nevertheless be used as circumstantial evidence tending to rebut the evidence produced by the party with the burden of proof.

For example, a bailee who has received undamaged goods and returns damaged goods has the burden of proving that the damage was not caused by his negligence unless the damage resulted from a fire. See discussion in *Redfoot v. J. T. Jenkins Co.*, 138 Cal. App.2d 108, 112, 291 P.2d 134, 135 (1955). See COM. CODE § 7403 (1)(b). Where the defendant is a bailee, proof of the elements of res ipsa loquitur in regard to an accident damaging the bailed goods while they were in the defendant's possession places the burden of proof—not merely the burden of producing evidence—on the defendant. When the defendant has produced evidence of his exercise of care in regard to the bailed goods, the facts that would give rise to the doctrine of res ipsa loquitur may be weighed against the evidence produced by the defendant in determining whether it is more likely than not that the goods were damaged without fault on the part of the bailee. But because the bailee has both the burden of producing evidence and the burden of proving that the damage was not caused by his negligence, the presumption of negligence arising from res ipsa loquitur cannot have any effect on the proceeding.

Effect of the Failure of the Plaintiff to Establish All the Preliminary Facts That Give Rise to the Presumption

The fact that the plaintiff fails to establish all of the facts giving rise to the res ipsa presumption does not necessarily mean that he has not produced sufficient evidence of negligence to sustain a jury finding in his favor. The requirements of res ipsa loquitur are merely those that must be met to give rise to a compelled conclusion (or presumption) of negligence in the absence of contrary evidence. An inference of negligence may well be warranted from all of the evidence in the case even though the plaintiff fails to establish all the elements of res ipsa loquitur. See Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter*, 10 So. CAL. L. REV. 459 (1937). In appropriate cases, therefore, the jury may be instructed that, even though it does not find that the facts giving rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more likely than not that the defendant was negligent. Such an instruction would be appropriate, for example, in a case where there was evidence of the defendant's negligence apart from the evidence going to the elements of the res ipsa loquitur doctrine.

Examples of Operation of Res Ipsa Loquitur Presumption

The doctrine of res ipsa loquitur may be applicable to a case under four varying sets of circumstances:

(1) Where the facts giving rise to the doctrine are established as a matter of law (by the pleadings, by stipulation, by pretrial order, or by some other means) and there is no evidence sufficient to sustain a finding that the defendant was not negligent.

(2) Where the facts giving rise to the doctrine are established as a matter of law, but there is evidence sufficient to sustain a finding of some cause for the accident other than the defendant's negligence or evidence of the defendant's exercise of due care.

(3) Where the defendant introduces evidence tending to show the nonexistence of the essential conditions of the doctrine but does not introduce evidence to rebut the presumption.

(4) Where the defendant introduces evidence to contest both the conditions of the doctrine and the conclusion that his negligence caused the accident.

Set forth below is an explanation of the manner in which Section 646 functions in each of these situations.

Basic facts established as a matter of law; no rebuttal evidence. If the basic facts that give rise to the presumption are established as a matter of law (by the pleadings, by stipulation, by pretrial order, etc.), the presumption requires that the jury find that the defendant was negligent unless and until evidence is introduced sufficient to sustain a finding either that the accident resulted from some cause other than the defendant's negligence or that he exercised due care in all possible respects wherein he might have been negligent. When the defendant fails to introduce such evidence, the court must simply instruct the jury that it is required to find that the defendant was negligent.

For example, if a plaintiff automobile passenger sues the driver for injuries sustained in an accident, the defendant may determine not to contest the fact that the accident was of a type that ordinarily does not occur unless the driver was negligent. Moreover, the defendant may introduce no evidence that he exercised due care in the driving of the automobile. Instead, the defendant may rest his defense solely on the ground that the plaintiff was a guest and not a paying passenger. In this case, the court should instruct the jury that it must assume that the defendant was negligent. *Cf. Phillips v. Noble*, 50 Cal.2d 163, 323 P.2d 385 (1958); *Fiske v. Wilkie*, 67 Cal. App.2d 440, 154 P.2d 725 (1945).

Basic facts established as matter of law; evidence introduced to rebut presumption. Where the facts giving rise to the doctrine are established as a matter of law but the defendant has introduced evidence either of his due care or of a cause for the accident other than his negligence, the presumptive effect of the doctrine vanishes. In most cases, however, the basic facts will still support an inference that the defendant's negligence caused the accident. In this situation the court may instruct the jury that it may infer from the established facts that negligence on the part of the defendant was a proximate cause of the accident. The court is required to give such an instruction when requested. The instruction should make it clear, however, that the jury should draw the inference only if, after weighing the circumstantial evidence of negligence together with all of the other evidence in the case, it believes that it is more likely than not that the accident was caused by the defendant's negligence.

Basic facts contested; no rebuttal evidence. The defendant may attack only the elements of the doctrine. His purpose in doing so would be to prevent the application of the doctrine. In this situation, the court cannot determine whether the doctrine is applicable or not because the

basic facts that give rise to the doctrine must be determined by the jury. Therefore, the court must give an instruction on what has become known as conditional res ipsa loquitur.

Where the basic facts are contested by evidence, but there is no rebuttal evidence, the court should instruct the jury that, if it finds that the basic facts have been established by a preponderance of the evidence, then it must also find that the defendant was negligent.

Basic facts contested; evidence introduced to rebut presumption. The defendant may introduce evidence that both attacks the basic facts that underlie the doctrine of res ipsa loquitur and tends to show that the accident was not caused by his failure to exercise due care. Because of the evidence contesting the presumed conclusion of negligence, the presumptive effect of the doctrine vanishes, and the greatest effect the doctrine can have in the case is to support an inference that the accident resulted from the defendant's negligence.

In this situation, the court should instruct the jury that, if it finds that the basic facts have been established by a preponderance of the evidence, then it may infer from those facts that the accident was caused because the defendant was negligent. The jury should draw the inference, however, only if it believes after weighing all of the evidence that it is more likely than not that the defendant was negligent and the accident actually resulted from his negligence.