

7/6/65

## Memorandum 65-41

Subject: Study No. 53(L) - Personal Injury Damages as Separate Property

Attached to this memorandum is a draft statute designed to carry out the policy decisions made by the Commission at the April meeting, as modified by the Commission at the June meeting.

The statute is basically the same as the draft that was presented to the Commission at the May meeting. Because consideration of that draft was deferred pending the end of the legislative session, the Commission has never considered at length the policy problems involved. Accordingly, we include in this memorandum an extract from the memorandum that accompanied the previous draft. See below.

Certain additional matters now warrant consideration also. So far as contribution is concerned, the Commission wanted to know why the State Bar recommended a contribution between joint tortfeasors statute that was limited to contribution between joint judgment tortfeasors. Mr. Garrett Elmore has supplied me with a report of a conference committee on contribution, which report recommends the present joint tortfeasor contribution statute.

The majority of the committee concluded:

that the statute most workable and feasible for California practice, pending the adoption of an adequate third party practice procedure, is one providing for contribution between joint tortfeasors against whom there is a common judgment.

The committee stated elsewhere in the report that it did not favor a third party practice limited to contribution. It favored a statute providing for a third party practice generally, comparable to that provided by Rule 14 of the Federal Rules of Procedure.

Legislation providing for a general contribution practice in California was introduced at this last session of the Legislature, but it was sent to

interim study. The State Bar had some objections to the legislation, and we will be able to advise you as to the nature of those objections at the time of the meeting.

Commissioner Sato has raised one other matter that deserves consideration by the Commission. He points out that under the draft statute an interspousal tort action is somewhat circuitous. If there is no separate property, a spouse's tort liability to the other spouse will be satisfied out of the community property. It will also be paid into the community property. The only distinction will be that the right of management will shift from one spouse to the other. A note at 51 California Law Review 448 (1963), points out that some of this circuitry exists under the existing law. Our statute, however, will aggravate it.

The note just cited has a couple of suggestions designed to eliminate the circuitry. These suggestions are designed to dissolve the community of interest in the community property to the extent necessary to permit the guilty spouse to satisfy his tort liability to the other spouse without using the innocent spouse's share. One suggestion is to provide for a double recovery to the extent that the guilty spouse uses community funds to pay his liability to the other spouse.

For example, assume a H and W have community property of \$100,000, but no separate property. If W obtains a judgment for \$10,000 for an interspousal tort, H would pay \$20,000 from community property. Thus, W would receive \$10,000 of her own interest, which would be an accelerated enjoyment of that interest, and \$10,000 of H's interest. The balance of \$80,000 would remain community property with each spouse having an interest of one half therein. Where separate funds exist but are insufficient to discharge the entire judgment, the recovery is doubled only to the extent the payment from community funds is required.

[51 CAL. L. REV. at 453.]

The above suggestion is based on the existing law which makes personal injury damages the separate property of the injured spouse. The above suggestion, to be workable, would have to be coupled with an amendment to our statute providing that the personal injury damages of a spouse are separate property when the injury was inflicted by the other spouse.

An alternative method would authorize the court to require that an amount equal to the injured spouse's claim be set aside from the community as the separate property of each spouse. Then a lien could be impressed on that separate property of the tortious spouse in favor of the injured spouse.

Should either of the above suggestions be approved in order to eliminate the circuitry which will exist under the draft statute?

There follows below the discussion from Memorandum 65-16 that accompanied the draft statute when it was first distributed:

\* \* \* \* \*

Although no specific section so provides, the community property is liable generally for the torts of the husband. Grolemund v. Cafferata, 17 Cal.2d 679 (1941). The rationale of the court in that case was that the husband could settle a tort claim with community funds since he had the right to manage the community property and dispose of community funds for a good consideration. Discharge of a tort claim is good consideration. Since he could settle a tort claim with community funds, the court believed that it would be illogical to hold that the same property could not be taken by execution. Thus, the judgment was based on the husband's right of management and control. The reasoning of the court would indicate that community property subject to the wife's right of management (Civil Code Section 171c) may not be taken to satisfy the husband's tort debts. By a parity of reasoning, it would appear that the community property subject to the wife's management and control is liable for her tort debts. However, we know of no case. Generally, the community property is not liable for the torts of the wife. McClain v. Tufts, 83 Cal. App.2d 140 (1947).

In Tinsley v. Bauer, 125 Cal. App.2d 724 (1954), it was held that the wife's earnings were subject to a liability incurred by her where the creditor waived the tort and sued in contract to recover money embezzled by the wife. The decision was based in part on the last sentence of Section 167 of the Civil Code, which reads: "Except as otherwise provided by law, the earnings of the wife are liable for her contracts heretofore or hereafter made before or after marriage." The embezzled money was considered "earnings" for this purpose.

Until 1951, personal injury damages awarded to either spouse were community property and were subject to the husband's management and control. In 1951, Section 171c was added to the Civil Code to provide that the wife's earnings and her personal injury damages were subject to her management and control until commingled with other community property. In 1957, the provisions of Section 171c that gave the wife the right to manage and control her personal injury damages were deleted as part of the legislation that resulted in the addition of Section 163.5 to the Civil Code. Section 163.5, of course, made personal injury damages of a spouse the separate property of that spouse.

The former rule of interspousal tort immunity in California was based at least in part on the foregoing community property law. To permit a wife to recover from her husband for his tort would merely result in the husband's use of community property funds to pay the damages back into the community property. Money would be taken from one pocket and be replaced in the same pocket. Of course, if the wife committed the tort upon the husband, the problem was more complicated. The wife could not use the general community for the satisfaction of the tort obligation--although it seems likely that she could use the community subject to her management and control. Thus, she would be required to

take her separate property (or the community property subject to her control) and pay it into the general community subject to the husband's control.

In a case significantly named Self v. Self, 58 Cal.2d 683 (1963), the court abandoned the interspousal tort immunity doctrine in partial reliance upon Civil Code Section 163.5. The court said that Section 163.5 "removed the last bar to the adoption of the more modern rule in this field." Under the decisions in Self v. Self and Klein v. Klein, 58 Cal.2d 692 (1962), the personal injury damages to which a spouse is entitled by reason of the tort of the other spouse are the separate property of the injured spouse and may be paid from whatever source the tortious spouse is permitted to pay tort damages. Presumably, therefore, if the husband commits a tort upon the wife, the wife under existing law is permitted to recover as her separate property damages which may be paid from either the community (including the wife's interest in the community) or the husband's separate property. If a tort is committed by a wife upon her husband, the husband is permitted to recover damages from the wife's separate property and (presumably) from the community property subject to the wife's control, and such damages are the husband's separate property.

We erroneously reported to you at the April meeting that the law had been changed to make interspousal torts uninsurable or, at least, uninsured in the absence of specific agreement. A bill to that effect was introduced in 1963 and was passed by one house, but it died in the other house.

Despite Self v. Self, the latest decisional law in California is that a parent is still immune from liability to an unemancipated minor child for negligent injury. See WITKIN, SUMMARY OF CALIFORNIA LAW 1221-1222 (1960).

Self v. Self, however, may herald a change in that law, too.

There was some discussion at the April meeting of the injured spouse's contributory negligence in the uninjured spouse's action for loss of consortium. We spoke in ignorance, however, for it is settled in California (for the time being) that the uninjured spouse has no action for loss of consortium. West v. San Diego, 54 Cal.2d 469 (1960). Witkin reports that the wife's contributory negligence is a defense to the husband's action for loss of her services. WITKIN, SUMMARY OF CALIFORNIA LAW 1325 (1960).

Against this background, our draft statute proposes to repeal Section 163.5 and to amend Section 171c to provide that the wife has the right of management and control over her personal injury damages. This amendment and repeal will restore the law to its pre-1957 condition.

Section 164.5 is then added to the Civil Code to strike directly at the doctrine of imputed contributory negligence between spouses. In lieu of imputed contributory negligence, the principle of contribution is added to the law in Civil Code Sections 183-186.

Section 171a is amended to clarify the extent to which the community property may be used to satisfy a married person's tort liabilities. It accepts the principle underlying the existing section and the rationale of Grolemund v. Cafferata, that only the community property subject to a particular spouse's control may be used to satisfy that spouse's tort liabilities. Section 164.7 requires that the separate property of a spouse be used before the community property may be used to satisfy an interspousal tort liability.

Because of Sections 164.7, 171a, and 171c, a third party tortfeasor

is precluded from satisfying a spouse's contribution liability out of the injured spouse's judgment. To provide otherwise would depart from the principle underlying Section 171a and would seem to require that all of the community property be made liable for each spouse's tort liabilities. Perhaps, the Commission might substitute for Section 171a a marshalling principle similar to that contained in Section 164.7. Thus, for torts generally, the tortfeasor spouse might be permitted to resort to the community property subject to the control of the other spouse after the remaining community property, not exempt from execution, had been exhausted. This, however, would be a rather drastic revision of the community property law and would seem to be beyond our authority which is merely to study the problem whether personal injury damages should be community or separate property.

The amendment to Section 171c might be omitted from the statute; but this would mean that the law would not work evenly. For example, if the wife were the guilty spouse and the husband the injured spouse, the third party tortfeasor would be unable to enforce contribution from the husband's judgment because the community subject to his control would not be liable for the wife's tort. But if the wife were injured and the husband the guilty spouse, the third party tortfeasor would be able to take half of the wife's judgment in satisfaction of the husband's liability. Such unequal treatment does not seem justifiable.

The draft statute with commentary on the specific sections follows:



An act to repeal Section 163.5 of, to amend Sections 171a and 171c of, and to add Sections 164.5, 164.7, 183, 184, and 185 to, the Civil Code, relating to tort liability by and to married persons.

SECTION 1. Section 163.5 of the Civil Code is repealed.

~~163.5.--All-damages,-special-and-general,-awarded-a-married person-in-a-civil-action-for-personal-injuries,-are-the-separate property-of-such-married-person.~~

Comment. Prior to the enactment of Section 163.5 in 1957, damages awarded for personal injuries were community property. The repeal of Section 163.5 will restore the former rule. See Civil Code Sections 164 and 171c (as amended herein).

SEC. 2. Section 164.5 is added to the Civil Code, to read:

164.5. If a married person is injured by the negligent or wrongful act or omission of a person other than his spouse, the fact that the negligent or wrongful act or omission of the spouse of the injured person was a concurring cause of the injury is not a defense in any action brought by the injured person to recover damages for such injury except in cases where such concurring negligent or wrongful act or omission would be a defense if the marriage did not exist.

Comment. Section 163.5 was enacted in 1957 in an effort to overcome the holding in Kesler v. Pabst, 43 Cal.2d 254 (1954), that an injured spouse could not recover from a tortfeasor if the other spouse were contributively negligent, for to permit recovery would allow the guilty spouse to profit from his own wrongdoing because of his community property interest in the damages. Section 163.5 made personal injury damages separate property so that the guilty spouse would not profit and his wrongdoing could not be imputed to the innocent spouse. The remedy provided by Section 163.5 was too drastic. Much of any personal injury damages award to a married person compensates for direct losses to the community--loss of future earnings, medical expenses, etc. Damages awarded to compensate for these losses should be treated as community property; they should be divisible on divorce, they should descend to heirs and devisees in the manner that community property descends, and the recipient of the damages should not be privileged to give it away without consideration. Accordingly, Section 163.5 has been repealed in this statute, and, instead, Section 164.5 deals directly with

the problem of imputed contributory negligence or imputed wrongdoing. Section 164.5 provides directly that the contributory negligence or wrongdoing of the other spouse is no defense to an action for personal injury damages brought by an injured spouse.

SEC. 3. Section 164.7 is added to the Civil Code, to read:

164.7. (a) For injury to a married person caused in whole or in part by the negligent or wrongful act or omission of the other spouse, unless the injured spouse gives written consent after the occurrence of the injury, the community property may not be used to discharge the liability of the tortfeasor spouse to the injured spouse or his liability to make contribution to any joint tortfeasor until the separate property of the tortfeasor spouse, not exempt from execution, is exhausted.

(b) This section does not apply to any insurance or other contract to discharge the tortfeasor spouse's liability, whether or not the consideration given for such contract consisted of community property, if such contract was entered into prior to the injury.

Comment. In Self v. Self, 58 Cal.2d 683 (1962), the California Supreme Court held that one spouse may be liable to the other spouse for personal injuries tortiously inflicted. Prior to the enactment of Section 163.5, the court had followed the rule that a spouse was immune from tort liability to the other spouse for the reason, among others, that the damages would be paid from the community property and would be community property when received. Hence, an interspousal tort action would be circuitous.

The repeal of Section 163.5 once more creates the possibility of such circuitry of action. Section 164.7 is added to the Civil Code to require that the tortfeasor spouse resort first to his separate property to satisfy a tort obligation arising out of an injury to the other spouse. And in Section 171c, the injured spouse is given the right of management over the damages paid.

Subdivision (a) provides that the tortfeasor spouse may use community property before his separate property is exhausted if he obtains the written consent of the injured spouse after the occurrence of the injury. The time limitation in subdivision (a) is designed to prevent an inadvertent waiver of the protection provided in subdivision (a) in a marriage settlement agreement or property settlement contract entered into long prior to the injury.

Subdivision (b) is designed to permit the tortfeasor spouse to rely on any liability insurance policies he may have even though the premiums have been paid with community funds.

SEC. 4. Section 171a of the Civil Code is amended to read:

171a. (a) For civil injuries committed by a married woman, damages may be recovered only from her ~~alone~~ separate property and the community property of which she has the management, control, and disposition, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist.

(b) For civil injuries committed by a married man, damages may be recovered only from his separate property and the community property of which he has the management, control and disposition, and his wife shall not be liable therefor, except in cases where she would be jointly liable with him if the marriage did not exist.

Comment. Section 171a as amended clarifies the extent to which the community property may be used to satisfy the tort liabilities of the respective spouses. It seems to be consistent with existing law; however, little case law can be found.

SEC. 5. Section 171c of the Civil Code is amended to read:

171c. Notwithstanding the provisions of Sections 161a and 172 of this code, and subject to the provisions of Sections 164 and 169 of this code, the wife has the management, control and disposition, other than testamentary except as otherwise permitted by law, of community property money earned by her , or community property money damages received by her for personal injuries suffered by her, until it is commingled with other community property , except that the husband has the management, control and disposition of such money damages to the extent necessary to pay for expenses incurred by reason of the wife's personal injuries. and to reimburse his separate property or the community property subject to his management, control, and disposition for expenses paid by reason of the wife's personal injuries .

During such time as the wife may have the management, control and disposition of such money, as herein provided, she may not make a gift thereof, or dispose of the same without a valuable consideration, without the written consent of the husband.

This section shall not be construed as making such money the separate property of the wife, nor as changing the respective interests of the husband and wife in such money, as defined in Section 161a of this code.

Comment. Section 171c is here restored to substantially the same form in which it appeared prior to 1957. The provisions giving the wife control over her personal injury damages were deleted in 1957 because Section 163.5 was then enacted to make such damages separate instead of community property. The repeal of Section 163.5 requires the restoration of the pre-1957 language to Section 171c.

SEC. 6. Section 183 is added to the Civil Code, to read:

183. If a money judgment is rendered against one or more defendants in a tort action for an injury to a married person and the negligent or wrongful act or omission of the spouse of the injured person is adjudged to have been a concurring cause of the injury, the spouse of such injured person, whether or not liable to the injured person, shall be deemed to be a joint judgment tortfeasor and liable to make contribution in accordance with Title 11 (commencing with Section 875) of Part 2 of the Code of Civil Procedure.

Comment. Sections 183-185 are added to the Civil Code to provide a means for requiring a spouse to contribute to any judgment against a third party for tortious injuries inflicted on the other spouse when the injuries were caused by their concurring negligence or wrongdoing.

Until 1957, the doctrine of imputed contributory negligence forced the innocent spouse to bear the entire loss caused by the negligence of the other spouse and the third party tortfeasor. Section 163.5, in effect, permitted the injured spouse to place the entire tort liability burden upon the third party tortfeasor and exonerate the other spouse whose actions also contributed to the injury. A fairer way to allocate the burdens of liability while protecting the innocent spouse is to require contribution between the joint tortfeasors. These sections provide a means for doing so.

Section 183 establishes the right of the third party tortfeasor to obtain contribution. It applies only if the defendant is held liable to a married person for injuries tortiously inflicted on such person. Thus, no issue of contribution can arise if the defendant is not liable. If the defendant is held liable, he is entitled to contribution from the plaintiff's spouse in the event that he establishes that the negligence or misconduct of the plaintiff's



spouse was a concurring cause of the injury involved in the case. The extent of his right to contribution is governed by the provisions of the Code of Civil Procedure relating to contribution among joint tortfeasors. Thus, for example, the right of contribution may be enforced only after the tortfeasor has discharged the judgment or has paid more than his pro rata share. The pro rata share is determined by dividing the amount of the judgment among the total number of tortfeasors; but where more than one person is liable solely for the tort of one of them--as in master-servant situations--they contribute one pro rata share. There is no right to contribution in favor of any tortfeasor who intentionally injured the injured person. Consideration received for a release given to one joint tortfeasor reduces the amount the remaining tortfeasors have to contribute. And the enforcement procedure contained in the Code of Civil Procedure may be followed.

Under Section 183 the defendant is entitled to contribution from the plaintiff's spouse even though that spouse might not be independently liable to the injured spouse. For example, if the guilty spouse has a good defense based on Vehicle Code Section 17158 as against the other spouse, he may still be held liable for contribution under Section 183.

SEC. 7. Section 184 is added to the Civil Code, to read:

184. The right to obtain contribution from the spouse of the injured person, as provided in Section 183, may be claimed by cross-complaint against the spouse in the action brought by the injured person or may be claimed in an independent action against such spouse.

Comment. Section 184 is intended to clarify the procedure through which the right to contribution created by Section 183 may be asserted.

Section 184 permits the third party defendant to join the tortfeasor spouse by cross-complaint. The California courts previously have permitted the cross-complaint to be used to join a stranger to pending litigation for the purpose of securing contribution from the stranger. In City of Sacramento v. Superior Court, 205 Cal. App.2d 398 (1962), the court held that a negligent defendant could cross-complain against the defendant's employer on the ground that the employer's negligence was a concurring cause of the employee's injury. The court held that if the defendant was able to prove the employer's concurring negligence, the defendant could have the amount of the employer's workman's compensation payments offset against the defendant's total liability. Similarly here, the defendant is permitted to cross-complain against the plaintiff's spouse on the ground that his negligent or wrongful conduct was a concurring cause of the injury; and if the defendant is able to establish the other spouse's concurring misconduct, the defendant is entitled to contribution as set forth in Section 183.

Section 184 does not require the use of the cross-complaint. The right to contribution under Section 183 may also be asserted in an independent action against the guilty spouse.

SEC. 8. Section 185 is added to the Civil Code, to read:

185. Subdivision (b) of Section 877 of the Code of Civil Procedure does not apply to the right to obtain contribution from the spouse of the injured person as provided in Section 183.

Comment. Section 877(b) of the Code of Civil Procedure provides that a release, dismissal, or covenant not to sue or not to enforce a judgment discharges the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors. The policy underlying this provision of the Code of Civil Procedure is to permit settlements to be made without the necessity for the concurrence of all of the defendants. Without such a provision, a plaintiff's settlement with one defendant would provide that defendant with no assurance that another defendant would not seek contribution at a later time. Here, however, the close relationship of the parties involved would encourage the giving of a release from one spouse to the other merely for the purpose of exacting full compensation from the third party tortfeasor and defeating his right of contribution. To permit such releases to discharge a spouse's duty to contribute under these sections would frustrate the purpose underlying this law. Hence, the provisions of Code of Civil Procedure Section 877(b) are made inapplicable to contributions sought under Section 183.