#63(L) 12/14/65

First Supplement to Memorandum 65-77

Subject: Study No. 63(L) - Evidence Code

Attached to this memorandum is a copy of a letter from Judge Richards of the BAJI Committee (buff). The letter raises questions as to how res ipsa loquitur and the presumption of negligence from violation of a statute are to be treated under the Evidence Code. Also attached to this memorandum is a copy of our reply (green).

We have attempted to clarify the res ipsa matter in our tentative recommendation. The question raised in this memorandum is whether we should also attempt to clarify the negligence per se presumption.

You will recall that we drafted the presumption as Government Code Section 815.6 in our governmental liability act. Section 815.6 provides:

> 815.6. Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Chief Justice Gibson, in Alarid v. Vanier, 50 Cal.2d 617, 624 (1958), stated the test for determining whether the presumption of negligence arising from statute violation had been overcome as follows:

> In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

Under this test, it appears that the presumption affects the burden of proof.

So far as the facts giving rise to the presumption are concerned, Tossman v. Newman, 37 Cal.2d 522, 525 (1951), states:

> It is settled that disobedience of a statute for which criminal sanctions are imposed is not negligence as a matter of law under all circumstances, but a presumption of negligence arises on proof of such a violation, and the presumption can be rebutted by evidence of justification or excuse.

Although the above formulation refers only to violation of a statute, it is settled that violation of a regulation gives rise to the same presumption. Lehmann v. Los Angeles City Bd. of Educ., 154 Cal. App.2d 256 (1957).

In Nunneley v. Edgar Hotel, 36 Cal.2d 493, 497 (1950), it was pointed out that proof of violation of a statute does not automatically give rise to the presumption:

> Miss Nunneley may not recover damages based upon such violation unless she is one of the class of persons for whose benefit the statute was enacted. She must also prove that the accident was of the nature which the statute was designed to prevent, and present proof of violation of the statute as the proximate cause of her injury.

In Richards v. Stanley, 43 Cal.2d 60, 62 (1954), the court stated:

> A person may not recover damages based upon the violation of a criminal statute or ordinance, however, unless he is one of a class of persons for whose benefit the statute or ordinance was enacted.

Upon the basis of these statements of the presumption, we suggest that the Commission consider adding the following section to the Evidence Code:

> 669. (a) The failure of a person to exercise due care is presumed from the violation of a statute, ordinance, or regulation if:
>
> (1) A criminal sanction is provided for violation of the statute, ordinance, or regulation;
>
> (2) The violation proximately caused death or injury to person or property;
>
> (3) The death or injury resulted from an accident of the nature which the statute, ordinance, or regulation was designed to prevent; and
>
> (4) The person suffering the death or injury was one of the class of persons for whose benefit the statute, ordinance, or regulation was adopted.
>
> (b) This presumption may be rebutted by proof that the person violating the statute, ordinance, or regulation did what

might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

Comment. Section 669 codifies a frequently applied common law presumption that is recognized in the California cases. Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958). The conditions of the presumption are those that have been developed in the California case law. See Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958); Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954); Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950).

Respectfully submitted,

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December 8, 1965

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Dear Mr. DeMoully:

The BAJI Committee has about completed its review and revision of the general instructions in Part I affected by the Evidence Code.

Two thorny problems face us and we would appreciate your observations and assistance. First, what does the Evidence Code do to the hybrid mandatory inference-presumption of negligence in res ipsa loquitur? Although res ipsa is discussed at length in the June 1964 Tentative Recommendation relating to burden of proof, etc., I have not found any reference to the application of the doctrine on the Evidence Code comments unless it be the final comment under section 600 that "the court may instruct the jury on the propriety of drawing particular inferences".

In a brief conversation with Bernie Witkin when he recently spoke to the L. A. Bar Association Trial Section, he expressed the view that res ipsa will become a presumption affecting the binder of producing evidence under section 603. It hardly seems likely to me that the "force and justice of the rule" (Ybarra v. Spangard, 25 Cal.2d 486) will become so pusillanimous as to become vitiated by defendant simply testifying, "I didn't do it," and thus leaving it up to the jury whether or not to draw an inference of negligence when the plaintiff is helpless to present evidence upon which such an inference may be drawn.

The second thorny and everyday problem is how a negligence per se presumption arising from a violation of a statute, ordinance or safety order is to be classified. We know that it will not be evidence but is it to be a burden of producing evidence presumption under section 603 or a burden of proof presumption under 605 or must we "await classification by the courts" (section 601 comment)?

We most certainly would appreciate your comments on these two questions as they are involved in the vast majority of personal injury and malpractice jury cases.

Cordially yours,

Philip H. Richards

PHR/fv

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December 14, 1965

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Dear Judge Richards:

Mr. DeMoully has asked me to respond to your letter of December 8. We are delighted to give you our views on the matters contained in your letter. Nevertheless, this response to your letter represents only the views of the Commission's staff and should not be considered as the views of the Commission.

The Commission is now engaged in preparing a few amendments to the Evidence Code to clarify some of its provisions. Because one of these proposed amendments deals with res ipsa loquitur, we are sending you with this letter a copy of the tentative recommendation relating to these amendments. The tentative recommendation has not been finally approved by the Commission, although the Commission has been over it and approved it in principle.

You will note the discussion of res ipsa loquitur at pages 3-5 and 13-15. This discussion reflects our view of the existing law. Although the doctrine in some respects does not seem to fit precisely within the classification scheme contained in the Evidence Code, for the most part we believe that the doctrine fits the description of a presumption affecting the burden of producing evidence. Hence, we propose to require such a classification of the doctrine.

If this analysis is correct, and the courts classify the doctrine as we propose to classify it, the trial court must decide whether the defendant's evidence attacks the elements of the doctrine or the conclusion of negligence that is required when the elements are established. If the defendant's evidence attacks only the elements of the doctrine, then an instruction on what has become known as conditional res ipsa loquitur becomes necessary. For example, if the defendant's evidence

does not relate to his own use of care but relates instead to his lack of exclusive control over the instrumentality that caused the injury, then the court must instruct the jury that, if it finds the elements of the doctrine exist, it is required to find that the defendant was negligent. If the defendant offers evidence of his care, the mandatory or presumptive effect of the doctrine disappears. The inference, however, remains. Thus, the court may still instruct that if the jury finds that the elements of the doctrine exist (probability of negligence, exclusive control, lack of voluntary action by injured person) it may infer that the defendant was negligent, and if this inference seems to the jury to be more persuasive than the defendant's evidence of his care, the jury should find that the defendant was negligent. In other words, if the jury, after considering the evidence (probability of negligence, etc.) and the inference of negligence that arises therefrom and weighing it against the evidence of the defendant's exercise of care, believes that the evidence and inference of negligence preponderates in convincing force, it should find for the plaintiff. If after such weighing the jury cannot decide whether it is likelier that the defendant was negligent or careful, or if the jury believes that it is likelier that the defendant was careful, then the jury should find for the defendant.

We are glad that you brought to our attention the presumption of negligence that arises from violation of a statute. It may be that the Commission will want to clarify that matter too instead of awaiting "classification by the courts."

We became somewhat familiar with the presumption when we worked on the governmental liability act that was enacted in 1963. It seems to us that the classification that it fits most closely is the Section 605, burden of proof, classification. Under Alarid v. Vanier, 50 Cal.2d 617 (1958), we believe that a defendant is required to prove by a preponderance of the evidence that "he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." If our surmise is correct, the jury should be instructed that if it believes that the defendant violated the statute, it should then determine whether the defendant "did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." If the jury believes that it is more likely than not that the defendant did act reasonably as described, the jury should find that the defendant was not negligent. If the jury is not persuaded that it is more likely than not that the defendant acted reasonably as described, then the jury should find that the defendant was negligent.

Naturally, until the courts actually rule on these presumptions, the above observations are merely speculation on what the courts might do. If legislation is enacted to clarify these matters, it will not become effective until September, 1967. Cases will arise, however, between January 1, 1967, and the effective date of the clarifying legislation that will involve these problems. Obviously, instructions must be prepared for these interim cases. But such instructions must be subject to the possibility that the appellate courts will view these presumptions differently than we believe they will at the present time.

Aside from these two presumptions, I would like to add an observation concerning the entire matter of instructing on presumptions and the evidentiary burdens. In drafting these provisions of the Evidence Code, it was our hope that they would be utilized merely as devices for informing the court and the jury as to what should be believed in the light of the convincing force of the evidence. We did not think that it would be necessary or particularly desirable to tell them about the legal labels involved. Rather, we thought the jury's task might be simplified if it were merely told "If you find A, B, and C, then you must find D" or "Plaintiff must persuade you that A exists; if he fails to persuade you that it is more probable than not that A exists, then you must find that it does not exist." While the suggested wording here is not intended as a model of draftsmanship, the idea is that it is unnecessary to tell the jury about the legal concepts of presumptions and evidentiary burdens in order to apprise the jury of its precise duty. We feel that if the jury were told its precise duty--what it must find in the light of what it believes from the evidence--the jury could perform its fact-finding function with a minimum of confusion.

We recognize that we may be in error in this regard, for it is not our business to deal with juries or to frame instructions. However, we did want you to know our thinking on the matter.

We appreciate your letter and hope that you will bring to our attention any further matters you discover in regard to the Evidence Code that need clarification or revision.

Very truly yours,

Joseph B. Harvey
Assistant Executive Secretary

JBH:lb