9/17/69

Memorandum 69-109

Subject: 63.20-50 - Evidence Code (Recommendation to the 1970 Legislature)

At the last meeting, the Commission approved the substance of the attached recommendation. The staff was directed to prepare the recommendation and send it to the printer, subject to its being finally approved at the October meeting. The recommendation is attached in the form in which it went to the printer. We will not receive the galleys in time for the October meeting.

The only significant question in connection with this recommendation is the provision relating to res ipsa loquitur. A considerable amount of material relating to res ipsa was included in the material distributed for the September meeting. The Continuing Education of the Bar has just published a book which contains a very good description of res ipsa loquitur which is in agreement with the Commission's recommendation. The pertinent portion of this book is attached as Exhibit I.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 69-109

EXHIBIT I

EXTRACT--CALIFORNIA NONPROFIT CORPORATIONS 260-264
(Cal. Cont. Ed. Bar 1969)

D. Res Ipsa Loquitur In Suits Against Hospitals and Physicians

1. [§7.9] When Applied

It has been stated by the California Supreme Court that "as a general rule, res ipsa loquitur applies where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible." *Siverson v Weber* (1962) 57 C2d 834, 836, 22 CR 337; see also *Faulk v Soberanes* (1961) 56 C2d 466, 470, 14 CR 545, 547.

The conditions that appear to be required before the doctrine may be applied are:

(a) The accident must be caused by an agency or instrumentality over which defendant has exclusive control or the right to control, or that is under the shared control of defendant and a third party with whom defendant has responsibility for plaintiff's safety (*Ybarra v Spangard* (1944) 25 C2d 486, 154 P2d 687).

(b) The accident was not due to any voluntary action or contribution on plaintiff's part, which was the responsible cause of the accident (*Zentz v Coca Cola Bottling Co.* (1952) 39 C2d 436, 247 P2d 344). The attorney should note also in this regard the recent case of *Vistica v Presbyterian Hosp.* (1967) 67 C2d 465, 62 CR 577, to the same effect

as *Zentz* that even though the accident was due to plaintiff's voluntary conduct, plaintiff is entitled to the benefit of res ipsa loquitur if the conduct is not the responsible cause of the accident (in *Vistica* plaintiff's decedent was a mentally ill patient with suicidal tendencies known to the ward personnel of defendant hospital, who eluded them and committed suicide by jumping from a window); and

(c) A probability that the accident was negligently caused must arise as a matter of common knowledge (*Davis v Memorial Hosp.* (1962) 58 C2d 815, 26 CR 633), from expert testimony (*Seneris v Haas* (1955) 45 C2d 811, 291 P2d 915; see *Quintal v Laurel Grove Hosp.* (1964) 62 C2d 154, 41 CR 577), or from evidence that the accident concerned rarely occurs when due care is used, combined with evidence of specific acts of negligence of a type that could have caused the accident (*Clark v Gibbons* (1967) 66 C2d 399, 412, 58 CR 125, 134).

The application of res ipsa loquitur to malpractice cases generally has been criticized. Rubsamen, *Res Ipsa Loquitur in California Medical Malpractice Law—Expansion of a Doctrine to the Bursting Point*, 14 STAN L REV 251 (1962).

When all three of these conditions exist, a presumption arises that the accident resulted from a lack of due care. For an excellent discussion of res ipsa, see Witkin, CALIFORNIA EVIDENCE §§260–293 (2d ed, 1966).

Ybarra v Spangard, *supra*, illustrates a drastic departure from the concept of exclusive control when res ipsa loquitur is applied in malpractice cases. In *Ybarra* a patient had received a traumatic injury while under anesthetic in surgery, and the court applied res ipsa loquitur against all doctors and hospital employees connected with the operation. Although the decision was itself predicated on the patient's unconsciousness, it was further explained in *Gobin v Avenue Food Mart* (1960) 178 CA2d 345, 2 CR 822, as having been based on a special responsibility for the unconscious patient that had been undertaken by all to whom the inference was applied. For a criticism of the case, see Prosser, LAW OF TORTS §39 at 228 (3d ed, 1964).

The broad application of res ipsa loquitur in malpractice cases has been explained by reference to the alleged reluctance of one physician to testify against another—the so-called conspiracy of silence (see *Salgo v Leland Stanford Jr. Univ. Bd. of Trustees* (1957) 154 CA2d 560, 568, 317 P2d 170, 175)—and to the consequent necessity of smoking out evidence that the defendant has or can get. See Prosser, TORTS §40 at 234 (1964). It is the authors' opinion that through the development of expert panels and other joint mechanisms by medical and bar groups this relation has changed. It must be noted, however, that many plaintiff attorneys believe that the reluctance of doctors to testify against each

other still persists. See *Clark v Gibbons, supra,* 66 C2d at 416 n3, 58 CR at 137 n3 (concurring opinion of Tobriner, J.).

The Evidence Code's provisions on presumptions and inferences do not refer specifically to the doctrine of res ipsa loquitur. Thus there is no express indication in the Evidence Code whether res ipsa loquitur is a §603 presumption (presumptions affecting the burden of producing evidence) or a §605 presumption (presumptions affecting the burden of proof). The California Law Revision Commission recommended to the 1967 legislature that the Evidence Code be amended by adding §646 to clarify the manner in which the doctrine of res ipsa loquitur functions under the code's provisions on presumptions. The proposed section reads as follows in 8 California Law Revision Comm'n, REPORTS, RECOMMENDATIONS AND STUDIES 113 (1966) (see the Commission's comment on 114–117):

> 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.

Although the legislature did not enact this amendment, its language is apparently an accurate description of the twofold operation of the doctrine of res ipsa loquitur under the Evidence Code—as a presumption and as an inference:

(a) *As a presumption.* Under the Evidence Code, a rebuttable presumption that is not expressly classified must be treated as a presumption affecting the burden of producing evidence if the only purpose of the presumption is to facilitate the determination of the particular action (Evid C §603), and as a presumption affecting the burden of proof when its purpose is to implement an extrinsic public policy (Evid C §605). See *Comment* to Evid C §602 (courts must classify presumptions by these criteria). By this test, res ipsa loquitur appears to be a presumption affecting the burden of producing evidence. Moreover, the previous course of California decisions seems to justify classifying res ipsa loquitur as an Evid C §603 presumption. See Witkin, EVIDENCE §264 (1966); 2 BAJI 206–206F (1967 pocket parts). This type of presumption disappears as soon as defendant introduces evidence that would support a finding contrary to the presumption, *i.e.*, a finding that defendant was not negligent. Evid C §604; see Witkin, EVIDENCE §265 (1966). See also Evid C §600(a) (abolishing former rule that presumption was evidence).

(b) *As an inference.* Unless defendant's evidence dispelling the res ipsa loquitur presumption is strong enough to disprove negligence as a matter of law (see, *e.g., Leonard v Watsonville Community Hosp.*

(1956) 47 C2d 509, 517, 305 P2d 36, 41), defendant's negligence remains in the case as an issue of fact. The doctrine of res ipsa loquitur then permits the trier of fact, in determining this issue, to draw, from the facts giving rise to the doctrine, an inference that the defendant was negligent. See Evid C §604; Evid C §600(b) (defining inference). In a jury case, plaintiff is then entitled to have the jury instructed on this permissible inference. The burden of proving defendant's negligence remains, however, on plaintiff.

2. [§7.10] Conditional Application

Conditional application of the doctrine of res ipsa loquitur is illustrated in *Quintal v Laurel Grove Hosp.* (1964) 62 C2d 154, 41 CR 577, in which the court held that in situations in which the facts are in conflict the jury should be instructed that if they find certain facts they are entitled to find from the evidence, they should apply the res ipsa presumption. In *Davis v Memorial Hosp.* (1962) 58 C2d 815, 26 CR 633, the court held that an instruction on conditional res ipsa should be given when the evidence is in conflict regarding facts necessary for application of the doctrine, or is subject to different inferences, and that the question of fact must be left to the jury under proper instruction.

In *Tomei v Henning* (1967) 67 C2d 319, 62 CR 9, a surgeon sutured a ureter while performing a hysterectomy. The sole question before the trial court was whether this undisputed occurrence constituted negligence. The plaintiff's expert, although admitting on cross-examination that such injuries are an unavoidable risk of the operation, nevertheless testified that it was negligence to suture the ureter and then close the wound without exercising any techniques to determine the condition of the ureter. The trial court rejected plaintiff's proposed res ipsa instruction and submitted the case to the jury for a finding on specific negligence. A verdict for the defense resulted. In holding that the trial court's denial of the proposed res ipsa instruction was prejudicial, the Supreme Court rejected respondent's contention that a res ipsa instruction would have been redundant because the only negligence suggested by the evidence was failure to protect the ureters. Speaking through the chief justice, the court held that by the failure to give the res ipsa instruction, plaintiff was unfairly denied an opportunity to have the jury reach a verdict in her favor based on an inference of negligence from the happening of the accident itself.

Since most cases in which a jury has been given conditional res ipsa loquitur instructions also contain plausible evidence of specific negligence, it may be useful for the defense to determine whether the jury has found the conditional fact(s) necessary for the applicability of res ipsa to be present. This may be accomplished by use of a special verdict under CCP §625. See *Clark v Gibbons* (1967) 66 C2d 339, 415, 58 CR 125, 136

(concurring opinion of Tobriner, J.). This procedure may be particularly important when the specific evidence of negligence implicates only one of two codefendants, both of whom may be held under the special responsibility theory of *Ybarra v Spangard* (1944) 25 C2d 486, 154 P2d 687 (see §7.9) if the jury accepts the critical conditional fact(s).

For California Law Revision Commission's proposed amendment to the Evidence Code on res ipsa loquitur, see §7.9.

69-109

September 10, 1969

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

RECOMMENDATION

relating to

THE EVIDENCE CODE

Number 5 -- Revisions of the Evidence Code

September 1969

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

(Insert in letterhead)

To His Excellency, Ronald Reagan
Governor of California and
The Legislature of California

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 has undertaken a continuing study of the Evidence Code to determine whether any substantive, technical, or clarifying changes are needed.

The Commission submitted recommendations for revisions in the Evidence Code to the Legislature in 1967 and 1969. See Recommendation Relating to the Evidence Code: Number 1--Evidence Code Revisions, 8 Cal. L. Revision Comm'n Reports 101 (1967); Recommendation Relating to the Evidence Code: Number 4--Revision of the Privileges Article, 9 Cal. L. Revision Comm'n Reports 501 (1969).

Most of the revisions recommended in 1967 were enacted, but one section--relating to res ipsa loquitur--was deleted from the bill introduced to effectuate the Commission's recommendation before the bill was enacted. This section was deleted so that it could be given further study. As a result of such study, the Commission has included in this recommendation a provision dealing with res ipsa loquitur.

The revisions recommended in 1969 did not become law. The bill introduced to effectuate the Commission's recommendation passed the Legislature in amended form but was vetoed by the Governor.

This new recommendation includes the same provisions that were included in the 1969 recommendation except for the provision to which the Governor objected.

Respectfully submitted,

Sho Sato
Chairman

9/10/69

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE EVIDENCE CODE

Number 5 -- Revisions of the Evidence Code

The Evidence Code was enacted in 1965 upon recommendation of the Law Revision Commission. The Legislature has directed the Commission to continue its study of the law of evidence. Pursuant to this directive the Commission has concluded that a number of substantive, technical, or clarifying changes are needed in the Evidence Code.

RES IPSA LOQUITUR

The Evidence Code divides rebuttable presumptions into two classifications and explains the manner in which each class affects the fact-finding 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.

Under the Evidence Code, it seems clear that the doctrine of res ipsa loquitur is actually a presumption,[1] for its effect as stated in the pre-Evidence Code cases[2] is precisely the effect of a presumption under the Evidence Code when there has been no evidence introduced to overcome the presumed fact.[3] The Evidence Code, however, does not state specifically whether res ipsa loquitur is a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence.

> Prior to 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.#
>
> 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.[4]
>
> 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

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1 See WITKIN, CALIFORNIA EVIDENCE § 264 (2d ed. 1966)("The problem of characterization is now solved by the Evidence Code, under which the judicially created doctrine must be deemed a presumption.").

2 Before the enactment 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).

3 See EVIDENCE CODE §§ 600, 604, 606, and the Comments thereto.

4. See, e.g., Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 437, 260 P.2d 63, 65 (1953).

5. See the Comment to EVIDENCE CODE § 600.

function under the Evidence Code. It is likely that this classification will codify existing law.[6] 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."[7]

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.[8]

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6. Witkin states that "our prior cases make it clear that [res ipsa loquitur] belongs in the class of presumptions which merely affect the burden of producing evidence." WITKIN, CALIFORNIA EVIDENCE § 264 (2d ed. 1966). McBaine takes the view that whether res ipsa loquitur "must be regarded as a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof cannot be determined with certainty until the courts rule on the matter or the Legislature enacts clarifying legislation." McBAINE, CALIFORNIA EVIDENCE MANUAL § 1245 (Supp. 1967). The Committee on Standard Jury Instructions has classified res ipsa loquitur as a presumption affecting the burden of producing evidence. See Comments to No. 206 in 2 BAJI, Supp. 1967 at 42 et seq. See also Ludlam, Robertson & Saunders, Tort and Contract Liability, CALIFORNIA NONPROFIT CORPORATIONS § 7.9 at 262 (Cal. Cont. Ed. Bar 1969)("res ipsa loquitur appears to be a presumption affecting the burden of producing evidence").

7. Comment to EVIDENCE CODE § 603.

8. 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).

Privilege not to be called in civil action

Evidence Code Section 971 provides that a married person whose spouse is a party to a proceeding has a privilege *not to be called* as a witness by any adverse party unless the witness spouse consents or the adverse party has no knowledge of the marriage. A violation of the privilege occurs as soon as the married person is called as a witness and before any claim of privilege or objection is made. This privilege is in addition to the privilege of a married person *not to testify* against his spouse (Evidence Code Section 970).

In a multi-party action, the privilege of a married person not to be called as a witness may have undesirable consequences. The privilege not to be called apparently permits the married person to refuse to take the stand even though the testimony sought would relate to a part of the case totally unconnected with his spouse. As worded, the privilege is unconditional; it is violated by calling the married person as a witness whether or not the testimony will be "against" his spouse.

Edwin A. Heafey, Jr., has stated the problem as follows:

> For example, if a plaintiff has causes of action against *A* and *B* but sues *A* alone, neither privilege can prevent the plaintiff from calling Mrs. *B* as a witness and obtaining her testimony on matters that are relevant to the cause of action against *A* and do not adversely affect *B*. However, if plaintiff joins *A* and *B* in the same action and wants to call Mrs. *B* for the same testimony, he presumably can be prevented from calling her by her privilege not to be called as a witness by a party adverse to her spouse . . . and from questioning her by her privilege not to testify against her spouse . . . .[9]

The privilege not to be called as a witness also may lead to complications where both spouses are parties to the proceeding. Where an action is defended or prosecuted by a married person for the "immediate benefit" of his spouse or of himself and his spouse, Evidence Code Section 973(b) provides that either spouse may be required to testify against the other. Evidence Code Section 972(a) provides that either spouse may be required to testify in litigation between the spouses. Thus, the privilege not to be called and the privilege not to testify against the other spouse are not available in most cases in which both spouses are parties.[10] However, where the spouses are co-plaintiffs or co-defendants and the action of each is not considered to be for the "immediate benefit" of the other spouse under Evidence Code Section 973(b), apparently neither spouse can be called as an adverse witness under Evidence Code Section 776 even for testimony solely relating to that spouse's individual case.[11] Moreover, the adverse party apparently cannot even notice or take the deposition of either of the spouses, for the noticing of a deposition might be a violation of the privilege.[12]

[9] HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967).

[10] See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 39.18 at 308 (Cal. Cont. Ed. Bar 1967).

[11] "[A]llowing a party spouse to use the privilege to avoid giving testimony that would affect only his separate rights and liabilities seems to extend the privilege beyond its underlying purpose of protecting the marital relationship." HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.9 at 317 (Cal. Cont. Ed. Bar 1967).

[12] *Id.* § 40.10 at 317.

If the privilege of a spouse not to be called as a witness were limited to criminal cases,[13] the significant problems identified by Mr. Heafey would be avoided without defeating the basic purpose of the privilege. A witness in a civil case could still claim the privilege not to testify against his spouse. An adverse party, however, would then be able to call the spouse of a party to the action to obtain testimony that is not "against" the party spouse. Accordingly, the Commission recommends that Section 971 be amended to limit the privilege provided in that section to criminal cases.

Waiver of privilege

Section 973(a) provides that a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under Section 970 (privilege not to be called) or 971 (privilege not to testify against spouse) in the proceeding in which the testimony is given. This section should be amended to clarify the rule in litigation involving multiple parties.

In multi-party litigation, a non-party spouse may be called as a witness by a party who is not adverse to the party spouse. In this situation, the witness spouse has no privilege to refuse to testify unless the testimony is "against" the party spouse; yet after the witness spouse has testified, all marital testimonial privileges—including the privilege not to testify against the party spouse—are waived. despite the fact that the waiver could not occur if the claim against the party spouse were litigated in a separate action. Thus, the Evidence Code literally provides that the witness spouse can be compelled to waive the privilege.[14] The problem stems from the breadth of the waiver provision in Section 973(a). The section should be amended to provide for waiver only when the witness spouse testifies for or against the party spouse.

[13] Apparently this privilege was not recognized in civil cases before adoption of the Evidence Code. Under former Penal Code Section 1322 (repealed Cal. Stats. 1965, Ch. 299, p. 1369, § 145), neither a husband nor a wife was competent to testify against the other in a criminal action except with the consent of both. However, this section was construed by the courts to confer a waivable privilege rather than to impose an absolute bar; the witness spouse was often forced to take the stand before asserting the privilege. See People v. Carmelo, 94 Cal. App.2d 301, 210 P.2d 538 (1949); People v. Moore, 111 Cal. App. 682, 295 Pac. 1039 (1931). Although it was said to be improper for a district attorney to call a defendant's wife in order to force the defendant to invoke the testimonial privilege in front of the jury, such conduct was normally held to be harmless error. See People v. Ward, 50 Cal.2d 702, 328 P.2d 777 (1958). Thus, the privilege not to be called is necessary in criminal cases to avoid the prejudicial effect of the prosecution's calling the spouse as a witness and thereby forcing him to assert the privilege in the presence of the jury.

[14] See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967).

Group therapy

Section 1012 defines a "confidential communication between patient and psychotherapist" to include:

> information . . . transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than . . . those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose of the consultation or examination.

Although "persons . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose of the consultation" would seem to include other patients present at group therapy treatment, the language might be narrowly construed to make information disclosed at a group therapy session not privileged.

In the light of the frequent use of group therapy for the treatment of emotional and mental problems, it is important that this form of treatment be covered by the psychotherapist-patient privilege. The policy considerations underlying the privilege dictate that it encompass communications made in the course of group therapy. Psychotherapy, including group therapy, requires the candid revelation of matters that not only are intimate and embarrassing, but also possibly harmful or prejudicial to the patient's interests. The Commission has been advised that persons in need of treatment sometimes refuse group therapy treatment because the psychotherapist cannot assure the patient that the confidentiality of his communications will be preserved.

The Commission, therefore, recommends that Section 1012 be amended to make clear that the psychotherapist-patient privilege protects against disclosure of communications made during group therapy.[15] It should be noted that, if Section 1012 were so amended, the general restrictions embodied in Section 1012 would apply to group therapy. Thus, communications made in the course of group therapy would be within the privilege only if they are made "in confidence" and "by a means which . . . discloses the information to no third persons other than those . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted."

15. Section 1014 provides that the privilege permits the holder of the privilege (normally the patient) "to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . ."

Exception for child who is victim of crime

Evidence Code Section 1014 provides that a patient has, under certain conditions, "a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . ." However, this section is subject to several exceptions based upon the general policy consideration that the public's interest in the disclosure of certain information outweighs the patient's interest in the confidentiality of these communications. See Evidence Code §§ 1016-1026. For example, Evidence Code Section 1024 provides that:

> There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

In this case the public's interest in preventing harm to the patient and to others outweighs the patient's interest in keeping such information confidential, so the patient cannot invoke the privilege.

The Commission recommends the addition of a section to the psychotherapist-patient privilege article to establish an analogous exception where disclosure of the communication is sought in a proceeding in which the commission of ~~such~~ a crime is a subject of inquiry and the psychotherapist has reasonable cause to believe that a child patient has been the victim of the crime and that disclosure of the communication would be in the best interest of the child. Under these circumstances, the Commission believes that facilitation of the prosecution of persons who perpetrate crimes upon children outweighs any inhibition of the psychotherapist-patient relationship which might result from the possibility of disclosure of the patient's communications.

RECOMMENDED LEGISLATION

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

An act to amend Sections 971, 973, and 1012 of, and to add Sections 646 and 1027 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 defendant introduces evidence which would support a finding that he was not negligent, the court may, and upon request shall, instruct the jury that it may draw the inference that the defendant was negligent if the facts that give rise to the res ipsa loquitur presumption are established. If such an instruction is given, the jury shall also be instructed in substance that it should find the defendant negligent 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 probable than not that the defendant was negligent.

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 probable 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 probable 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 sufficient to sustain a finding 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 probable 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 probable than not that the defendant was negligent and that the accident ~~actually~~ resulted from his negligence.

Evidence Code Section 971 (amended)

SEC. 2. Section 971 of the Evidence Code is amended to read:

971. Except as otherwise provided by statute, a married person whose spouse is a ~~party to a~~ *defendant in a criminal* proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

Comment. Section 971 is amended to preclude the assertion by a married person of a privilege not to be called as a witness in a civil proceeding. As to any proceeding to which his spouse was a party, the former wording of Section 971 appeared to authorize a married person to refuse to take the stand when called by a party adverse to his spouse even in multi-party litigation where the testimony sought related to a part of the case wholly unconnected with the party spouse. See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967). Apparently the adverse party could not even notice or take depositions from the non-party spouse, for the noticing of a deposition might be held to be a violation of the privilege. *Id.* § 40.10 at 317.

Elimination of the privilege *not to be called* in a civil proceeding does not necessarily mean that a non-party spouse must testify at the proceeding. The privilege *not to testify* against one's spouse in any proceeding (Section 970) and the privilege for confidential marital communications (Section 980) are available in a civil proceeding. The only change is that an adverse party may call a non-party spouse to the stand in a civil case and may demonstrate that the testimony sought to be elicited is not testimony "against" the party spouse. In such a case, the non-party spouse should be required to testify. If the testimony would be "against" the party spouse, the witness spouse may claim the privilege not to testify given by Section 970.

In connection with the procedure for ruling on the claim of privilege, see Section 402(b)(hearing and determination out of presence or hearing of the jury).

Evidence Code Section 973 (amended)

SEC. 3. Section 973 of the Evidence Code is amended to read:

973. (a) Unless erroneously compelled to do so, a married person who ~~testifies in a proceeding to which his spouse is a party, or who~~ testifies *for or* against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given.

(b) There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.

otherwise could arise

Comment. Subdivision (a) of Section 973 is amended to eliminate a problem that ~~arose~~ in litigation involving more than two parties. In multi-party civil litigation, if a married person is called as a witness by a party other than his spouse in an action to which his spouse is a party, the witness spouse has no privilege not to be called and has no privilege to refuse to testify unless the testimony is "against" the party spouse. Yet, under the former wording of the section, after the witness spouse testified in the proceeding, all marital testimonial privileges—including the privilege not to testify against the party spouse—were waived. The section is amended to provide for waiver only when the witness spouse testifies "for" or "against" the party spouse.

Evidence Code Section 1012 (amended)

SEC. 4. Section 1012 of the Evidence Code is amended to read:

1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation ~~or examination~~, *including other patients present at joint therapy*, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose ~~of the consultation or examination~~ *for which the psychotherapist is consulted*, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

Comment. Section 1012 is amended to add "including other patients present at joint therapy" in order to foreclose the possibility that the section would be construed not to embrace marriage counseling, family counseling, and other forms of group therapy. However, it should be noted that communications made in the course of joint therapy are within the privilege only if they are made "in confidence" and "by a means which . . . discloses the information to no third persons other than those . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted." The making of a communication that meets these two requirements in the course of joint therapy would not amount to a waiver of the privilege. See Evidence Code Section 912(c) and (d).

The other amendments are technical and conform the language of Section 1012 to that of Section 992, the comparable section relating to the physician-patient privilege. Deletion of the words "or examination" makes no substantive change since "consultation" is broad enough to cover an examination. See Section 992. Substitution of "for which the psychotherapist is consulted" for "of the consultation or examination" adopts the broader language used in subdivision (d) of Section 912 and in Section 992.

Evidence Code Section 1027 (new)

Sec. 5. Section 1027 is added to the Evidence Code, to read:

1027. There is no privilege under this article if:

(a) The patient is a child under the age of 16;

(b) The psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child; and

(c) Disclosure of the communication is sought in a proceeding in which the commission of such crime is a subject of inquiry.

Comment. Section 1027 provides an exception to the psychotherapist-patient privilege that is analogous to the exception provided by Section 1024 (patient dangerous to himself or others). The exception provided by Section 1027 is necessary to permit court disclosure of communications to a psychotherapist by a child who has been the victim of a crime (such as child abuse) in a proceeding in which the commission of such crime is a subject of inquiry. Although the exception provided by Section 1027 might inhibit the relationship between the patient and his psychotherapist to a limited extent, it is essential that appropriate action be taken if the psychotherapist becomes convinced during the course of treatment that the patient is the victim of a crime and that disclosure of the communication would be in the best interest of the child.