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9/23/69

First Supplement to Memorandum 69-109

Subject: Study 63 - Evidence Code

We sent a copy of the revised res ipsa recommendation to Judge Richards, BAJI consultant. He sent us the attached letter suggesting revisions of the suggested new section and of the official Comment. These are essential revisions and should be approved by the Commission.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

# The Superior Court

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OFFICE OF  
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September 19, 1969

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
Stanford University School of Law  
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Dear Mr. DeMouilly:

Thank you for your letter of September 16, 1969 and enclosures relating to the latest developments on the classification of *res ipsa loquitur* as a 604 presumption.

I think the approach now suggested will dissipate most of my concern. There is, however, one fatal defect to the proposed draft of Evidence Code Section 646. The proposed section provides that the court may instruct that the jury draw the inference that "the defendant was negligent" but entirely omits the *res ipsa* inference that the defendant's negligence was the proximate cause of the occurrence.

Your Comment on page 11 on "Basic facts established as matter of law; evidence introduced to rebut presumption" recognizes the inference of proximate cause as well as negligence. It states: "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." (Emphasis mine.)

BAJI Instruction 206 (Revised), which has been repeatedly approved, begins: "From the happening of the accident involved in this case an inference arises that a proximate cause of the occurrence was some negligent conduct on the part of the defendant." (Emphasis mine.)

Restatement, Second, Torts, § 328D, reads: "(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when," etc. (Emphasis mine.)

Roddiscraft, Inc. v. Skelton Logging Co., 212 Cal.App.2d 784, says as to *res ipsa*, at page 793: "Its effect, where applicable, is to declare that from the happening of the accident in question an inference arises that the proximate cause of the occurrence was some negligent conduct on the part of the defendant." (Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 436; Burr v. Sherwin Williams Co., 42 Cal.2d 682, 688; Leonard v. Watsonville Community Hosp., 47 Cal.2d 507, 514.) (Emphasis mine.)

Mr. John H. DeMouilly  
California Law Revision Com.

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With the above in mind, I submit a revised section, the strike-out being your draft and the underlined my draft. The inclusion of the inference of proximate cause is, in my opinion, vital to a proper statement of the effect of the doctrine of res ipsa loquitur.

Your Comment on page 11 under "Basic facts established as matter of law; evidence introduced to rebut presumption" still reads that "The instruction should make it clear, however, that the jury should draw the inference only if," etc. This is contrary to the second sentence of the proposed new section. What is intended, I think, is that "The instruction should make it clear, however, that the jury should find the defendant negligent only if," etc. (Emphasis mine.)

Likewise, I believe the last sentence of the Comment on page 12 should be revised to read: "The jury should find the defendant negligent, however," etc. (Emphasis mine.)

Unless these changes are made in the Comment, you will have a code section stating that if the conditional facts are established the jury may infer the defendant's negligence and a Comment stating that the jury may not draw an inference of the defendant's negligence unless it believes that it is more probable that he was negligent.

I hope you will understand that the foregoing suggestions are not for the purpose of being captious, for I sincerely believe that they are essential to carry out the suggested solution to the problem.

Again with appreciation for permitting us to comment on the proposal, I am

Sincerely yours,

Philip H. Richards

PHR/fv  
Encl.

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~~ a proximate cause of the occurrence was some negligent conduct on the part of the defendant 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.