



1-1-1970

Evidence Review of Selected 1970 California Legislation

University of the Pacific; McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

 Part of the [Legislation Commons](#)

Recommended Citation

University of the Pacific; McGeorge School of Law, *Evidence Review of Selected 1970 California Legislation*, 2 PAC. L. J. 414 (1971).
Available at: <https://scholarlycommons.pacific.edu/mlr/vol2/iss1/28>

This Greensheet is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Evidence

Res Ipsa Loquitur

Evidence Code §646 (new).
SB 129; STATS 1970, Ch 69

Section 646, now added, codifies the judicial doctrine of *res ipsa loquitur* as part of the Evidence Code and purports to clarify the traditional debate as to whether the doctrine creates a presumption or an inference [See *Hardin v. San Jose City Lines*, 41 Cal.2d 432 (1963)] of negligence.

This Section now provides that the judicial doctrine is a presumption affecting the burden of producing evidence (*Section 603*) and clears up the ambiguity of whether the doctrine shifts the burden of proof to the defendant to rebut the presumption of negligence. Once plaintiff has established the elements to support the doctrine, the presumption arises. The effect of this presumption is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding that the presumed fact did not exist (*Section 604*).

Paragraph (c) of Section 646 provides that if the evidence would support a *res ipsa loquitur* presumption and the defendant produces evidence which would support a finding that he was not negligent or that his negligence was not the proximate cause of the occurrence, the court may, and upon request shall, instruct the jury 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 all of the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

This bill was sponsored by the California Law Revision Commission.

Reference:

- 1) WITKIN, CALIFORNIA EVIDENCE, *Burden of Proof and Presumptions* §§218, 219, 260 (2d ed. 1966); WITKIN, CALIFORNIA EVIDENCE, *Burden of Proof and Presumptions* §260 (Supp. 1969).

Psychotherapists—Patient Privilege

Evidence Code §§1027, 1028 (new); 1010, 1012 (amended).

SB 480; STATS 1970, Ch 1396

SB 481; STATS 1970, Ch 1397

The amendment to Section 1010 broadens the psychotherapist-patient privilege from disclosure to extend to professional consultation between a patient and a clinical social worker (*Article 4, Chapter 17, Division 3 of the Business and Professions Code*) engaged in applied psychotherapy of a non-medical nature and school psychologists holding a credential authorizing such service issued by the State Board of Education.

However, under new Section 1028 such professional consultation between the patient and the clinical social worker or school psychologist now added to Section 1010 will not be privileged for purposes of criminal proceedings.

Under Section 1027, now added, no privilege exists for any psychotherapist if: (a) The patient is a child under the age of 16, and (b) The psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child.

The addition of social workers and school psychologists to Section 1010 brings these specialists within other provisions relating to the psychotherapist privilege; (*Section 1013*) who holds the privilege, (*Section 1026*) duty to assert privilege, etc. Chapters 1396 and 1397 are identical.

References:

- 1) WITKIN, CALIFORNIA EVIDENCE, *Witnesses* §§857, 858 (Supp. 1969).
- 2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1967 CODE LEGISLATION, 111.

Writings

Evidence Code §1530 (amended).

SB 266; STATS 1970, Ch 41

(Effective April 3, 1970)

Section 1530 revises the list of officials who may make the final

Evidence

statement of attestation certifying the genuineness of the signature and the official position of (1) the person who attested the copy of a writing in the custody of a public entity which is located in a country or territory other than the United States, Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands; or (2) any foreign official who has certified either the genuineness of the signature and the official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and the official position of the person attesting the copy.

Pursuant to this amendment, the consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States is now included to the list (secretary of an embassy or legation, consul general, consul, or vice-consul) of those officials who may make such final statement.

A consular agent or other officer in the foreign service of the United States who is in the nation in which the writing is kept is no longer authorized after January 1, 1971, to make the statement.

Medical Record; failure to produce

Evidence Code §1158 (amended).

AB 2398; STATS 1970, Ch 556

Section 1158 allows a client to authorize his attorney to inspect and copy the client's medical records.

The attorney must obtain a written authorization from his client and present the authorization to the person in charge of the records (these persons are enumerated in the statute). The person in charge of the records must promptly make them available; but until now there has been no sanction for failure to do so.

This amendment adds a paragraph to Section 1158 which provides that failure on the part of any person or agency in control of the records to make them available within 5 days after the presentation of the authorization may subject the person to all reasonable expenses, including attorney fees, incurred in any proceeding to enforce the provisions of this Section.

References:

- 1) CAL. CODE CIV. PROC. §2034.
- 2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1963 CODE LEGISLATION 145.
- 3) Louisell, *Discovery Today*, 45 CAL. L. REV. 486 (1957).

**Credit Representations; statements by third parties,
admissibility**

Code of Civil Procedure §1974 (amended).

SB 90; STATS 1970, Ch 720

The amendment to Section 1974 states that no evidence is admissible to charge a person for a representation about the credit of a third person unless the representation or a signed memorandum of it is in writing.

Previously the statute stated that no person is liable upon the representation unless the representation or a signed memorandum of it was in writing. There was no reference to a limitation on admissible evidence.

Section 1974 is further amended to state that it is a statute of frauds provision and is to be applied in a manner that is consistent with the manner in which subdivision 2 of Section 1624 of the Civil Code is applied. Subdivision 2 is patterned after the original statute of frauds provision which states that an oral promise to answer for the debt, default, or miscarriage of another is invalid unless the representation or some note or memorandum thereof is in writing and subscribed by the party to be charged or his agent. This enactment is in the same words as the 1872 version of Section 1974 which was amended in 1965.

References:

- 1) 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §194 (7th ed. 1960); 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* §9 (7th ed. 1960).
- 2) Annot., 9 A.L.R. 536 (1920). Annot., 32 A.L.R. 2d 743 (1953).