10/17/61

Memorandum No. 47(1961)

Subject: Study No. 53(L)--Personal Injury Damage Awards to Married Persons

You have already received the study relating to marital interests in personal injury damages. This memorandum collects the policy questions that must be decided by the Commission on the basis of the study.

Existing Law

Section 163.5 of the Civil Code provides:

> All damages, special and general, awarded to a married person in a civil action for personal injuries, are the separate property of such married person.

The enactment of this statute in 1957 has created numerous problems. These are pointed out in detail in the study. Briefly, the statute's purpose was to prevent the imputation of the contributory negligence of one spouse to the other in personal injury actions. This purpose was achieved insofar as such imputation had been based on the fact that an award to an injured spouse in a personal injury action was considered community property. However, such contributory negligence may be imputed in some cases on other grounds. If a spouse is an owner of a car, negligence will be imputed in some cases under Vehicle Code Section 17150. Section 163.5 has been construed to apply only to actions for personal injuries and not for wrongful death; hence, if a parent brings an action for the death of a child, the negligence of one spouse will be imputed

to the other, for in such a case the recovery is still community property. Damages for injury to a minor child may also be treated as community property if Section 163.5 is construed to apply only to damages for personal injury to the married person who is seeking recovery.

Because a married person's personal injury damages are made separate property, they may not be divided on divorce and do not descend in the same manner that community property does. For example, a husband's recovery for loss of future earnings is his separate property under the statute, and his wife, therefore, has no interest therein that can be asserted upon divorce. Such a recovery is entirely subject to the husband's testamentary disposition and the wife has no right she can assert against such disposition. If the husband dies intestate, the wife will receive but 1/2 or 1/3 of the sum if the husband has surviving children or other near relatives instead of receiving the entire amount as she would if the property were community. If the husband uses the funds from a personal injury award to buy a house, it is his separate property and will be treated as such for inter vivos and probate homestead purposes.

The statute has left uncertain the status of payments made in settlement of personal injury claims, for it mentions only damages awarded in a civil action.

Damages: Community or Separate

California formerly treated all personal injury damages as community property. Under classic community property law, the determination of the nature of the damages in a personal injury action would be made upon the basis of the interest being protected. California applies this principle

in determining the nature of awards for property damage but not in determining the nature of awards for personal injury. The classic view is described by de Funiak as follows:

> Since the right of action for injury to the person, or for that matter, to the reputation, is intended to bring about compensation for the injury, and the compensation is intended to repair or make whole the injury, so far as is possible in such a case, the compensation partakes of the same character as that which has been injured or suffered loss. In this respect, the situation is very similar to an exchange of property during marriage. But what or who has been injured? Is it the marital community or is it the separate individuality of the spouse? In actuality, both. The physical injury to the spouse, the pain and suffering of the spouse therefrom is an injury to the spouse as an individual. If the spouse also suffers monetary loss to separate property or from inability to pursue allowable separate projects, that also is a loss to the spouse separately and as an individual. But on the other hand, if the injury deprives the marital community of the earnings or services of the spouse, that is an injury to the marital community; likewise there is loss to the community where the community funds are expended for hospital and medical expenses, etc. Since the husband is usually the breadwinner, contributing definite earnings, the loss to the marital community resulting from an injury to him is more obvious and more easily calculable in monetary figures. Therefore, there is usually little question that an injury depriving the community wholly or partly of his earnings is an injury to the community. If the wife is contributing earnings to the marital community, any injury interrupting or lowering these earnings is equally, as in the case of the husband, an injury to the community, and a cause of action for such injury is property of the community. . . . Even if the wife is not contributing earnings to the marital community, her services are a definite asset of the marital community, and the community, if wholly or partly deprived of them, suffers a loss which should render the right of action and the compensation therefor the property of the community. It is not alone the question of hospital and medical bills involved, although these are definitely a drain on the community property; it may be necessary to employ someone to keep house, to look after the children, the expenses for which definitely tend to indicate the value of the wife's services to the marital community and the loss thereto by deprivation of her services. [1 de Funiak, Community Property, 226-229 (1943)(footnotes omitted).]

The consultant recommends the repeal of Civil Code Section 163.5. This would presumably result in the reestablishment of the former case law

in California that all personal injury damages are community property. He rejects the classic view, which regards some personal injury damages as separate and some as community, as needlessly complex.

The first question, then, to be decided is: to what extent should damages for the personal injury of a spouse be separate property or community property? Should all damages be separate as provided in Civil Code Section 163.5? Should all damages be community, as under the former case law? Should damages to community interests--loss of earnings, hospital bills, loss of services--be community property while damages to separate interests are separate property? If the last alternative is chosen, what type of verdict would the jury be required to render in such a case?

A subsidiary question is whether the rule adopted should apply to the underlying cause of action as well as the damages themselves. In other words, should payments made in settlement of a claim be subject to the same rule as judgments?

Imputed Negligence

As indicated in the study, the reason for the enactment of Civil Code Section 163.5 was to prevent the application of the doctrine of imputed negligence when a spouse's contributory negligence was in part responsible for the injury. This purpose was not fully achieved by the code section, for under Vehicle Code Section 17150 contributory negligence is still imputed to the injured spouse if the injury arises out of an automobile accident and the injured spouse is an owner with a right of management over the automobile. (If the community owns the automobile and the husband, or some person authorized by the husband, is driving, the contributory

negligence of the husband is not imputed to the wife because only the husband has the right to manage the community property.) At page 15 of the Study is a table of the different results that flow from the application of Civil Code Section 163.5 and Vehicle Code Section 17150 to accidents involving husband and wife.

In actions by parents for the wrongful death of or injury to children, the negligence of one spouse will be probably imputed to the other despite the enactment of Section 163.5.

The consultant recommends that existing Section 163.5 be replaced by a statute that would directly preclude the application of the doctrine of imputed negligence between spouses in all cases. It would read as follows:

> 163.5. The negligence of one spouse shall not be imputed to the other spouse as owner of a motor vehicle under Vehicle Code Section 17150 or for any other reason.

This statute would not prevent a spouse who owns a car from being held liable to injured third parties if the injuries are caused by the negligent driving of the other spouse. The ownership liability created by Vehicle Code Section 17150 is a direct statutory liability and is not dependent upon the doctrine of imputed negligence.

This recommendation would mean that the rule of Cervantes v. Maco Gas Co., 177 C.A.2d 246 (1960)(hearing denied), would be changed. There, H & W sued D for the wrongful death of their son, S. D's employee, E, ran a gas line to the house at the request of H & W and connected it to a heater. E installed a valve, checked the connection, then turned off the valve. H asked E how the stove should be vented and was told. E told H that the heater should be vented before it was used. H was to vent the heater, and it was so understood by the parties. H & W's son died of carbon monoxide

poisoning because the heater was unvented. H & W sued D for wrongful death. The trial court instructed the jury that W could recover but H could not if H was contributorily negligent because each spouse's recovery would be separate property under Civil Code Section 163.5. The jury gave a verdict for W but denied recovery to H. A new trial was ordered because of the instruction and the plaintiffs appealed. The appellate court said the instruction was erroneous and affirmed the order. The court said Section 163.5 applies only to personal injury actions, not wrongful death actions. Hence, damages awarded W would be community property and H's contributory negligence should be imputed to her for that reason.

Under the statute proposed by our consultant, the result of Cervantes would be changed. Thus, if H brings the action: no recovery--contributory negligence; if W brings the action: recovery--no contributory negligence; yet, the interests of the parties in the ultimate award is identical. This would seem to place an undue emphasis on a technicality not going to the merits of the action.

Another example:

H & W are driving in a jointly owned car. W is injured because H, the driver, and D were negligent. Under the proposed statute, W can recover.

But, if W is riding as a passenger with son S and is injured because S and D were negligent, W cannot recover from D because S's negligence will be imputed to W as a co-owner.

This latter result may or may not be just, but it flows from a legislative policy applicable to all owners of cars. (Vehicle Code Section 17150.) It may be unjust as a general rule to impute the contributory negligence of drivers to injured owners who were not themselves negligent. But the

desirability of that policy is not before the Commission. The Commission must decide whether to exempt a car owner who is injured while a spouse is driving from the general rule which prohibits any car owner from recovering for his injuries if the driver of his car is contributorily negligent.

The foregoing presents the other question raised in the study: to what extent, if at all, should the doctrine of imputed negligence be made inapplicable between spouses? Should the doctrine of imputed negligence be inapplicable to the extent that the doctrine depends upon the community nature of the recovery? Should the doctrine be inapplicable only if an injured spouse is seeking to recover for his own injuries? Should the doctrine be inapplicable whether its basis is community property law, agency, or any other rule--such as Vehicle Code Section 17150?

In connection with these questions, the Commission should be aware of a possible limitation on its authority. The resolution authorizing this study merely authorized the Commission to study "whether an award of damages made to a married person in a personal injury action should be the separate property of such married person." The wording of this authorization indicates that the Commission's authority does not extend to recommending any changes in the ownership liability policy expressed in Vehicle Code Section 17150. Perhaps the Commission should seek to have its authority broadened at the budget session in 1962.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary