#53

7/13/66

Memorandum 66-37

Subject: Study 53 - Personal Injury Damages

Attached are two copies of the tentative recommendation on this subject (dated January 1, 1966). Please mark any revisions you may care to suggest on one copy and return it to the staff at the July meeting. We plan to approve the bill for printing at the July meeting and the recommendation for printing at the August meeting.

We made every effort to obtain comments on this tentative recommendation. Notices that it was available for distribution were published in State Bar publications and legal newspapers. One legal newspaper (at least) published the recommendation (excluding the proposed legislation and comments). The entire recommendation (including proposed legislation and comments) was published in the March 1966 issue of the U.C.L.A. Law Review, together with the research study. We include a copy of the U.C.L.A. Law Review containing this material. We sent the tentative recommendation to the Judicial Council which has indicated that they will have no comments on it. We sent it to the State Bar and the report of the Committee on Administration of Justice is attached as Exhibit II to Memorandum 66-36.

We discuss the comments we received below.

Comments of State Bar Committee

A "substantial majority" of the State Bar Committee recommends that no change should be made in Section 163.5 (providing that personal injury damages recovery of a married person is his or her separate property). See pages 11-12 of Exhibit II to Memorandum 66-36. The staff recommends that no

change be made in our recommendation. We agree with the minority of the Committee and with the research consultant who has detailed the defects in the existing statutory scheme in the research study (contained in the attached U.C.L.A. Law Review article).

The State Bar Committee disapproves of the special contribution statute. "If the principle of contribution is sound, it should apply in all cases and the procedure should be uniform." We recommend retention of the special contribution statute. Special contribution problems are presented in the two types of situations covered by the special contribution statutes included in our two tentative recommendations. We suspect that a factor in the disapproval of the State Bar Committee is the belief of that committee that there is a need for a general re-examination of the contribution statute.

Commissioner Stanton's Comments

Some time ago Commissioner Stanton sent us his comments on the tentative recommendation. Some of the comments suggest editorial changes in the recommendation and we will take those into account when we revise the recommendation after this meeting and prepare a new one for your approval for printing at the August meeting. His comments concerning the proposed legislation are discussed below.

Section 171a. He raises the question whether this section should be numbered 171.5 rather than 171a. Generally, we follow the numbering system he suggests. However, in the Civil Code there are a series of sections numbered: 171, 171a, 171b, 171c, 172. We think that it would cause confusion if we renumbered Section 171a as Section 171.5.

Section 905. He asks: Can the court extend the 100 day time stated in this section? "Is the 100 day limit a statute of limitations which may

not be extended by the court, or does the court retain its discretion to permit the filing of a cross-complaint after expiration of the time limit in the interests of justice? May the time limit be extended by stipulation or court order?" I think we thought of the 100-day time limit as a statute of limitations, but I do not recall that we discussed the specific problem presented by Mr. Stanton's questions. We could clarify the provision by adding either of the following provisions to Section 905:

> The cross-complaint may not be filed after the time specified in this section.

or

> The time limit for filing a cross-complaint under this section may be extended by the court for a reasonable time in the interest of justice or may be extended by stipulation of the plaintiff and the defendant.

Insurance coverage in cases of interspousal tort liability.

The Commission requested that the staff make a check to determine the extent to which automobile insurance policies and personal liability insurance policies cover interspousal torts. The information is summarized in Exhibit II (yellow pages).

Generally speaking, the National Bureau of Casualty Underwriters has only one standard policy that contains an intra-family exclusion. This is the "Special Package Automobile Policy" (Revised, January 1963-no amendatory endorsements). Other policies do not contain such an exclusion. Family Automobile Policy (Revised, May 1, 1958--amendatory endorsements, January 1, 1963); Comprehensive Personal Liability Policy (Revised, December 2, 1959--amendments, June 19, 1963). The policies that do not contain the intra-family exclusion constitute a large majority (perhaps 85% of the National Bureau policies).

The policies all contain an intentional injury exclusion stating that the policy does not apply to bodily injury or property damage caused intentionally by or at the direction of the insured.

The extent to which California policies are issued without the addition of an intra-family exclusion is not clear. The largest insurers--State Farm and All State--do not use the National Bureau policies, and the State Farm and All State policies contain the intra-family exclusion.

The significance of this information is that we make property damages recovered by one spouse from the other separate property. When we made this decision we assumed that most insurance policies would not apply to intra-family torts and this somewhat influenced our decision on the matter. It is apparent that this assumption is not true. Nevertheless, if you will recall the difficulty we had in reaching an agreement on the statutory scheme contained in the tentative recommendation, you can understand why the staff recommends that we make no change in the tentative recommendation which, as far as we know, has thus far not caused any one to send an objection to us.

Negligence of one spouse bars recovery by other spouse from third person for wrongful death of their child.

Exhibit I (pink sheet) suggests that the Commission in the course of its consideration of Civil Code Section 163.5 consider the case where a wrongful death action is brought by one parent for the death of a minor child and the other spouse was negligent as well as the third person from whom recovery is sought. This question was considered in Memorandum 61-47 and the Commission decided to not to make any change in the existing law that applies in such a case.

Moreover, the Commission was directed to undertake a study "to determine

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 type of case discussed in Exhibit I probably is beyond the scope of our legislative directive.

We recommend that we take no action in response to the letter set out as Exhibit I. Moreover, because of our heavy agenda for the next few years, we suggest that no action be taken by the Commission to place this study on its agenda of topics for study.

Respectfully submitted,

John H. DeMoully
Executive Secretary.

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TELEPHONE
YUKON 1-7210

March 4, 1966

California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

Gentlemen:

I understand that you are considering Civil Code Section 163.5 or the "Cobey amendment".

I have just finished the trial of a case involving the death of a minor child in which the contributory negligence of the mother stood as an issue towards recovery. However, there was absolutely no question but that the father was guilty of no participation in the acts leading up to the accident and that no issue of contributory negligence could even be submitted to a jury as to him.

In order to avoid the inequitable result of no recovery to either parent, even though one parent is free of any fault, I would hope that the section would be amended to indicate that the words "personal injury" also apply to actions for wrongful death.

I would presume that this is the thrust of your present legislative inquiry. You have undoubtedly seen the case of Estate of Simoni, 220 Cal.App.2d 339, and the Hastings Law Review article which quotes Senator Cobey's letter as to his intent regarding this amendment.

I am familiar with the recent DCA case of Premo vs. Grigg, 237 ACA 202. Although my viewpoint is not unfettered by my inclinations, that appears to be a most unfortunate decision and one which is weak on the law of summary judgment as well as the implication of this particular amendment.

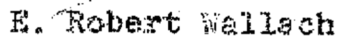
In my own case, the evidence was that the mother and father were divorced so that there was absolutely no reason why the father should not be able to recover even though the mother was unable to recover because of her alleged contributory negligence.

In the Premo case, it seems very apparent that the mother was absolutely free of any contributory negligence even if some jury were to find the father at fault and that recovery should have been permitted to the mother.

This is in line with the theories presented by the Supreme Court in Self vs. Self, and it is a fiction to suggest as the Court did in Fremo that to award recovery to one parent but not to the other is a distinction without a difference. The facts of life often indicate that there really is a difference when a recovery of this type is permitted.

Thank you for reading this letter, and I trust that your recommendation will be favorable to this point of view.

Very truly yours,



E. Robert Wallach

ERW:gr

EXHIBIT II

National Bureau of Casualty Underwriters

INTER-OFFICE CORRESPONDENCE

To: Mr. Gilmore — Office: American Insurance Associati

From: Mr. Earle — Office: National Bureau

Subject: California Law Revision Commission – Tort Liability Study — Date: January 20, 1966

Dear Bob:

Please refer to your letter and enclosures of December 27, 1965. I thought I would place my thoughts on paper and then possibly we could get together as to the type of reply you decide to send.

The types of policies Mr. Harvey seems interested in and of which he requests copies seem to be automobile liability policies issued to owners of private passenger automobiles and comprehensive personal liability policies. Accordingly, I am enclosing copies of the following:

(1) Present Family Automobile Policy Form as amended by Endorsement A799.

(2) Present Special Package Automobile Policy Form.

(3) (a) Present Comprehensive Personal Liability Policy Form as amended by endorsement G748a.

(b) The Jacket together with the Comprehensive Personal Coverage Part, which supersedes the present Comprehensive Personal Liability Policy Form, as of July 1, 1966.

At the outset, I would offer two caveats: (1) the enclosed forms are promulgated by this Bureau for its members and subscribers - all companies may not be using them in California; (2) the questions are of a type that companies may consider the answers to be within their exclusive province, espectially on any particular fact situation - hence they would not wish to be bound by our answers.

As to the four questions:

1. Only the Special Package Automobile Policy Form has an intra-family exclusion (j) on page 5. Accordingly, this policy would not cover inter-spousal tort liability. Since the others do not have such an exclusion and since they cover in the Insuring Agreement "all sums which the insured shall become legally obligated to pay as damages" I would think they would cover inter-spousal tort liability in a state like California where such liability seems to exist. Whether an intra-family exclusion will be inserted in these other forms in the future, only time will tell.

2. Each of the enclosed Automobile forms have an intentional injury exclusion stating that the policy does not apply "to bodily injury or property damage caused intentionally by or at the direction of the insured".

Section 17158 of the California Vehicle Code permits a guest in a vehicle to recover only when the injury proximately resulted from the "willful misconduct" of the driver. In construing this phrase, the Supreme Court of California has stated that it "means intentional wrongful conduct, done either with knowledge that serious injury to the guest probably will result or with a wanton and reckless disregard of the possible results". The Court added that its existence is essentially a question of fact and that "an intent to injure anyone is not a necessary ingredient of willful misconduct". (Reuther v. Viall, 1965, 398 P. 2d 792, 795). An earlier case draws the distinction between "willful misconduct" wherein an intent to injure the guest is present and where it is not by stating "one may be guilty of willful misconduct in the operation of an automobile, not only when he performs an act, or omits to do so, with the deliberate intent to injure his guest, but he may also be guilty of such culpable conduct when he knowingly performs an act or fails to do so with such wanton and reckless disregard of consequences that he knows, or is charged with knowledge, that an injury or death will probably result from his conduct". (Hagglund v. Nelson, 1937, 73 P. 2d 265, 268).

Section 533 of the California Insurance Code states that "an insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others". The Courts similarly have drawn a distinction here between willful misconduct which involves intent to injure the victim and that which does not and conclude that the statute does not proscribe coverage for the latter, however wanton, reckless or gross the act may be. (See Escobedo v. Travelers Ins. Co., 1961, 17 Cal. Rptr. 219, 225; 1964, 38 Cal. Rptr. 645, 649).

Therefore, it seems to me that coverage for liability of an operator to a guest under Vehicle Code Section 17158 would depend on whether the automobile policy exclusion, applying to injuries "caused intentionally by or at the direction of the insured" (or Section 533 of the Insurance Code which seems directed to the same end) can be said to apply to the particular fact situation.

3. The enclosed forms cover "all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage". It seems to me that this would also cover any contribution the insured is forced to make under Section 875 of the Code of Civil Procedure, providing for contribution between joint tort feasors, to the extent this section is applicable. (See Truck Ins. Exchange v. American Surety Co., 1964, 338 P. 2d 811).

4. As noted above, each of the enclosed forms have an exclusion applying to injuries "caused intentionally by or at the direction of the insured". However, they also provide, in the Persons Insured provision, for severability by stating that the insurance "applies separately to each insured against whom claim is made or suit is brought". Therefore, I would think the same result should obtain as in the Arenson case as to an insured who did not intentionally cause the injury or direct it.

Would you please see that copy of your reply goes to John A. Wadlewski, manager of our Pacific Coast Branch Office.

EFE:CD
Encs.

#53

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

WHETHER DAMAGES FOR PERSONAL INJURY TO A MARRIED PERSON SHOULD BE SEPARATE OR COMMUNITY PROPERTY

January 1, 1966

California Law Revision Commission
30 Crothers Hall
Stanford University
Stanford, California

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

#53

1/1/66

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

WHETHER DAMAGES FOR PERSONAL INJURY TO A MARRIED PERSON SHOULD BE SEPARATE OR COMMUNITY PROPERTY

The 1957 Legislature directed the Law Revision Commission to undertake a study "to determine whether an award of damages made to a married person in a personal injury action should be the separate property of such married person." This study involves more than a consideration of the property interests in damages recovered by a married person in a personal injury action; it also involves a consideration of the extent to which the contributory negligence of one spouse should be imputed to the other, for the doctrine of imputed contributory negligence has been determined in the past by the nature of the property interests in the award.

Many, if not most, actions for the recovery of damages for personal injury in which the contributory negligence of a spouse is a factor arise out of vehicle accidents. Because contributory negligence is imputed to vehicle owners under Vehicle Code Section 17150, that section creates special problems of imputed contributory negligence between spouses. The problems of imputed contributory negligence under Section 17150 are dealt with in a recommendation that will be separately published. Nevertheless, that recommendation should be considered in connection with this recommendation, for the two recommendations taken together, provide a comprehensive and consistent statutory scheme on the subject of imputed contributory negligence between spouses.

Personal injury damages as separate or community property

Prior to the enactment of Civil Code Section 163.5 in 1957, damages awarded for a personal injury to a married person were community property. CIVIL CODE §§ 162, 163, 164; Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949); Moody v. So. Pac. Co., 167 Cal. 786, 141 Pac. 388 (1914). Each spouse thus had an interest in any damages that might be awarded to the other for a personal injury. Therefore, if an injury to a married person resulted from the concurrent negligence of that person's spouse and a third party, the injured person was not permitted to recover damages, for to allow recovery would permit the negligent spouse, in effect, to recover for his own negligent act. Kesler v. Pabst, 43 Cal.2d 254, 273 P.2d 257 (1954).

Civil Code Section 163.5, which provides that damages awarded to a married person for personal injuries are separate property, was enacted in 1957. Its purpose was to prevent the contributory negligence of one spouse from being imputed to the other to bar recovery of damages because of the community property interest of the guilty spouse in those damages. Estate of Simoni, 220 Cal. App.2d 339, 33 Cal. Rptr. 845 (1963); 4 WITKIN, SUMMARY OF CALIFORNIA LAW 2712 (1960).

Although Section 163.5 eliminated the doctrine of imputed contributory negligence insofar as that doctrine was based on the community nature of a spouse's personal injury damages (see Cooke v. Tsipouroglou, 59 Cal.2d 660, 664, 31 Cal. Rptr. 60, 381 P.2d 940 (1963)), its sweeping provisions have had other and less desirable consequences, including the following:

Section 163.5 applies to any recovery for personal injuries to a married person regardless of whether the other spouse had anything to do with the injuries, thus changing the law in an important respect although it was

unnecessary to do so to remedy the problem the Legislature was attempting to solve.

(2) Although earnings are community property--and are usually the chief source of the community property--damages for the loss of future earnings are, incongruously, made the separate property of the injured spouse by Section 163.5.

(3) While expenses incurred by reason of a personal injury are usually paid from community property, Section 163.5 seems to make any damages awarded as reimbursement for such medical expense the separate property of the injured spouse, thus preventing the community from being reimbursed for the out-of-pocket losses that it has suffered by reason of the injury.

(4) As separate property, the damages received for personal injury are not subject to division on divorce.

(5) As separate property, personal injury damages may be disposed of by gift or will without limitation.

(6) In case of an intestate death, the surviving spouse receives all of the community property, but may receive as little as one third of the damages awarded for personal injury because they are separate property.

(7) Some couples may, by commingling a damages award with community property, convert it to community property and inadvertently incur a gift tax liability upon which penalties and interest may accrue for years before it is discovered.

To eliminate these undesirable ramifications of Section 163.5, the Commission recommends the enactment of legislation that would again make personal injury damages awarded to a married person community property. The problem of imputed contributory negligence should be met in some less

drastic way than by converting all such damages into separate property even when no contributory negligence is involved.

Although personal injury damages awarded to a married person should be community property as a general rule, the Commission recommends retention of the rule that such damages are separate property when they are paid in compensation for an injury inflicted by the other spouse. If damages paid by one spouse to the other in compensation for a tortious injury were regarded as community property, the payment would be somewhat circular in that the tortfeasor spouse would be compensating himself to the extent of his interest in the community property.

Management of community property personal injury damages

Because a wife's personal injury damages are her separate property under Civil Code Section 163.5, they are now subject to her management and control. It is unnecessary and undesirable to change this aspect of the existing law even though personal injury damages are made community property.

If personal injury damages were community property subject to the husband's management, the law would work unevenly and unfairly. A creditor of the wife, who would have been able to obtain satisfaction from the wife's earnings (CIVIL CODE § 167; Tinsley v. Bauer, 125 Cal. App.2d 724, 271 P.2d 116 (1954)), would be unable to levy on damages paid to the wife for the loss of those earnings. See CIVIL CODE § 167. A husband's creditor would be able to levy on the damages paid for the wife's lost earnings even though he could not have reached the earnings themselves. See CIVIL CODE § 168. The wife's asset, her earning capacity, would be converted in effect to the husband's asset by a damages award. Yet no such conversion takes place upon the husband's recovery of personal injury damages.

Prior to the enactment of Section 163.5, Section 171c provided that the wife had the right to manage, inter alia, the community property that consisted of her personal injury damages. Upon amendment of Section 163.5 to make personal injury damages community property, Section 171c should be amended to again give the wife the right to manage her personal injury damages.

Payment of damages for tort liability of a married person

In Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641 (1941), the Supreme Court held that the community property is subject to the husband's liability for his torts. In McClain v. Tufts, 83 Cal. App.2d 140, 187 P.2d 818 (1947), it was held that the community property is not subject to liability for the wife's torts. Both of these decisions were based on the husband's right to manage the community property, and both were decided before the enactment of Civil Code Section 171c, which gives the wife the right to manage her earnings. The rationale of these decisions indicates that the community property under the wife's control pursuant to Section 171c is subject to liability for her torts and is not subject to liability for the husband's torts; but no reported decisions have ruled on the matter. Cf. Tinsley v. Bauer, 125 Cal. App.2d 724, 271 P.2d 116 (1954)(wife's "earnings" derived from embezzlement are subject to the quasi-contractual liability incurred by the wife as a result of the embezzlement under Civil Code Section 167).

The Commission recommends the enactment of legislation to make clear that the tort liabilities of the wife may be satisfied from the community property subject to her management and control as well as from her separate property. Such legislation will provide assurance that a wife's personal injury damages will continue to be subject to liability for her torts even though they are community instead of separate property.

When a tort liability is incurred because of an injury inflicted by one spouse upon the other (see Self v. Self, 58 Cal.2d 683, 26 Cal. Rptr. 97, 376 P.2d 65 (1962), and Klein v. Klein, 58 Cal.2d 692, 26 Cal. Rptr. 102, 376 P.2d 70 (1962), which abandon the rule of interspousal tort immunity), it seems unjust to permit the liable spouse to use the community property (including the injured spouse's share) to discharge that liability when the guilty spouse has separate property with which the liability could be discharged. The guilty spouse should not be entitled to keep his separate estate intact while the community property is depleted to satisfy an obligation arising out of an injury caused by the guilty spouse to the co-owner of the community.

Accordingly, the Commission recommends the enactment of legislation that would require a spouse to exhaust his separate property to discharge a tort liability arising out of an injury to the other spouse before the community property subject to the guilty spouse's control may be used for that purpose.

Imputed contributory negligence

Although the enactment of Section 163.5 has had undesirable ramifications in its effect on the community property system, it did successfully abrogate the doctrine of imputed contributory negligence and allow an injured spouse to recover for injuries caused by the concurring negligence of the other spouse and a third party. See Cooke v. Tsipouroglou, 59 Cal.2d 660, 664, 31 Cal. Rptr. 60, 381 P.2d 940 (1963). The enactment of legislation making personal injury damages awarded to a married person community property will again raise the problem that Section 163.5 was enacted to solve.

The doctrine of imputed contributory negligence should be met directly--by providing explicitly that the negligence of one spouse is not to be imputed to the other. This would, however, permit an injured spouse to place the entire tort liability burden on the third party and exonerate the other spouse whose actions also contributed to the injury simply by suing the third party alone; for a tortfeasor has no right to contribution from any other tortfeasor under California law unless the joint tortfeasors are both joined as defendants by the plaintiff and a joint judgment is rendered against them.

A fairer way to allocate the burdens of liability while protecting the innocent spouse would be to provide for contribution between the joint tortfeasors. Contribution would provide a means for providing the innocent spouse with complete relief, relieving a third party whose actions but partially caused the injury from the entire liability burden, and requiring the guilty spouse to assume his proper share of responsibility for his fault.

The existing contribution statute (CODE CIV. PROC. §§ 875-880) does not provide an effective right to contribution when one of the joint tortfeasors is the spouse of the plaintiff. Under the existing statute, the plaintiff is in virtually complete control of a defendant's right to contribution; for the contribution right does not exist unless there is a common judgment against the joint tortfeasors. A defendant has no right to cross-complain for contribution against a person not named as a defendant by the plaintiff. Cf. Thornton v. Luce, 209 Cal. App.2d 542, 26 Cal. Rptr. 393 (1962). Thus a plaintiff may shield his spouse from contribution liability by the simple expedient of refusing to name the spouse as a defendant. The close relationship of the parties would encourage a plaintiff to utilize this control

over the defendant's right to contribution merely to shield the plaintiff's spouse from responsibility for his fault. Therefore, to create an adequate right to contribution when the plaintiff's spouse is involved, legislation should be enacted which gives a defendant the right to cross-complain against the plaintiff's spouse for the purpose of seeking contribution, thus depriving the plaintiff spouse of the power to exonerate the guilty spouse from contribution liability.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by enactment of the following measures:

#53(L)

An act to amend Sections 163.5 and 171a of, and to add Sections 164.5 and 164.7 to, the Civil Code, to add a new chapter heading immediately preceding Section 875 of, and to add Chapter 2 (commencing with Section 900) to Title 11 of Part 2 of, the Code of Civil Procedure, relating to tort liability of and to married persons.

The people of the State of California do enact as follows:

SECTION 1. Section 163.5 of the Civil Code is amended to read:

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.~~ All money or other property paid by or on behalf of a married person to his spouse in satisfaction of a judgment for damages for personal injuries to the spouse or pursuant to an agreement for the settlement or compromise of a claim for such damages is the separate property of the injured spouse.

Comment. Prior to the enactment of Section 163.5 in 1957, damages paid to a married person for personal injuries were community property. Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949). The enactment of Section 163.5 made all damages awarded for personal injury to a married person the separate property of such person. Lichtenauer v. Dorstewitz, 200 Cal. App.2d 777, 19 Cal. Rptr. 654 (1962). Under the above amendment of Section 163.5, personal

injury damages paid to a married person will be separate property only if they are paid by the other spouse. In all other cases, the former rule--that personal injury damages paid to a married person are community property--will automatically be restored because their character will again be determined by the provisions of Section 164.

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, 273 P.2d 257 (1954), that an injured spouse could not recover from a negligent tortfeasor if the other spouse were contributively negligent. The rationale of the Kesler holding was that 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.

Section 163.5 is amended in this act to restore the former rule that personal injury damages are community property. To prevent the rule of Kesler v. Pabst, 43 Cal.2d 254, 273 P.2d 257 (1954), from again being applied in personal injury actions brought by a married person, Section 164.5 provides directly that the contributory negligence or wrongdoing of the other spouse is not a defense to the action brought by the injured spouse. However, to avoid requiring the third party to pay all of the damages in such a case, he is given a right to obtain contribution from the guilty spouse by Sections 900-910 of the Code of Civil Procedure.

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

164.7. (a) Where an injury to a married person is caused in whole or in part by the negligent or wrongful act or omission of his spouse, 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 prevent the use of community property to discharge a liability referred to in subdivision (a) if the injured spouse gives written consent thereto after the occurrence of the injury.

(c) This section does not affect the right to indemnity provided by 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. As a general rule, a tort liability of a married person may be satisfied from either his separate property or the community property subject to his control. See Section 171a and the Comment thereto. 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. When the liability is incurred because of an injury inflicted by one spouse upon the other, it is unjust to permit the guilty spouse to keep his separate estate intact while the community is depleted to satisfy an obligation resulting from his injuring the co-owner of

the community.

Subdivision (b) 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 limitation 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 (c) 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-from-her-alone,-and-her-husband-shall not-be-liable-therefor,~~ A married person is not liable for any injury or damage caused by the other spouse except in cases where he would be ~~jointly~~ liable ~~with-her~~ therefor if the marriage did not exist.

(b) The liability of a married person for death or injury to person or property may be satisfied only from the separate property of such married person and the community property of which he has the management and control.

Comment. Prior to the enactment of Section 171a in 1913, a husband was liable for the torts of his wife merely because of the marital relationship. Henley v. Wilson, 137 Cal. 273, 70 Pac. 21 (1902). Section 171a was added to the code to overcome this rule and to exempt the husband's separate property and the community property subject to his control from liability for the wife's torts. McClain v. Tufts, 83 Cal. App.2d 140, 187 P.2d 818 (1947). The section was not intended to, and did not, affect the rule that one spouse may be liable for the tort of the other under ordinary principles of respondeat superior. Perry v. McLaughlin, 212 Cal. 1, 297 Pac. 554 (1931)(wife found to be husband's agent); Ransford v. Ainsworth, 196 Cal. 279, 237 Pac. 747 (1925)(husband found to be wife's agent); McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417 (1917)(operation of husband's car by wife with his consent raises inference of agency). Subdivision (a) revises the language of the section to clarify its original meaning.

Subdivision (b) has been added to eliminate any uncertainty over the nature of the property that is subject to the wife's tort liabilities. It is consistent with the existing law to the extent that the existing law can be ascertained. Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641 (1941), held that the community property is subject to the husband's tort liabilities because of his right of management and control over the community. McClain v. Tufts, 83 Cal. App.2d 140, 187 P.2d 818 (1947), held that the community property is not subject to the wife's tort liabilities because of her lack of management rights over the community. Under the rationale of these cases, the enactment of Civil Code Section 171c in 1951--giving the wife the right of management over her earnings and personal injury damages--probably subjected the wife's earnings and personal injury damages to her tort liabilities; but no case so holding has been found.

SEC. 5. A new chapter heading is added immediately preceding Section 875 of the Code of Civil Procedure, to read:

CHAPTER 1. CONTRIBUTION AMONG JOINT JUDGMENT TORTFEASORS

SEC. 6. Chapter 2 (commencing with Section 900) is added to Title 11 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 2. CONTRIBUTION IN PARTICULAR CASES

900. As used in this chapter:

(a) "Plaintiff" means a person who recovers or seeks to recover a money judgment in a tort action for death or injury to person or property.

(b) "Defendant" means a person against whom a money judgment is rendered or sought in a tort action for death or injury to person or property.

(c) "Contribution cross-defendant" means a person against whom a defendant has filed a cross-complaint for contribution in accordance with this chapter.

Comment. The definitions in Section 900 are designed to simplify reference in the remainder of the chapter. The definition of "plaintiff" includes a cross-complainant if the cross-complainant recovers or seeks tort damages upon his cross-complaint. Similarly, the defined term "defendant" includes a cross-defendant against whom a tort judgment has been rendered or is sought. The "defendant" may actually be the party who initiated the action. "Contribution cross-defendant" means anyone from whom contribution is sought by means of a cross-complaint under this chapter. The contribution cross-defendant may, but need not, be a new party to the action.

901. If a money judgment is rendered against a defendant in a tort action, a contribution cross-defendant, whether or not liable to the plaintiff, shall be deemed to be a joint tortfeasor judgment debtor and liable to make contribution to the defendant in accordance with Chapter 1 (commencing with Section 875) of this title where:

(a) The defendant or the contribution cross-defendant is the spouse of the plaintiff; and

(b) A negligent or wrongful act or omission of the contribution cross-defendant is adjudged to have been a proximate cause of the death or injury.

Comment. Sections 900-910 are added to the Code of Civil Procedure 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 an injured spouse to bear the entire loss caused by the concurring negligence of the other spouse and a third party tortfeasor. The 1957 enactment of Section 163.5, in effect, permitted the injured spouse to place the entire tort liability burden upon the third party tortfeasor by suing him alone, thus in practical effect exonerating 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 901 establishes the right of the third party tortfeasor to obtain contribution from the plaintiff's spouse. To give a negligent spouse

an equivalent right of contribution, Section 901 also permits a defendant spouse to obtain contribution from a third party tortfeasor.

Section 901 requires an adjudication that the negligence or misconduct of the defendant's joint tortfeasor was a proximate cause of the injury before the right to contribution arises. To obtain an adjudication that is personally binding on the joint tortfeasor, the defendant must proceed against him by cross-complaint and see that he is properly served. See Section 905 and the Comment thereto. Usually the fault of the defendant and the fault of the contribution cross-defendant will be determined at the same time by the same judgment. But if the defendant's cross-action is severed and tried separately, the showing required by Section 901 for an adjudication that the contribution cross-defendant is a joint tortfeasor consists merely of the judgment against the defendant and the fault of the contribution cross-defendant. Section 901 does not permit a contest of the merits of the judgment against the defendant in the trial of the cross-action. Cf. Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949)(nonparty spouse bound by judgment in action for personal injuries brought by other spouse because of privity of interest in the damages sought).

After the defendant has obtained a judgment establishing that the contribution cross-defendant is a joint tortfeasor, his right to contribution is governed by Sections 875-880 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 defendant 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. Consideration received for a release given to one joint tortfeasor reduces the amount the remaining tortfeasors have to contribute. And the enforcement procedure specified in Code of Civil Procedure Section 878 is applicable.

Under Section 901 the defendant may be entitled to contribution even though the person from whom contribution is sought might not be independently liable for the damage involved. For example, if the contribution cross-defendant has a good defense based on Vehicle Code Section 17158 (the guest statute) as against the plaintiff he may still be held liable for contribution under Section 901.

905. A defendant's right to contribution under this chapter must be claimed, if at all, by cross-complaint in the action brought by the plaintiff. The defendant shall file a cross-complaint for contribution at the same time as his answer or written 100 days after the service of the plaintiff's complaint upon the defendant, whichever is later.

Comment. Section 905 provides that the right to contribution created by this chapter must be asserted by cross-complaint. If the person claiming contribution began the litigation as a plaintiff and seeks contribution for damages claimed by cross-complaint, Section 905 authorizes him to use a cross-complaint for contribution in response to the cross-complaint for damages.

The California courts previously have permitted the cross-complaint to be used as the pleading device for securing contribution. City of Sacramento v. Superior Court, 205 Cal. App.2d 398, 23 Cal. Rptr. 43 (1962). Section 905 requires the use of the cross-complaint so that all of the issues may be settled at the same time if it is possible to do so. If for some reason a joint trial would unduly delay the plaintiff's action--as, for example, if service could not be made on the contribution cross-defendant in time to permit a joint trial--or if for some other reason a joint trial would not be in the interest of justice, the court may order the actions severed. CODE CIV. PRCC. § 1048. See Roylance v. Doelger, 57 Cal.2d 255, 261-262, 19 Cal. Rptr. 7, 368 P.2d 535 (1962).

Under existing law a cross-complaint must be filed with the answer unless leave of court is obtained to file the cross-complaint subsequently. CODE CIV. PRCC. § 442. Under Section 905, however, a cross-complaint for

contribution may be filed as a matter of right within 100 days after the service of the plaintiff's complaint on the defendant even though an answer was previously filed. This additional time is provided because it may not become apparent to a defendant within the brief period for filing an answer (10-30 days) that the case is one where a claim for contribution may be asserted. Section 905 also limits the time within which a cross-complaint for contribution may be filed in order that the assertion of the contribution claim might not be unduly delayed.

Inasmuch as no right to contribution accrues until the liability of the defendant has been adjudicated and he has paid more than his pro rata share of the judgment, there is no time limit on the right to file a cross-complaint for contribution other than the limitation prescribed in Section 905. A plaintiff's delay in filing his complaint for damages until the end of his limitations period will have no effect on the defendant's right to file a cross-complaint for contribution within the time limits prescribed here.

906. For the purpose of service under Section 417 of a cross-complaint for contribution under this chapter, the cause of action against the contribution cross-defendant is deemed to have arisen at the same time that the plaintiff's cause of action arose.

Comment. Section 417 of the Code of Civil Procedure permits a personal judgment to be rendered against a person who is personally served outside the state if he was a resident of the state at the time of service, at the time of the commencement of the action, or at the time the cause of action arose. Section 906 has been included in this chapter to eliminate any uncertainty concerning the time a cause of action for contribution arises for purposes of service under Section 417. Section 906 will permit personal service of the cross-complaint outside the state if the cross-defendant was a resident at the time the plaintiff's cause of action arose.

907. Each party to the cross-action for contribution under this chapter has a right to a jury trial on the question whether a negligent or wrongful act or omission of the contribution cross-defendant was a proximate cause of the injury or damage to the plaintiff.

Comment. If the contribution cross-defendant were a codefendant in the principal action, he would be entitled to a jury trial on the issue of his fault. Section 907 preserves his right to a jury trial on the issue of his fault where he is brought into the action by cross-complaint for contribution. After an adjudication that the contribution cross-defendant is a joint tortfeasor with the defendant, neither joint tortfeasor is entitled to a jury trial on the issue of contribution. Judgment for contribution is made upon motion after entry of the judgment determining that the parties are joint tortfeasors and after payment by one tortfeasor of more than his pro rata share of that judgment. CODE CIV. PROC. §§ 875(c), 878. The court is required to administer the right to contribution "in accordance with the principles of equity." CODE CIV. PROC. § 875(b). As the issues presented by a motion for a contribution judgment are equitable issues, there is no right to a jury trial on those issues.

908. Failure of a defendant to claim contribution in accordance with this chapter does not impair any right to contribution that may otherwise exist.

Comment. Section 908 is included to make it clear that a person named as a defendant does not forfeit his right to contribution under Code of Civil Procedure Sections 875-880 if a joint tortfeasor is named as a codefendant in the original action and he fails to cross-complain against his codefendant pursuant to this chapter.

909. Subdivision (b) of Section 877 of the Code of Civil Procedure does not apply to the right to obtain contribution under this chapter.

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 tortfeasors. Without such a provision, a plaintiff's settlement with one tortfeasor would provide that tortfeasor with no assurance that another tortfeasor would not seek contribution at a later time. Here, however, the close relationship of the parties involved would encourage plaintiffs to give releases from liability, not for the purpose of bona fide settlement of a claim, but merely for the purpose of exacting full compensation from the third party tortfeasor and defeating his right of contribution. To permit such releases to defeat the third party's right of contribution 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 contribution sought under this chapter.

910. There is no right to contribution under this chapter in favor of any person who intentionally injured the person killed or injured or intentionally damaged the property that was damaged.

Comment. Section 910 may not be necessary. Section 875(d) provides: "There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person." Section 910, however, is included to make clear that this substantive provision in the chapter relating to joint judgment tortfeasors applies to the right of contribution under this chapter. Moreover, Section 910 applies to intentionally caused property damage, whereas Section 875(d) appears to apply only to intentionally caused personal injuries.

SEC. 7. This act does not confer or impair any right or defense arising out of any death or injury to person or property occurring prior to the effective date of this act.

Comment. This act changes the nature of personal injury damages from separate to community property. It also creates a contribution liability on the part of a person who may have been previously immune from liability for his conduct. In order to avoid making any change in rights that may have become vested under the prior law, therefore, the act is made inapplicable to causes of action arising out of injuries occurring prior to the effective date of the act.

An act to amend Section 171c of the Civil Code, relating to community property.

The people of the State of California do enact as follows:

SECTION 1. 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 ~~,~~ and control ~~and-disposition, other-than-testamentary-except-as-otherwise-permitted-by-law,~~ of the community personal property ~~money~~ earned by her , and the community personal property received by her as damages for personal injuries suffered by her, until it is commingled with ~~other~~ community property subject to the management and control of the husband, except that the husband may use such community property received as damages 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 and control 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~~ of the community property under her management and control , or dispose of the same without a valuable consideration~~,~~ without the written consent of the husband. The wife may not make a testamentary disposition of such community property except as otherwise permitted by law.

This section shall not be construed as making such ~~money~~ earnings or damages the separate property of the wife, nor as changing

the respective interests of the husband and wife in such ~~money~~ community property , as defined in Section 161a of this code.

Comment. Prior to 1957, Section 171c provided that the wife had the right to manage and control her personal injury damages. When Section 163.5 was enacted to make such damages separate instead of community property, the provisions of Section 171c giving the wife the control over her personal injury damages were deleted. As the amendment of Section 163.5 again makes personal injury damages community property instead of separate, Section 171c is amended to restore the provisions relating to the wife's right to manage her personal injury damages.

The personal injury damages covered by Section 171c are only those damages received as community property. Damages received by the wife from her husband are separate property under Section 163.5; hence, Section 171c does not give the husband any right of reimbursement from those damages.

Section 171c has been revised to refer to "personal property" instead of "money." This change is designed to eliminate the uncertainty that existed under the former language concerning the nature of earnings and damages that were not in the form of cash. The husband, of course, retains the right to manage and control the community real property under Section 172a.

The reference to Sections 164 and 169 has been deleted as unnecessary; neither section is concerned with the right to manage and control community property.

SEC. 2. This act shall become effective only if _________ Bill No. _______ is enacted by the Legislature at its 1967 Regular Session, and in such case this act shall take effect at the same time that _______ Bill No. _____ takes effect.

Note: The bill referred to is the first of the two proposed measures contained in this tentative recommendation.