

#63(L)

9/13/66

Memorandum 66-59

Subject: Study 63(L) - Evidence Code (Evidence Code Revisions)

In preparing the Evidence Code recommendation for the printer, we became concerned that Section 669 does not accomplish precisely what the comment says that it does. We are concerned that Section 669 may impose too high a standard of care upon children who violate statutes. Accordingly we suggest that Section 669 be amended as indicated below. The comment that follows explains the section as proposed to be amended and was approved in the form set forth here at the last meeting.

669. (a) The failure of a person to exercise due care is presumed if:

(1) He violated a statute, ordinance, or regulation of a public entity;

(2) The violation proximately caused death or injury to person or property;

(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(b) This presumption may be rebutted by proof that :

(1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law ; or

(2) Unless the violation occurred in the course of an activity

normally engaged in only by adults and requiring adult qualifi-  
cations, the person violating the statute, ordinance, or regu-  
lation was a minor and exercised the degree of care ordinarily  
exercised by persons of his maturity, intelligence, and capacity  
under similar circumstances.

Comment. Section 669 codifies a common law presumption that is frequently applied in the California cases. See Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958). The presumption may be used to establish a plaintiff's contributory negligence as well as a defendant's negligence. Nevis v. Pacific Gas & Elec. Co., 43 Cal.2d 626, 275 P.2d 761 (1954).

Effect of Presumption

If the conditions listed in subdivision (a) are established, a presumption of negligence arises which may be rebutted by proof of the facts specified in subdivision (b). The presumption is one of simple negligence only, not gross negligence. Taylor v. Cockrell, 116 Cal. App. 596, 3 P.2d 16 (1931).

Section 669 appears in Article 4 (beginning with Section 660), Chapter 3, of Division 5 of the Evidence Code and, therefore, is a presumption affecting the burden of proof. EVIDENCE CODE § 660. Thus, if it is established that a person violated a statute under the conditions specified in subdivision (a), the opponent of the presumption is required to prove to the trier of fact that it is more probable than not that the violation of the statute was reasonable and justifiable under the circumstances. See EVIDENCE CODE § 606 and the Comment thereto. Since the ultimate question is whether the opponent of the presumption was negligent rather than whether he violated the statute, proof of justification or excuse under subdivision (b) negates the existence of negligence instead of merely establishing an excuse for negligent conduct. Therefore, if the presumption is rebutted by proof of justification or excuse under subdivision (b), the trier of fact is required to find that the violation of the statute was not negligent.

Violations by children. Section 669 applies to the violation of a statute, ordinance, or regulation by a child as well as by an adult. But

in the case of a violation by a child, the presumption may be rebutted by a showing that the child, in spite of the violation, exercised the care that children of his maturity, intelligence, and capacity ordinarily exercise under similar circumstances. Daun v. Truax, 55 Cal.2d 647, 16 Cal. Rptr. 351, 365 P.2d 407 (1961). However, if a child engages in an activity normally engaged in only by adults and requiring adult qualifications, the "reasonable" behavior he must show to establish justification or excuse under subdivision (b) must meet the standard of conduct established primarily for adults. Cf. Prichard v. Veterans Cab Co., 63 Cal.2d 727, 47 Cal. Rptr. 904, 408 P.2d 360 (1965)(minor driving an automobile).

Failure to establish conditions of presumption. Even though a party fails to establish that a violation occurred or that a proven violation meets all the requirements of subdivision (a), it is still possible for the party to recover by proving negligence apart from any statutory violation. Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950)(plaintiff permitted to recover even though her injury was not of the type to be prevented by statute).

#### Functions of Judge and Jury

If a case is tried without a jury, the judge is responsible for deciding both questions of law and questions of fact arising under Section 669. However, in a case tried by a jury, there is an allocation between the judge and jury of the responsibility for determining the existence or nonexistence of the elements underlying the presumption and the existence of excuse or justification.

Subdivision (a), paragraphs (3) and (4). Whether the death or injury involved in an action resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent (paragraph (3) of subdivision (a)) and whether the plaintiff was one of the class of persons

for whose protection the statute, ordinance, or regulation was adopted (paragraph (4) of subdivision (c)) are questions of law. Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950)(statute requiring parapet of particular height at roofline of vent shaft designed to protect against walking into shaft, not against falling into shaft while sitting on parapet). If a party were relying solely on the violation of a statute to establish the other party's negligence or contributory negligence, his opponent would be entitled to a directed verdict on the issue if the judge failed to find either of the above elements of the presumption. See Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950)(by implication).

Subdivision (a), paragraphs (1) and (2). Whether or not a party to an action has violated a statute (paragraph (1) of subdivision (a)) is generally a question of fact. However, if a party admits violating the statute or if the evidence of such violation is undisputed, it would be appropriate for the judge to instruct the jury that a violation of the statute, ordinance, or regulation has been established as a matter of law. Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958)(undisputed evidence of driving with faulty brakes).

The question of whether the violation of a statute has proximately caused or contributed to the plaintiff's death or injury (paragraph (2) of subdivision (a)) is normally a question for the jury. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279 (1947). However, the existence or nonexistence of proximate cause becomes a question of law to be decided by the judge if reasonable men can draw but one inference from the facts. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279 (1947). See also Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958)(defendant's

admission establishes proximate cause); Moon v. Payne, 97 Cal. App.2d 717, 218 P.2d 550 (1950)(failure to obtain permit to burn weeds not proximate cause of child's burns).

Subdivision (b). Normally, the question of justification or excuse is a jury question. Fuentes v. Panella, 120 Cal. App.2d 175, 260 P.2d 853 (1953). The jury should be instructed on the issue of justification or excuse whether the excuse or justification appears from the circumstances surrounding the violation itself or appears from evidence offered specifically to show justification. Fuentes v. Panella, 120 Cal. App.2d 175, 260 P.2d 853 (1953)(instruction on justification proper in light of conflicting testimony concerning violation itself and surrounding circumstances). However, an instruction on the issue of excuse or justification should not be given if there is no evidence that would sustain a finding by the jury that the violation was excused. McCaughan v. Hansen Inc. Lumber Co., 176 Cal. App.2d 827, 833-834, 1 Cal. Rptr. 796, 800 (1959)(evidence went to contributory negligence, not to excuse); Fuentes v. Panella, 120 Cal. App.2d 175, 260 P.2d 853 (1953)(dictum).

Respectfully submitted,

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