63.20-50 11/4/69

Memorandum 69-142

Subject: Study 63.20-50 - Evidence Code (Res Ipsa Loquitur)

Attached as Exhibit I (pink) is a revised version of the res ipsa loquitur section and the Comment thereto. Several drafts of this have been sent to you since the October meeting. The revisions of the last draft sent to you are shown in handwriting of the enclosed draft.

Most of the changes are technical. The revisions in the text of the section are suggested by Judge Richards, except for the phrase "and drawing such inferences therefrom as are warranted." See Exhibit II (yellow) attached. This recommendation was previously approved for submission to the 1970 Legislature.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Evidence Code Section 646 (new)--res ipsa loquitur

Section 1. Section 646 is added to the Evidence Code, to read:

646. (a) As used in this section, "defendant" includes any party against whom the res ipsa loquitur presumption operates:

(b) The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence.

(c) If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury ~~in substance~~ to the effect that:

(1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and

(2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing ~~the circumstantial evidence of negligence together with~~ all other evidence in the case and drawing such inferences therefrom as are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

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:

> First, that it is the kind of [accident][injury] which ordinarily does not occur in the absence of someone's negligence;
>
> Second, that it was caused by an agency or instrumentality in the exclusive control of the defendant [originally, and which was not mishandled or otherwise changed after defendant relinquished control]; and
>
> Third, that the [accident][injury] was not due to any voluntary action or contribution on the part of the plaintiff which was the responsible cause of his injury. [BAJI [redacted] (5th [redacted] ed. 1969)(brackets in original)]

No. 4.00

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 that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary finding. 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 was not negligent or that any negligence on his part was not a proximate cause of the accident, the presumptive effect of the doctrine vanishes. However, the jury may still be able to draw an inference that the accident was caused by the defendant's lack of due care 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 from which the jury can infer that the accident resulted from the defendant's failure to exercise due care. Section 646 requires the court to give such an instruction when a party so requests. Whether the jury should so find will depend on whether the jury believes that the probative force of the circumstantial and other evidence of the defendant's negligence exceeds the probative force of the contrary evidence and, therefore, that it is more probable than not that the accident resulted from the defendant's negligence.

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. 450 (1937). In appropriate cases, therefore, the jury may be instructed that, even though it does not find that the facts giving rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more probable than not that the defendant was negligent. Such an instruction would be appropriate, for example, in a case where there was evidence of the defendant's negligence apart from the evidence going to the elements of the res ipsa loquitur doctrine.

Examples of Operation of Res Ipsa Loquitur Presumption

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

(1) Where the facts giving rise to the doctrine are established as a matter of law (by the pleadings, by stipulation, by pretrial order, or by some other means) and there is no evidence sufficient to sustain a finding 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.

but the defendant has introduced.

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

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); *Ficks v. Wilkie*, 67 Cal. App.2d 440, 154 P.2d 725 (1945).

Basic facts established as matter of law; evidence introduced to rebut presumption. Where the facts giving rise to the doctrine are established as a matter of law but the defendant has introduced evidence sufficient to sustain a finding either of his due care or of a cause for the accident other than his negligence, the presumptive effect of the doctrine vanishes. Except in those rare cases where the inference is dispelled as a matter of law, 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 not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant ~~only~~ unless the jury believes, ~~if~~ after weighing ~~the circumstantial evidence of negligence together with~~ all the ~~other~~ evidence in the case, ~~it believes~~ that it is more probable than not that the accident was caused by the defendant's negligence.

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

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

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

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 not find that a proximate cause of the accident was some negligent conduct on the part of the defendant, however, only if it believes after weighing all of the evidence that it is more probable than not that the defendant was negligent and that the accident resulted from his negligence.

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unless

But the court shall also instruct the

Memo 69-142

EXHIBIT II

The Superior Court

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November 3, 1969

Mr. John H. DeMoully
Executive Secretary
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School of Law
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Dear Mr. DeMoully:

I agree that the changes made in the draft of the proposed res ipsa loquitur in section accompanying your letter of October 30, 1969, are improvements. However, I do have a couple of comments which should have been made earlier.

I am disturbed by the phrase "in substance" at the end of (c). Obviously it is not intended that the language of (1) and (2) should be quoted in an instruction. In fact, if the conditional facts are established as a matter of law, then under your comment, example (2) "the court may instruct the jury that it may infer from the established facts etc." no reference to finding the basic facts is necessary. In other words, the conditional instruction, such as BAJI No. 4.00 is unnecessary when the conditional facts are established as a matter of law. Would it do to strike out "in substance" completely and substitute therefor "to the effect"?

My subsequent suggestion relates to the clause "after weighing the circumstantial evidence of negligence". You and I know that the evidence that gives rise to the res ipsa instruction is circumstantial evidence, and I assume it is that evidence which the clause refers to, but the jury is not so advised. Would it

not do to say "after weighing all the evidence in the case"? This would include the evidence giving rise to the presumption, as well as to the evidence direct and circumstantial.

Again let me express our appreciation for having the opportunity of discussing this matter with you.

Sincerely,

Philip H. Richards

PHR:jp