

8/7/69

Memorandum 69-99

Subject: Study 63 - Revisions of Evidence Code

Attached are two copies of a tentative recommendation that consolidates the following:

- (1) The res ipsa loquitur tentative recommendation.
- (2) The marital testimonial privilege provisions that were deleted from the bill introduced at the 1969 Legislature to avoid complicating the psychotherapist-patient privilege recommendation.
- (3) The group therapy portion of the psychotherapist-patient privilege recommendation and a new exception for the psychotherapist-patient privilege. These apparently were unobjectionable portions of the bill vetoed by the Governor. The extension of the privilege portion of the vetoed bill is not included.

We will deal with any comments we receive on res ipsa loquitur and the marital testimonial privilege in separate memoranda.

Please mark any suggested editorial revisions on one copy of the tentative recommendation and turn it in to the staff at the September meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

63.20

August 1, 1969

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to
THE EVIDENCE CODE

Number 5 -- Revisions of the Evidence Code

CALIFORNIA LAW REVISION COMMISSION
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WARNING: 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. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

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.

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.

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 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. The Commission has included in this recommendation the same provisions that were included in the 1969 recommendation except for the provision to which the Governor objected which is not included.

TENTATIVE 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.

Thus, the Evidence Code does not contain any provisions dealing directly with the doctrine of res ipsa loquitur. Because of the frequency with which the decision of cases requires the application of this presumption, however, the code should deal explicitly with it.

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

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

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

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

This classification accords with the purpose of the doctrine. Like other presumptions affecting the burden of producing evidence, it is based on an underlying logical inference; and "evidence of the nonexistence of the presumed fact . . . is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence." *Comment to EVIDENCE CODE* § 603.

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

MARITAL PRIVILEGE

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 mat-

ters 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 spouse²

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.³ 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.⁴ 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.⁵

If the privilege of a spouse not to be called as a witness were limited to criminal cases,⁶ 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.¹ 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.

¹ For further discussion, see 8 CAL. L. REVISION COMM'N REPORTS 1814 (1967).

² HEAFY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967).

³ See HEAFY, CALIFORNIA TRIAL OBJECTIONS § 39.18 at 308 (Cal. Cont. Ed. Bar 1967).

⁴ "[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." HEAFY, CALIFORNIA TRIAL OBJECTIONS § 40.9 at 317 (Cal. Cont. Ed. Bar 1967).

⁵ Id. § 40.10 at 317.

⁶ 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 waiving the privilege. See *People v. Carmelo*, 94 Cal. App.2d 361, 210 P.2d 583 (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.

PSYCHOTHERAPIST-PATIENT PRIVILEGE

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. 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."

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 when the psychotherapist has reasonable cause to believe that a child patient has been the victim of a crime and disclosure of the communication is sought in a proceeding in which the commission of such crime is a subject of inquiry. 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 party against whom the presumption operates introduces evidence which would support a finding that he was not negligent, the court may, and on request shall, instruct the jury as to any inference that it may draw from such evidence and the facts that give rise to the presumption.

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

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

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

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

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

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

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

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

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

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

Examples of Operation of Res Ipsa Loquitur Presumption

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Evidence Code Section 971 (amended)

~~Section 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 HEAFLEY, 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.

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.

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. 1027. 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;
- (c) The communication relates to such crime; and
- (d) 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. Section 1027 is substantially the same as subdivision 3 of Section 4508 of the New York Civil Practice Law (privilege accorded client of "certified social worker"). 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 the patient refuses to permit the psychotherapist to make the disclosure necessary to the successful prosecution of the perpetrator of the crime.