#63 12/12/72

Memorandum 73-10

Subject: Study 63 - Evidence Code

The Evidence Code provides a physician-patient privilege. A number of exceptions to the privilege are provided, including Section 999 which makes the privilege inapplicable in a proceeding to recover damages on account of conduct which constitutes a crime.

Attached is a copy of Fontes v. Superior Court, 28 Cal. App.3d 589 (Nov. 1972), where the plaintiff sought disclosure of medical records and the court indicates that the physician-patient privilege would not provide protection where the defendant violated the Vehicle Code provisions relating to the duty to stop for a red light and the provision establishing the basic speed law.

Justice Kaus points out in the opinion that the rationale for the Section 999 exception in the Commission's Comment does not stand up under analysis. More significant, he suggests that 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." He suggests: "We earnestly suggest that the section be reevaluated." Equally important is the fact that the trial court will be required, in order to apply the exception, to determine whether the patient actually engaged in conduct which constituted a crime. See discussion in note 17 of the attached opinion.

The attached opinion raises the issue whether the physician-patient privilege should be retained in California. See the discussion on page 593 of the opinion, noting that legal writers generally reject the privilege

and that the federal rules of evidence do not contain such a privilege. Also noted (note 2 of attached opinion) is the fact that McCormick on Evidence (1972) states: "The California privilege, for example, is subject to 12 exceptions. . . . Not much except the smile is left. . . ." (The physician-patient privilege should be distinguished from the psychotherapist-patient privilege, a privilege separately provided in California and recognized in the federal rules of evidence.)

A short time ago, Justice Cobey (who carried the Commission's evidence bill) called me and suggested that a review of the Evidence Code was in order in view of the adoption of the federal rules. The physician-patient privilege would appear to be the kind of discrepancy between the state and federal rules that Justice Cobey had in mind when he made this suggestion.

If the physician-patient privilege is to be retained, consideration should be given to the repeal of Section 999. The justification for such repeal would be that the exception cannot be justified on any logical basis, may be a means for extorting unjustified settlements, and may result in a wasteful expenditure (beyond the value of the protection afforded) of the time of the court and parties in determining whether the facts that bring a particular case within an exception exist. On the other hand, if it is believed that there is little to justify the privilege but that it should not be repealed, the position could be taken that no recommendation will be made that would have the effect of extending the protection afforded by the privilege. Note, for example, the evidence sought to be obtained in the instant case and its relevance to the action.

Respectfully submitted,

John H. DeMoully
Executive Secretary

[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.)

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.)

HEADNOTES

Classified to McKinney's Digest

(1) **Inspection and Physical Examination § 4—Physical Examination—Parties to Civil Action.**—The court has power to order a physical examination of the defendant in an action for personal injuries.

(2) **Inspection and Physical Examination § 4—Physical Examination—Parties to Civil Action—Ophthalmological Examination.**—In an action against a city fireman and his employer for injuries suffered when the fireman allegedly drove a fire truck through a red light, without sounding a siren, and at an excessive speed, the victim was entitled to have his motion for an eye examination of the fireman granted, where a prima facie case for such an examination had been made by evidence that about a year before the accident, the fireman had had a cataract operation and was, thereafter, required to wear a contact lens in one eye in addition to his regular spectacles, and where the adequacy of his vision for the operation of an emergency vehicle, such as a fire truck, was relevant to the victim's case.

(3) **Inspection and Physical Examination § 4—Physical Examination—Parties to Civil Action—General Physical Examination.**—In the absence of a showing of a basis for a general physical examination, a motion for such an examination of defendant in a personal injury action is properly denied.

(4) **Witnesses § 80—Privileged Relationships and Communications—Physician and Patient—Actions and Proceedings Embraced by Rule—Injury From Criminal Conduct.**—Plaintiff made out a colorable case for application of Evid. Code, § 999, declaring that there is no physician-patient privilege in a proceeding to recover damages on account of conduct of the patient which constitutes a crime, where his cause of action for injuries suffered in an intersection collision with a fire truck driven by defendant was based in part on defendant's alleged violation of Veh. Code, § 21453, subd. (a), relating to the duty to stop when faced with a traffic control signal displaying a red light, and Veh. Code, § 22350, the basic speed law.

COUNSEL

Veatch, Carlson, Dorsey & Quimby, Robert C. Carlson and Henry F. Walker for Petitioner in Civ. No. 40813 and Real Party in Interest in Civ. No. 40860.

No appearance for Respondent.

Eischen & Kast and Joseph Calvin Eischen for Real Party in Interest in Civ. No. 40813 and for Petitioner in Civ. No. 40860.

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]

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

[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.

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

[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-

[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.

[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

[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*i* of the Vehicle Code, prohibiting the resetting of odometers, rarely raise questions of the used car dealer's health. (See *Laczko* v. *Jules Meyes, 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.)