#63 Memorandum 73-64 9/7/73

Subject: Study 63 - Evidence Code Section 999--The "Criminal Conduct" Exception to the Physician-Patient Privilege

We have distributed for comment our tentative recommendation to repeal Evidence Code Section 999. Attached are two copies of the tentative recommendation. At the September meeting, the Commission should decide whether to submit this recommendation to the 1974 legislative session. Accordingly, please mark any editorial revisions you may care to suggest on one copy and return it to the staff at the September meeting.

We attach as exhibits six letters we received on the tentative recommendation. Two additional letters were received expressing support for the tentative recommendation: Philip M. Jelley on behalf of Fitzgerald, Abbott & Beardsley (Oakland firm) and from Roy C. Zukerman, Fountain Valley attorney. We have not reproduced these letters since they merely state that the tentative recommendation is well drawn and approved.

Exhibits II through V are letters from members of a committee of the California Trial Lawyers Association opposing the repeal of Section 999. Exhibits I and VI are letters supporting the tentative recommendation from Judge Bernard S. Jefferson, Los Angeles Superior Court. In Exhibit VI, Judge Jefferson answers the objections to the tentative recommendation that are made by the chairman of the committee of the California Trial Lawyers Association which reviewed the bill (see Exhibit V from Bruce Cornblum). Judge Jefferson is an authority on the field of evidence. He is the author of the California Evidence Benchbook, published by the Conference of California Judges in 1972 and made available to lawyers generally later by the California Continuing Education of the Bar.

It is suggested that you read the attached letters, especially Exhibit VI. Some of the letters reflect a basic lack of understanding of the procedure a judge must follow in ruling on a claim of privilege which involves a fact --as distinguished from a law--question. I would agree with Mr. Cornblum that the judge would determine as a matter of law the meaning of the word "crime" as used in Section 999. In other words, he would determine whether a traffic infraction, for example, constitutes a "crime" within the meaning of Section

999. On the other hand, the judge would have to hear all the evidence submitted by both parties to determine whether the patient actually engaged in conduct with constitutes a crime; in other words, he would have to hear all the witnesses and permit cross-examination of them and be persuaded by a preponderance of the evidence that the patient did engage in the alleged conduct which constitutes a crime. He could not determine this issue merely on the basis of whether there is sufficient evidence to sustain a finding that the patient engaged in that conduct.

Although it seems fairly certain that the recommendation would be opposed by the California Trial Lawyers Association, the staff believes that the recommendation is a sound one and should be approved for printing and submission to the 1974 session of the Legislature.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 73-64

EXHIBIT I

CHAMBERS OF
The Superior Court
LOS ANGELES, CALIFORNIA 90012
BERNARD S. JEFFERSON, JUDGE

TELEPHONE
(213) 625-3414

July 17, 1973

California Law Review Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

I am writing to comment with respect to the proposal to amend the Evidence Code by repealing Section 999, which now creates an exception to the physician-patient privilege in a proceeding to recover damages on account of conduct of the patient which constitutes a crime. This exception should never have been a part of the Evidence Code and I am glad to see the proposal to repeal the same.

Very truly yours,

Bernard S. Jefferson

Bernard S. Jefferson

BSJ:ks

RS	
AES	

Memo 73-64

EXHIBIT II

CAPUTO & LICCARDO
Attorneys at Law
1960 THE ALAMEDA
SAN JOSE, CALIFORNIA 95126

RICHARD P. CAPUTO
SALVADOR A. LICCARDO
RONALD R. ROSSI
RICHARD J. KOHLMAN

TELEPHONE 244-4570
AREA CODE 408

June 25, 1973

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Tentative Recommendation Relating to Evidence Code §999, April, 1973.

Gentlemen:

I disagree with the recommendation to repeal Evidence Code §999.

I have spent 10 years of law practice as a trial lawyer in personal injury cases representing both plaintiffs and defendants. I believe that Evidence Code §999 and the analysis given it by the Second District Court of Appeal in Fontes v. Superior Court, 104 Cal.Rep. 845 (C.A. 1972) provides a very salutary vehicle by which plaintiffs can obtain evidence of a defendant's physical and mental condition at the time of an accident or other occurrence which gives rise to an action for damages. The drunken driver, for example, does not tender the issue of his physical condition at the time of an accident in resulting third-party litigation. Nevertheless, that fact is very much an issue in a lawsuit against him for injuries he causes. This and the fact situation in the Fontes case are only two of the many circumstances within which this problem can arise. Subpenaing the defendant's medical records provides an expeditious and inexpensive way of obtaining information, and in some cases evidence, respecting a matter that is just as ligitimately an issue as that tendered by the plaintiff. The procedure for examination under CCP §2032 is time consuming, expensive and unwieldy. In the usual case, it is of no value whatever to the plaintiff's trial lawyer.

I don't think a quasi criminal trial is at all necessary or contemplated under §999 as indicated in the tentative recommendations. I think all that is necessary is to show that

the defendant is alleged to have commited an act which, if proven, would constitute a crime. I think that is the more reasonable construction of the Statute. If not, it can be easily amended to that effect.

I do not consider the "Chamber of Horrors" argument respecting invasions of a patient's privacy in private litigation to be valid. History has shown that this type of logic has little relevance to the reality of human existence when repressive legislation is repealed or restrictive civil decisions are overruled. Moreover, I think this remote hazard is but a small price for a defendant to pay in civil litigation for the unconscionable license granted to his attorney and his insurance company to pry unmercifully into the past, present and future mental, emotional and physical condition of a plaintiff or claimant who, with rare exceptions, is only seeking just compensation for injuries received at the hands of another.

I sincerely feel that the repeal of Evidence Code §999 will work far more injustice than its continued existence.

Thank you for considering my views.

Very truly yours,

CAPUTO & LICCARDO

Richard J. Kohlman

RJK/bjc

Memo 73-64

EXHIBIT III

EDWARD W. BABIC
ATTORNEY AT LAW
3505 LONG BEACH BOULEVARD SUITE 28
LONG BEACH, CALIFORNIA 90807
TELEPHONE 426 3545

July 25, 1973

Mr. Bruce Cornblum, Esq.
Chairman, CTLA/Law Revision
Commission Committee
203 S. Murphy Avenue
Sunnyvale, California 94086

In Re: LRC Tenative Recommendations

Dear Bruce:

As per your letter of July 17, I am submitting a few comments on the recent Tentative Recommendations of the Law Revision Commission. I must admit, though, I have had occasion to discuss only three of the four with my colleagues in the Long Beach Bar Association. Therefore, I have no comment as to the recommendation relating to enforcement of Sister State Money Judgments.

I, too, am concerned with the tentative recommendations relative to the Criminal Conduct execption to the Physician-Patient privilege. My instant concern is carried toward the issues involving drugs and drug abuse, and the possible shield that may be afforded a wrongdoer by revoking this section.

You have brought an interesting point forward relative to vehicle accident cases where an "Act of God" is asserted as a defense. Quaere the effect of prescribed narcotics or non-prescribed narcotics coupled with warnings not to engage in certain activities made to the patient by a physician.

In reading their recommendations, I suppose you might say that their logic and reasoning gives me a very uneasy feeling and it is certainly far from comforting. To repeal a law because it is cumbersome or might only rarely prevent necessary evidence to be brought to light, is frankly plain frightening. The next "thing" to go might just be the motion to supress, for it too is cumbersome.

As to the Recommendation relative to the Erroneously Ordered Disclosure of Privileged Information, the consensus down here seems to be about 15 to 1 in favor of the recommendation.

The only caveat is that the wording seems to give a green light to circumvent the doctrine of Res Judicata; or at least is seems to provide two opportunities to litigate the same issue through the use of a secondary collateral attack on the finding of a trial court.

Finally as the recommendation relating to Inheritance Rights of Non-Resident Aliens, no real objection was raised. However, the point was raised that it is tragic that the commission has seen fit to give priority to the Non-resident Alien in inheritance law revision, when unjust, inevitable and probably just plain wrong law exists relative to inheritance rights of the "illegitimate" child.

I hope you will find the comments relevant and useful. I would like to have set them out more in detail, however, the pressures of tax litigation are infringing upon me slightly more than I would like.

I am looking forward to perhaps seeing you at the State Bar Convention.

Very truly yours,

Edward W. Babic

mab

Memo 73-64 exhibit IV

WEINSTEIN, SHELLEY & PROCTOR
ATTORNEYS AT LAW
1104 SOUTH GARFIELD AVENUE
ALHAMBRA, CALIFORNIA 91801

STANLEY WEINSTEIN
ROBERT R. SHELLEY
ROBERT C. PROCTOR, JR.

TELEPHONE
ATLANTIC 9-7733
CUMBERLAND 3-7771

July 26, 1973

Mr. Bruce Cornblum
Attorney at Law
203 South Murphy Avenue
Sunnyvale, California 94086

Dear Bruce:

Of the tentative recommendations forwarded from the Law Revision Commission, I only have comments concerning the recommended revocation of the Evidence Code Section 999. My over-all view is that the entire subject of the physician-client privilege can best be handled by elimination of the privilege. The discovery and introduction of such evidence could be adequately handled by the present relevancy and discretionary exclusion provisions of Evidence Codes 350 and 352.

As long as the privilege remains on the books, the current exception should be maintained and perhaps expanded. For example, a plaintiff must waive his privileges by instituting the lawsuit for the recovery of damages for injury. However, the defendant whose conduct produces the claim in the first place has a potential for keeping out of the trial relevant medical history of the defendant. This seems to me is grossly unfair. It penalizes the injured party and favors the negligent one. In this regard, I would modify the exception contained in Evidence Code Section 999 to eliminate the requirement that the holder of the privilege's conduct constitute a crime. This Section could be reworded to tie into Evidence Code Section 996 to provide that if any litigant raises an issue in which his medical condition or history is relevant, that the privilege of that litigant is waived.

The Commission parrots Judge Kaus' unsupported opinion "that the section invites extortionate settlements made to avoid embarrassing disclosures." Just as practical lawyers know that civil cases are almost always tried after criminal cases involving the same conduct, we also know that no insurance company is going to settle a personal injury case because of any real or imagined embarrassment to their insured.

My comments can be summarized as follows:

1. I believe the entire question of physician-client privilege should be re-examined rather than a piecemeal examination of the exceptions thereto.

2. As long as we have the privilege, Section 999 should be expanded to cover relevant examination of the defendant's medical condition and history where he raises that issue by way of defense. (A resort to CCP Section 2032 for physical exam would not necessarily divulge information concerning past medical conditions.)

3. If our choice at this time is to live with the privilege of Section 999 as now written, or to revoke Section 999, my vote is to retain the Section.

I have taken the liberty of sending copies of this letter to the other members of the committee.

Best personal regards.

Very truly yours,

ROBERT C. PROCTOR, JR.

RCP:eh

cc: Jim Flanagan, Esq.
Wylie Aitken, Esq.
Michael Scranton, Esq.
Edward Babic, Esq.

Memo 73-64 EXHIBIT V

SCHER & CORNBLUM

ATTORNEYS AT LAW

MEYER SCHER
BRUCE CORNBLUM
JOANNE BANKER

SUNNYVALE, CALIFORNIA 94086
203 SOUTH MURPHY AVENUE
739-5300

July 17, 1973

California Law Revision Commission
School of Law
Stanford University
Stanford, Ca.

Attention: John H. DeMoully

Re: Opposition to Tentative Recommendation to Repeal Evidence Code Section 999

Dear Mr. DeMoully:

In our luncheon meeting June 22, 1973, among other extremely interesting topics touched upon by yourself, was the introduction to me of the recommendation of the Commission to repeal Evidence Code §999.

You indicated among other things that hardly anyone ever heard of, let alone used, this code section in civil litigation. I personally, as a practitioner, am familiar with that section and have used it in a few of my cases, more particularly in the "negligent entrustment area" and "Act of God cases " claimed by the defendant. In order to satisfy myself that this section is used by the Trial Bar, I made inquiry to the Board of Governors of the California Trial Lawyers in our meeting in San Diego on July 14, 1973 per part of my report to the Board pertaining to the Law Revision Commission.

As you may know, I am also a member of the Board of Governors of our state-wide organization. Contrary to your thought, the members of the Board of Governors are very familiar with this section and it was the sense of the Board of Governors that this study should be opposed at this level and also in the legislature if the Commission elects to proceed in drafting legislation to repeal this section.

As you probably know, a minor although frequently used defense in trial is the defense of "unexpected health circumstances" such as the "heart attack or sudden seizure" defense. In general see Cornblum, (1971) Modern California Personal Injury Litigations Section 4. If such a defense is raised, it would be unfair for the defendant to take the stand and claim he didn't know about his heart condition. This puts directly in issue (1) whether in fact he did have a heart attack or seizure and (2) whether he knew about

FS

this before. The plaintiff would be in a difficult position in that he could not legitimately inquire into this area of relevancy without Evidence Code §999.

In addition, oftentimes an issue in the case when these "health problems are involved" is the doctrine of negligent entrustment. In general see Cornblum, supra, Modern California Personal Injury Litigation, Chapter 6. This would be especially relevant if an employer caused a pre-employment physical to be had of the employee through an independent physician. Recently the Supreme Court has held that there is a duty to inform the employee of a physical condition which has shown up in a physical examination by an independent physician. Under these circumstances, many times the employee does not have access to the medical report but yet the physician's examination could be barred by the privilege in the absence of Evidence Code §999.

I disagree with the suggestion on page 1 of the study that the exception is "burdonsome and difficult to administer". Whether or not there is a violation of a crime, i.e. Vehicle Code violation, it is determined in accordance with Evidence Code §669 (Law Revision Commission comment). The mixed question of law and fact is applied in hundreds of "violation of statute" cases involving negligence. In general, see Cornblum, Modern California Personal Injury Litigation, Section 19.

As stated in the above cited text at page 26:

> Whether an injury resulted from an occurrence of the nature which the statute, ordinance or regulation was designed to prevent, and whether the plaintiff was one of the class of persons for whose protection the statute was adopted, are questions of law for the court.

Therefore, there does not have to be two trials, and there is really no problem about the burden of proof. It simply is a matter of whether or not the jury can be instructed in accordance with BAJI (5th Edition) 3.45.

With regards to the suggestion on page 2 of the report that "it opens the door to invasion of patient's privacy" is certainly not well founded. After all, that is what Evidence Code §352 is all about. Absent relevancy and if relevant, the presence of prejudice can be easily controlled by the trial judge. In addition, the defense can protect their record by requesting the appropriate protective orders during the discovery stage. It is clear that Evidence Code

this before. The plaintiff would be in a difficult position in that he could not legitimately inquire into this area of relevancy without Evidence Code §999.

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§352 will apply to other sections where the issue of prejudice to a particular party is present. See People v. Beagle 6 C 3rd 441 (Judge's Discretion to Exclude Evidence of Prior Felony Conviction) as well as analysis of People v. Beagle in 61 California Law Review page 515 (noting that there was no discussion in Evidence Code §788 permitting the use of Evidence Code §352 to that section.)

I previously disagreed with Point 4 on Page 2 of the study and also I disagree with the fact that CCP §2032 will solve the problem in that the issue is not "what the physical condition of the defendant is after the accident" but rather "what was his physical condition immediately after the accident" which obviously would be more probative on the issues for which this section is extremely important.

With all due respect to Judge Kaus, his "academic" analysis is unrelated to the real world and overlooks the protection the trial court can give to a party.

Thus we have a situation where no defendant yet on this planet has been prejudiced by plaintiff's use of this section. On the other hand the defendant can obtain the plaintiff's medical records when he goes to court but yet the defendant can hide behind the privilege if Evidence Code §999 is repealed, even though he hides behind a general denial of the allegations of plaintiff's complaint thus not "tendering the issue" and leaving the court and the plaintiff to virtually have to accept the defendant's "testimony" that he had a sudden health condition and this caused the accident.

I hope that the trial bar has by these reasons given a "satisfactory justification" to the Commission notwithstanding the "vacated" decision of Fontes.

Very truly yours

Bruce Cornblum

BRUCE CORNBLUM
Chairman
CTLA Law Revision Commission;
Member, Board of Governors
Calffornia Trial Lawyers
Association

BC:lm

Memo 73-64

EXHIBIT VI

CHAMBERS OF
The Superior Court
LOS ANGELES, CALIFORNIA 90012
BERNARD S. JEFFERSON, JUDGE

TELEPHONE
(213) 625-3414

August 8, 1973

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Dear Mr. DeMoully:

Thank you for your letter of July 24th requesting that I express my reaction to the letter of July 17, 1973 from Mr. Bruce Cornblum in opposition to the tentative recommendation to repeal Evidence Code Section 999. It is my considered opinion that Mr. Cornblum's letter does not set forth any sound reasons for retaining Evidence Code Section 999.

In talking with my fellow judges of the Los Angeles Superior Court, I am convinced that this section is one that has seldom been used. However, I would not advocate the repeal of the section just because of its application in rare instances if there appeared a good justification for its retention.

Mr. Cornblum speaks of its application in a trial situation in which the defendant raises the defense of a medical condition, such as a sudden heart attack which caused him to lose control of his car. Mr. Cornblum thinks that if the defendant so testifies, the repeal of Section 999 would prevent the plaintiff from obtaining information relative to defendant's treatment from his physician. Section 999 is not needed in this situation. This would be a case in which the defendant has tendered the issue of his physical condition and, under Section 996, there would be no physician-patient privilege.

With respect to the negligent entrustment situation raised by Mr. Cornblum, it is pointed out that the employee would not have access to the medical report of his pre-employment physical examination. The employee is the patient and is the holder of the privilege and certainly can waive it. I don't quite understand how the negligent entrustment situation would work to the benefit of the defendant to preclude a plaintiff from obtaining the medical information. In addition to an express waiver by the patient-employee, Section 912 would also be applicable in that the patient, as a holder of the privilege, has consented to the physician's disclosure of the employee's condition to his employer. This would constitute a waiver of the privilege

to preclude the employer from refusing to divulge what has been communicated to him from the physician who examined his employee.

Mr. Cornblum's reliance upon Evidence Code Section 669 relative to the burden of proof issue is misplaced. That section relates to presumptions and is concerned only with burden of proof as to ultimate facts before the trier of fact and the effect of the presumption from a violation of a statute. The burden of proof involved with respect to the question of the applicability of a privilege and an exception to a privilege deals with the determination of a preliminary fact to the admissibility of evidence.

If evidence is sought which the defendant in a personal injury action claims is subject to exclusion under the physician-patient privilege, the initial burden of proof would be upon the defendant to show the applicability of the privilege. The burden of proof as to an exception to the privilege would fall upon the proponent of the evidence. If the proponent is relying upon Section 999, he would have the burden of proof by preponderance of the evidence to convince the trial judge that the proceeding is one to recover damages on account of conduct of the patient which constitutes a crime. Irrespective of whether the complaint alleges that a crime has been committed by the defendant, the plaintiff would have to establish that the conduct of the patient was such as to constitute a crime. These preliminary fact questions are governed by Section 405 of the Evidence Code. I point this out in Chapter 25 of my California Evidence Benchbook. The burden of proof allocation as to privileges is set forth in Section 25.2(n).

The burden of proof is on the preliminary fact issue as to admissibility of the medical evidence sought and is further complicated because it may arise in discovery proceedings before the matter reaches the trial stage. This is where the greatest danger to invasion of patient's privacy is likely to develop. Since discovery may be secured of evidence that need not be relevant or admissible, a plaintiff may obtain, under Section 999, medical information on a defendant which would be completely irrelevant to issues raised by the pleadings. Furthermore, the trial judge, on a pretrial discovery motion, would have the task of determining the preliminary issue of fact as to the application of Section 999 based upon the preponderance-of-the-evidence burden of proof. There appears to me to be no justification for permitting Section 999 to operate in view of the wide scope of discovery permitted under our discovery decisions.

Mr. Cornblum suggests that Section 352 may be used to protect patient-defendants from any unwarranted use of Section 999. Section 352 would appear to have little application to

the problem raised by Section 999 in a discovery proceeding where there is grave doubt about the relevancy of the medical evidence sought. Section 352 has application only at the trial level. Since discovery procedures are designed to obtain information without regard to whether it will later be offered in evidence, a party seeking to prevent discovery cannot rely upon Section 352.

I agree wholeheartedly with the views of Justice Kaus and hope that the Law Revision Commission will recommend to the Legislature the repeal of Section 999.

Very truly yours,

Bernard S. Jefferson

BSJ:ks

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

T E N T A T I V E

RECOMMENDATION

relating to

EVIDENCE CODE SECTION 999—THE "CRIMINAL CONDUCT" EXCEPTION TO THE PHYSICIAN-PATIENT PRIVILEGE

April 1973

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments should be sent to the Commission not later than August 15, 1973.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature.

This tentative 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.

STATE OF CALIFORNIA RONALD REAGAN, Governor

CALIFORNIA LAW REVISION COMMISSION
SCHOOL OF LAW—STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305
(415) 321-2300, EXT. 2479

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Chairman
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HOWARD R. WILLIAMS
GEORGE H. MURPHY
Ex Officio

LETTER OF TRANSMITTAL

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 to study 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. This recommendation is submitted as a result of this continuing review.

Section 999 of the Evidence Code provides that the physician-patient privilege is not applicable in a proceeding to recover damages on account of conduct of the patient which constitutes a crime. This recommendation is made in response to a suggestion in the vacated opinion in Fontes v. Superior Court, 104 Cal. Rptr. 845 (Ct. App. 1972), that the need for Section 999 be reevaluated. Although a rehearing was granted in Fontes and the case was ultimately decided on another ground, the vacated opinion is reprinted as an appendix to this report because it contains a good discussion of the background, effect, and problems inherent in Section 999.

#63

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

EVIDENCE CODE SECTION 999--THE "CRIMINAL CONDUCT" EXCEPTION TO THE PHYSICIAN-PATIENT PRIVILEGE

Section 999 of the Evidence Code provides that the physician-patient privilege[1] is not applicable "in a proceeding to recover damages on account of conduct of the patient which constitutes a crime." The Commission recommends that this exception to the physician-patient privilege be repealed for the following reasons:

1. The exception is burdensome and difficult to administer. It applies only if the judge determines the preliminary fact--that the patient actually engaged in conduct which constitutes a crime.[2] To determine this fact, the judge must in effect conduct a separate, collateral criminal proceeding, hearing evidence produced by both sides, within a civil trial which is in progress.[3] The net result is that the exception requires two trials; after a "trial" by the judge on whether the patient actually engaged in criminal conduct, the damage action must then be tried in full before the trier of fact.

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1. See Evid. Code §§ 990-1007.

2. See Evid. Code §§ 400-405.

3. This requirement raises difficult questions. Must the judge find the patient guilty beyond a reasonable doubt as in a regular criminal trial or only guilty by the civil trial standard of a preponderance of the evidence? Do all the protections afforded a defendant in a criminal trial apply in the judge's determination of the preliminary fact under Section 999? What is the meaning of the word "crime" in Section 999? Does "crime" include minor traffic violations? What relationship between the issue in the civil action for damages and the alleged criminal conduct is required to satisfy the exception? What use may be made of the evidence disclosed at the hearing on the claim of the privilege?

2. The exception "opens the door to invasions of patients' privacy in private litigation not initiated by the patient or by anyone in his behalf. It invites extortionate settlements, made to avoid embarrassing disclosures."[4] Repeal of the exception would eliminate this potential for abuse by the unscrupulous.

3. No satisfactory justification has been given for the exception. See the discussion in Fontes v. Superior Court, set out in the appendix to this report.

4. Repeal of the exception will rarely prevent access to medical information needed in a damage action since the court has the power under Code of Civil Procedure Section 2032 to order the defendant to submit to a physical, mental, or blood examination.[5] Repeal of the exception will not make evidence unavailable in a criminal action since the privilege is not applicable in criminal proceedings.[6] Likewise, the other limitations[7] and exceptions[8] to the physician-patient privilege will continue.

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4. Fontes v. Superior Court, 104 Cal. Rptr. 845, 848 (Ct. App. 1972)(footnote omitted), reprinted p.4 infra.

5. See Harabedian v. Superior Court, 195 Cal. App.2d 26, 15 Cal. Rptr. 420 (1961). See also Code Civ. Proc. § 2034 (sanctions for failure to comply with order under Section 2032).

6. Evid. Code § 998.

7. See definitions of "patient" (Evid. Code § 990) and "confidential communication between patient and physician" (Evid. Code § 992).

8. See Evid. Code §§ 996 (so-called patient-litigant exception), 997 (services of physician sought or obtained to assist in crime or tort), 998 (criminal proceeding), 1000 (parties claiming through deceased patient), 1001 (breach of duty arising out of physician-patient relationship), 1002 (intention of deceased patient concerning writing affecting property interest), 1003 (validity of writing affecting property interest), 1004 (commitment or similar proceeding), 1005 (proceeding to establish patient's competence), 1006 (required report), 1007 (proceeding to determine right, license, or privilege). See also Evid. Code § 912 (waiver of privilege).

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

An act to repeal Section 999 of the Evidence Code, relating to the physician-patient privilege.

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

Section 1. Section 999 of the Evidence Code is repealed.

~~999. There is no privilege under this article in a proceeding to recover damages on account of conduct of the patient which constitutes a crime.~~

Comment. Section 999 is repealed because it was difficult to apply and opened the way to oppressive tactics against the patient involved. See Recommendation Relating to Evidence Code Section 999--The "Criminal Conduct" Exception to the Physician-Patient Privilege, 11 Cal. L. Revision Comm'n Reports 0000 (1973). Where medical information is needed, the patient may be ordered to submit to an examination under Code of Civil Procedure Section 2032. See also Code Civ. Proc. § 2034 (sanctions for failure to comply with order under Section 2032).

APPENDIX

[Civ. No. 40813. Second Dist., Div. Five. Nov. 9, 1972.]

JOHN GONZALEZ FONTES, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
JUAN FRANCISCO SALAS, Real Party in Interest.

[Civ. No. 40860. Second Dist., Div. Five. Nov. 9, 1972.]

JUAN FRANCISCO SALAS, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
JOHN GONZALEZ FONTES, Real Party in Interest.

(Consolidated Cases.)

Rehearing granted December 6, 1972

SUMMARY

In an action for injuries suffered in an intersection collision with a fire truck driven by defendant, plaintiff, on learning that defendant had had a cataract operation shortly before the accident, moved to compel an eye and a general physical examination of defendant, and for permission to inspect some of his past medical records. The motion for examination, both for the eye and the general examination, was denied, but the motion to inspect the records was granted. Both parties petitioned the Court of Appeal for appropriate relief.

The Court of Appeal held that plaintiff had not made a showing sufficient to form a basis for a general physical examination and that, therefore, the motion for such examination had been properly denied. The court held, however, that evidence of the cataract operation and defendant's need for both regular spectacles and a contact lens for one eye constituted a prima facie showing for compelling an eye examination. With respect to the motion to inspect defendant's medical records, the court overrode defendant's assertion of the physician-patient privilege, pointing out that Evid. Code, § 999, makes the privilege inapplicable in a proceeding to recover damages on account of conduct which constitutes a crime, and that plaintiff's cause of action was based, at least in part, on Vehicle Code violations constituting misdemeanors. (Opinion by Kaus, P. J., with Stephens and Ashby, JJ., concurring.)

OPINION

KAUS, P. J.—These two consolidated writ matters arise out of a personal injury action resulting from an intersection accident on April 9, 1969. It is one of plaintiff Salas' theories that defendant Fontes, responding to an emergency, drove a fire truck through a red light without sounding a siren and at an excessive speed. Fontes and his employer, the County of Los Angeles, are defendants. At a deposition of Fontes it appeared that he had had a cataract operation on his right eye in 1968; thereafter he was required to wear a contact lens on that eye, together with his regular glasses. He was 51 years old at the time and approaching retirement.

Salas then became curious to find out whether Fontes' eyesight, even as corrected, was such that perhaps he should not have been driving an emergency vehicle. To satisfy himself on that point, he filed two motions in the respondent court: first, a motion to compel an ophthalmological as well as a general physical examination of Fontes; second a motion to permit the inspection of some of Fontes' past medical records.

Fontes resisted the motion for the two physical examinations, claiming that his physical condition was not in controversy. He pointed to the fact that counsel for Salas had been "furnished with the names of the places where information could be obtained concerning [Fontes'] eye examination." He also asserted that, in any event, two physical examinations were at least one too many.

The motion for inspection of documents was met by a claim of the benefit of the physician-patient privilege with respect to the information to which Salas' counsel had been referred in response to the other motion!

The respondent court denied the motion for physical examinations of Fontes, but granted the motion for an inspection of the medical records. No reasons for its rulings were given. (See *Greyhound Corp.* v. *Superior Court*, 56 Cal.2d 355, 384 [15 Cal.Rptr. 90, 364 P.2d 266].)

Each side then petitioned this court for appropriate relief. (*Burke* v. *Superior Court*, 71 Cal.2d 276, 277, fn. 1 [78 Cal.Rptr. 481, 455 P.2d 409].) In view of the interrelated and partly novel problems involved, we issued alternative writs and consolidated the proceedings for the purpose of this opinion.

Physical Examination of Fontes

(1) The power of the court to order the physical examination of a defendant driver in an action for personal injuries was established in *Harabedian* v. *Superior Court*, 195 Cal.App.2d 26, 31-32 [15 Cal.Rptr. 420, 89 A.L.R.2d 994]. Although, as the Supreme Court of the United States, in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 [13 L.Ed.2d 152, 159, 85 S.Ct. 234], said, *Harabedian* was then the only modern case in state courts which had permitted such an examination, its authority has never been questioned. In fact in *Schlagenhauf* the existence of such a power even in the federal courts was expressly recognized. (Cf. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 [85 L.Ed. 479, 61 S.Ct. 422].) Indeed Fontes does not really question *Harabedian*, but points out that there the trial court had exercised its discretion in favor of allowing the examination, while here the discretion went the other way.

True enough, but discretion appears to have been partly abused here. **(2)** Salas has made out a strong prima facie case for the granting of the motion for an eye examination. Its factual basis—the cataract operation—

is in no way disputed. Ophthalmological examinations are neither painful nor embarrassing. About the only reason we can think of for not granting the motion is that the court may have thought that the inspection of the records might make it moot. If that was the implied basis for the ruling, it should have been made without prejudice.

(3) On the other hand no basis for a general physical examination is shown and it was properly denied. The fact that a generous pension law permits Fontes to retire relatively early in life does not make him decrepit. (See generally, Grossman & Van Alstyne, Discovery Practice, §§ 745, 747 (Vol. 14 West's Cal. Practice).)

Inspection of Medical Records

As noted, the motion for an inspection of Fontes' medical records was met by an assertion of the physician-patient privilege. (Evid. Code, § 900 et seq.)

The physician-patient privilege—hereafter sometimes simply "the privilege"—was unknown to the common law. The history of its grudging acceptance in the United States is outlined in 8 Wigmore, Evidence, section 2380-2380a (McNaughton rev. 1961) where the author finally concludes: "There is little to be said in favor of the privilege, and a great deal to be said against it."[1] In many states the privilege still does not exist. (See 8 Wigmore, Evidence (1961) § 2380, fn. 5.) Where it has been recognized, the accepted technique has been to qualify it with broad exceptions which cover just about every situation in which the evidence encompassed by the privilege might possibly become relevant. (See 6 Cal. Law Revision Com. Rep. (1964) p. 420, fn. 10.) In recognition of this fact of legal life, the framers of the "Proposed Rules of Evidence for the U.S. District Courts and Magistrates" rejected the privilege altogether. Their reasons are quoted in the footnote.[2]

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[1]In this he echoes most legal writers. (Quick, *Privileges Under the Uniform Rules of Evidence*, 26 U.Cin.L.Rev. 537, 547-548.) A physician-patient privilege was included in the Uniform Rules of Evidence only over the objection of the committee that drafted them. (Gard, *The Uniform Rules of Evidence*, 31 Tul.L.Rev. 19, 26.)

[2]"The rules contain no provision for a general physician-patient privilege. While many states have by statute created the privilege, the exceptions which have been found necessary in order to obtain information required by the public interest or to avoid fraud are so numerous as to leave little if any basis for the privilege. Among the exclusions from the statutory privilege, the following may be enumerated: communications not made for the purposes of diagnosis and treatment; commitment and restoration proceedings; issues as to wills or otherwise between parties claiming by succession from the patient; actions on insurance policies; required reports (venereal diseases, gunshot wounds, child abuse); communications in furtherance of crime or fraud; mental or physical condition put in issue by patient (personal injury cases); malpractice actions; and some or all criminal prosecutions. California, for example, excepts cases in which the patient puts his condition in issue, all criminal proceedings, will and similar contests, malpractice cases, and disciplinary proceedings, as well as certain other situations, thus leaving virtually nothing covered by the privilege. California Evidence Code §§ 990-1007. For other illustrative statutes see Ill.Rev.Stat. 1967, ch. 51, § 5.1; N.Y.C.P.L.R. § 4504; N.C.Gen.Stat. 1953, § 8-53. . . ." (Comm. on Rules of Practice & Proc. of the Jud. Conf. of the U.S., *Prop. Rules of Evid. for the U.S. Dist. Cts. and Magistrates*, p. 53 (1971) Rev. Draft, West ed.). See also McCormick on Evidence (1972) section 105, page 227, footnote 95: "The California privilege, for example, is subject to 12 exceptions. . . . Not much except the smile is left. . . ."

It is generally believed that the psychiatrist-patient relationship is entitled to more protection than that between physician-patient. Thus the psychotherapist-patient privilege as enacted in California (Evid. Code, § 1010 et seq.) is significantly broader than the physician-patient privilege. (See also *In re Lifschutz*, 2 Cal.3d 415, 437-439 [85 Cal.Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1].) A psychotherapist-patient privilege is also contained in rule 504 of the proposed federal rules.

Given the will-o'-the-wisp nature of the privilege and the relevance of Fontes' eyesight to the issues, it would be surprising if some statutory exception did not apply to the situation at bar. Salas recognizes that he cannot rely on the so-called patient-litigant exception (Evid. Code, § 996), since Fontes has never tendered an issue relevant to his physical condition: he merely meets one tendered by Salas. (*Carlton* v. *Superior Court*, 261 Cal. App.2d 282, 289-290 [67 Cal.Rptr. 568].) Instead Salas argues that public policy requires that the privilege be deemed waived because Fontes was driving the fire truck as a public employee—a rather startling proposition, which we reject. He also relies on the dissent in *Carlton* v. *Superior Court, supra*, at pages 293-296.

Carlton presented a situation on all fours with this case, except that the alleged vehicular misconduct of the defendant was not just running a red light and speeding, but felony drunk driving. (Veh. Code, § 23101.) For obvious reasons the plaintiff in the personal injury action wanted to see the records of the hospital where Carlton had been taken after the accident. The majority of the court of appeal prohibited the enforcement of superior court orders permitting such an inspection. It held that the privilege applied. The dissent pointed to the fact that in a criminal case against Carlton he could not have asserted the privilege, and argued that the victim of an intoxicated driver was entitled to just as much protection as the general public. (Evid. Code, § 998.) The Supreme Court denied a hearing.

We do not feel bound to follow *Carlton* because neither the majority nor the dissent ever discussed the applicability of section 999 of the Evidence Code,[3] which reads as follows: "There is no privilege under this article in a proceeding to recover damages on account of conduct of the patient which constitutes a crime."

(4) As this case reaches us it seems clear that plaintiff's cause of action is based, at least in part, on a claim that Fontes violated section 21453, subdivision (a) of the Vehicle Code, relating to the duty to stop when faced with a traffic control signal displaying a red light, and section 22350 of the Vehicle Code, the basic speed law. Whether or not the crimes referred to in section 999 include infractions, violations of sections 21453 and 22350 of the Vehicle Code are misdemeanors. (Veh. Code, § 40000.15.)[4]

We have—though, as will appear, with reluctance—come to the conclusion that on the record before us Salas has made out a colorable case for

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[3]Hereafter, unless otherwise indicated, all statutory references are to the Evidence Code.

[4]A study of the Uniform Rules of Evidence, which contain a provision similar to section 999 in rule 27(3)(a), and of the history of the Evidence Code (6 Cal.Law Revision Com.Rep. (1964) pp. 410-411), leaves no doubt that the framers of the code, when referring to "a crime" in section 999, meant to include all crimes, at least as that term was then defined in the Penal Code. (Pen. Code, § 16.)

the application of section 999.[5] At the same time we feel bound to explain why—given the legislative determination that the physician-patient relationship deserves protection, at least in some situations—section 999 vindicates no countervailing policy worthy of attention. Instead it opens the door to invasions of patients' privacy in private litigation not initiated by the patient or by anyone in his behalf.[6] It invites extortionate settlements, made to avoid embarrassing disclosures. We earnestly suggest that the section be reevaluated.[7]

The black letter of section 999, a verbatim copy of the California Law Revision Commission's[8] recommendation, has a traceable ancestry;[9] however we know of no attempt to rationalize it until the commission drafted its comment to section 999. With all respect it appears to us that the com-

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[5]As we shall point out (see fn. 17, *post*), this holding does not preclude the trial court from reconsidering its order permitting the inspection in the light of this opinion and additional facts and arguments which the parties may wish to submit after remand.

[6]Although the privilege is not available in criminal proceedings (Evid. Code, § 998), these are initiated by a public official who, presumably, has no motive except to secure a conviction. Further, even if they have relevant testimony to give, the physicians of criminal defendants are rarely called as witnesses. (Quick, *op. cit.*, fn. 1, *supra*, p. 549.) It is, of course, appreciated that bad faith attempts at discovery of medical facts may be thwarted by protective orders under section 2019, subdivision (d) of the Code of Civil Procedure.

[7]It may be thought that we are going to a great deal of trouble writing about an obscure section in the Evidence Code which has never been discussed in any published opinion. Sooner or later, however, it would be spotlighted somewhere and its potential for abuse realized by the unscrupulous.

[8]Both the section and the comment were adopted by the Legislature precisely as recommended by the California Law Revision Commission—hereinafter "the commission."

[9]Rule 223(2)(a) of the Model Code of Evidence (1942) contains an identical exception to the privilege where the patient's criminal conduct which is called into question in a civil action is felonious. The stated reason for the exception is that it "is dictated by the necessity of fullest disclosure in criminal prosecutions for serious offenses." That is no reason at all for the exception in civil cases. The complete inapplicability of the privilege in felony prosecutions was already provided for in rule 221. The Uniform Rules of Evidence have a similar exception in rule 27(3)(a). No reason is given in the comment, which merely explains that the privilege was first voted out altogether by the National Conference of Commissioners on Uniform State Laws, but was included three years later by a close vote. When Professor Chadbourn wrote his study of the Uniform Rules for the California Law Revision Commission, he said with respect to rule 27(3)(a): "Evidently, the thought here is that if the action were criminal there would be no privilege . . . and, by analogy, there should be no privilege where the action is civil." This may be a thought, but is not much of a reason. If certain policy considerations dictate the creation of the privilege, and other policies peculiar to criminal prosecutions point to its abandonment in criminal actions, it certainly does not follow that the latter policies suddenly apply to civil cases as well. Nevertheless, Professor Chadbourn recommended acceptance of the principle of rule 27(3)(a). (6 Cal. Law Revision Com., *supra*, fn. 4, pp. 410-411.)

ment vainly attempts to state a legal rationale for an inherited exception to the privilege which exception is, in truth, based on a fundamental lack of sympathy for the privilege itself.[10] The comment reads as follows:

"Section 999 makes the physician-patient privilege inapplicable in civil actions to recover damages for any criminal conduct, whether or not felonious, on the part of the patient. Under Sections 1290-1292 (hearsay), the evidence admitted in the criminal trial would be admissible in a subsequent civil trial as former testimony. Thus, if the exception provided by Section 999 did not exist, the evidence subject to the privilege would be available in a civil trial only if a criminal trial were conducted first; it would not be available if the civil trial were conducted first. *The admissibility of evidence should not depend on the order in which civil and criminal matters are tried.* This exception is provided, therefore, so that the same evidence is available in the civil case without regard to when the criminal case is tried." (Italics added.)

We submit that an analysis of the comment merely exposes the lack of a sound basis for section 999.

1. The basic legal premise for the comment is, to put it gently, suspect. It is obviously the thought that if the criminal action is tried first, the privilege could not be claimed in a later civil action, since its very assertion would make the witness who testified to a confidential communication between doctor and patient in the criminal trial "unavailable" within the meaning of sections 1291 and 1292 of the Evidence Code (see Evid. Code, § 240, subd. (a)(1)) and that, therefore, his former tesitmony at the criminal trial would be admissible in the later civil proceeding. The reason why the privilege, normally applicable in civil proceedings, could not be asserted is that former testimony admissible under sections 1291 and 1292 is not subject to objections "based on competency or privilege which did not exist at the time the former testimony was given." (Evid. Code, §§ 1291, subd. (b)(2), 1292, subd. (b).) That being so, the availability of the privilege should not depend on the sequence in which the interrelated civil and criminal trials take place.

It is not, however, necessarily so. Unavailable at the later civil trial are objections based on competency and privilege which did not "exist" at the earlier criminal one, rather than objections which simply did not apply.

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[10]This is not a matter of speculation. Professor Morgan, the "Reporter" of the Model Code writes that the privilege was included by the American Law Institute "contrary to the recommendation of he Reporter and his advisors and of the Council." (Morgan, Basic Problems of Evidence (A.L.I. 1957) p. 110.) The Uniform Rules' comment on the privilege is actually an apology for its inclusion.

What the framers of sections 1291 and 1292 obviously had in mind was the witness who, between the two trials, has become a lunatic or married the party against whom he is called to testify. The problems arising from these intervening events truly did not "exist" at the first trial. This is not so with the privilege under consideration. It always "existed" as to a civil proceeding—it merely did not apply in the criminal case.

2. Even if the legal premise to the comment is sound—which we obviously doubt—the policy rationale for its application is mind-boggling. "The admissibility of evidence should not depend on the order in which civil and criminal cases are being tried." Why not? While this declaration commands a nice egalitarian ring, what value does it vindicate? One may legitimately ask: is it more important not to discriminate between patients who are so unfortunate that their medical problems have become relevant in an earlier criminal case and those whom the vagaries of court calendaring thrust first into the civil spotlight, than to protect the confidentiality of the doctor-patient relationship in a setting in which it otherwise deserves protection?[11] In this connection it should be pointed out that the affirmative answer implicit in the comment sacrifices the privilege for a principle which, as a practical matter, needs no protection. How often does it happen that a civil trial involving a defendant—not necessarily the patient—who is being sued for damages[12] on account of criminal conduct of the patient actually precedes a criminal trial in which the same patient's confidential medical communications are in issue?

Every experienced trial lawyer knows the answer to that question.[13] Further, in a large percentage of cases where someone is being sued on account of the patient's criminal conduct, the patient will never have been charged with a crime; if charged, the chances that there has been an actual trial are statistically quite remote.[14] Even more remote is the assumption

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[11]We repeat that we fully realize that it is not a judicial function to make the basic determination whether the physician-patient relationship deserves protection.

[12]Why must the defendant in the civil case be sued for damages? Why discriminate in favor of patients whose criminal conduct has caused someone to be sued to abate a nuisance or for declaratory relief? The strange result of this limitation is that the privilege is not available in an action such as the one at bar, but could be claimed in a life insurance company's action against the patient to have it established that he cannot claim the benefit of a policy because he murdered the deceased! (*Meyer* v. *Johnson*, 115 Cal.App. 646 [2 P.2d 456].)

[13]We note that section 1382 of the Penal Code counts in days what section 583 of the Code of Civil Procedure measures in months!

[14]Parenthetically it may be observed that in the case at bar it would be very odd if Fontes has been charged criminally. That he went through a red light is admitted by Captain Schnakenberg, his superior, who also gave his deposition. The captain

that medical evidence, relevant in both trials, will actually have been offered in the criminal case.

It seems pretty clear, therefore, that the comment's rationale sacrifices the privilege for a pseudo-egalitarian principle which even in theory seems to be based on values far less vital than those which underlie the privilege; in practice it needs no protection.

3. Section 999 goes further than is justified by the comment's rationale that the admissibility of evidence should not depend on the order in which the civil and criminal cases are tried. The rationale obviously assumes that privileged testimony, relevant in the civil trial, would also have been relevant in the criminal trial, if that had been tried first, so that it could be offered under sections 1291 or 1292. Yet it requires no demonstration that there is such a difference between the principles of culpability applicable in criminal, as opposed to civil, matters, that the assumption is not justified. Yet section 999 applies on its face, even if the evidence never would have been admissible in the criminal trial.

4. If it is supposed to effectuate the purpose of the comment, section 999 does not go far enough. Confidential medical communications of a particular patient can be relevant in interrelated criminal and civil cases whether or not the civil case involves a defendant who is being sued for damages on account of the patient's criminal misconduct. Yet section 999 only applies in this last situation. In all others—on the comment's interpretation of sections 1291 and 1292—the privilege disappears if the criminal case is tried first, but remains assertable if the sequence is reversed. Yet the principle that the admissibility of evidence should not depend on which case is tried first, is clearly violated.[15]

So much for the comment's justification for section 999. Yet we are still faced with the section itself. We can think of no reasonable interpretation which would make it inapplicable to civil automobile litigation, such as the case at bar.[16] At the very least, section 999 is highly relevant to a proper disposition of Salas' discovery motions.

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rode on Fontes' truck. The siren could be operated by Schnakenberg or Fontes. Schnakenberg testified that he himself was operating the siren at the critical time.

[15]See E. Heafey, Cal. Trial Objections (Cont.Ed.Bar 1967) section 36.10. The nonapplicability of section 999 to civil actions for nonmonetary relief on account of the patient's criminal conduct (see fn. 8, *ante*) is only the most obvious example of section 999's failure to put the comment's rationale into effect.

[16]It could perhaps be argued that section 999 was intended to apply to civil litigation only in the very unusual situation where, but for the existence of a criminal statute, no case at all could be stated. (Cf. *Hudson v. Craft*, 33 Cal.2d 654, 660 [204 P.2d 1, 7 A.L.R.2d 696].) Such an interpretation of section 999 would probably

Disposition

The writ prayed for by Salas will have to be granted with respect to the requested eye examination of Fontes. While everything we have said so far with respect to Fontes' petition concerning the inspection of his medical records indicates that we can find no basis for saying that the order allowing it was wrong, we think that because of the interrelated nature of the two proceedings, both writs should be granted. This will enable the parties to make any further showing with respect to both discovery motions which they may care to make in the light of this opinion. Further an affirmative reconsideration with respect to the eye examination, may cause the court to feel that—at least for the time being—there is no "good cause" for the inspection of the medical records. Other considerations, not argued or brought to our attention, may enter the picture.[17]

Both writs to issue.

Stephens, J., and Ashby, J., concurred.

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remove most automobile accident litigation from its ambit: the reasonable man needs no statute to tell him that drunk driving is negligent. Further, most criminal statutes which give birth to civil causes of action otherwise unknown are in the commercial field; but crimes such as violations of section 2805 of the Vehicle Code, prohibiting the resetting of odometers, rarely raise questions of the used car dealer's health. (See *Luczko* v. *Jules Meyer, Inc.*, 276 Cal.App.2d 293 [80 Cal.Rptr. 798].) Since we must assume that it was intended to give section 999 some effect, we cannot make it disappear by confining it to cases where the very existence of a civil cause of action depends on a criminal statute. Further, the policy considerations underlying section 999—such as they are—are equally applicable whether the very cause of action is created by the criminal statute, or whether the violation of such a statute is merely one way of proving the civil case.

[17]For example, we have intentionally said nothing concerning the strength of the showing necessary to establish that Salas is suing on account of Fontes' criminal conduct. Obviously the trial court cannot try the whole case on liability to determine that preliminary question. On the other hand Fontes may be able to make a respectable argument that something more than a mere assertion in a pleading is required. (See generally Evid. Code, § 400 et seq.) This question is more complicated here than in the usual automobile accident case, because Fontes will assuredly try to make something of his immunity from criminal liability extended, under certain conditions, by section 21055 of the Vehicle Code. Except for the unmeritorious contention that Fontes waived his privilege just by driving a fire truck in the line of duty, no issues peculiar to Fontes' status as a public employee have been raised in this court. (See generally Veh. Code, §§ 17004, 21055; *Torres* v. *City of Los Angeles*, 58 Cal.2d 35 [22 Cal.Rptr. 866, 372 P.2d 906]; Van Alstyne, Cal. Government Tort Liability (Cont.Ed. Bar 1964) §§ 2.41, 7.25(a), 7.30(a), 7.71.)