#62(L) 8/11/66

First Supplement to Memorandum 66-47

Subject: Study 62(L) - Vehicle Code § 17150 and Related Sections

Attached to this memorandum as Exhibit I is a letter commenting on the tentative recommendation that was distributed in January. The following matters are raised:

Section 902

Mr. Agay suggests substitution of "would be" for "is made."

Imputed contributory negligence generally

Mr. Agay correctly points out that, as indicated by the comment to Section 902, if an employer and employee leave their office together on a business appointment, their choice of vehicle will become extremely crucial in determining if the passenger would be entitled to relief against a negligent third party. This is because the contributory negligence of the operator would be imputed to the passenger if the employer were the passenger; but the contributory negligence of the operator would not be imputed to the passenger if the employee were the passenger. These results would flow from the common law imputation of contributory negligence that arises out of the doctrine of respondeat superior. Mr. Agay suggests that these results are ridiculous and should be modified in our statute.

It should be remembered that in the hypothetical situation the guest statute is not applicable. Tucker v. Landucci, 57 Cal.2d 767 (1962). Therefore, the employer is not barred from recovering for his personal injuries, he is merely forced to recover his damages from the negligent employee rather than the negligent third party. Thus, the situation presented is not as crucial as the one dealt with in the proposed statute. The proposed statute is designed to give a vehicle owner a remedy in a situation where he had none. Mr. Agay is suggesting the substitution of a remedy he believes is superior for the remedy that now exists.

We agree with Mr. Agay that the contribution remedy proposed by our statute is superior to the common law remedy forced upon plaintiffs by the doctrine of respondeat superior. But we think that the problem is general and should not be attacked in a statute dealing only with remedies for injuries caused by the operation of vehicles. The suggestion raises other problems that would have to be dealt with: Should the plaintiff-employer be liable under the doctrine of respondeat superior for the employee's obligation to contribute to the third party? If a plaintiff-employer is liable to contribute to the damages he has suffered because of the negligence of his employee, should not any plaintiff be required to contribute a contributive share to the damages caused, in part, by his own negligence? In other words, should a general requirement of contribution be substituted for the doctrine of contributory negligence as well as the doctrine of imputed contributory negligence?

As a general proposition, this seems to be a good idea. As a matter of fact, there seems to be a good basis for it in existing California statutes that the courts have not read in the present context. See Civil Code Section 1432 ("A party to a . . . joint and several obligation [the statute is dealing with obligations generally, not contractual obligations] . . . who satisfies more than his share of the claim against all, may require a proportionate contribution from all parties joined with him."); Civil Code Section 1714 ("Everyone is responsible . . . for an injury occasioned to another by his want of ordinary care or skill . . ., except so far as [the word should be "unless" to make contributory negligence a bar] the latter has, willfully or by want of ordinary care, brought the injury upon himself."). But we do not believe that this is the place to make this far reaching revision of the law.

Insurance

Mr. Agay points out that generally an owner's policy (under its extended coverage for permissive operators) is considered the primary insurance and an operator's policy is considered excess. See Exhange Cas. & Surety Co. v. Scott, 56 Cal.2d 613 (1961); American Automobile Ins. Co. v. Republic Indemnity Co., 52 Cal.2d 507 (1959). Thus, the plaintiff's own insurance carrier is the primarily responsible insurer for the contribution cross-defendant's obligation to contribute Mr. Agay suggests that some consideration should be given to modifying the usual rule.

In 1963, the Legislature added Section 11580.1 to the Insurance Code to deal with this problem. Subdivision (f) of the section then provided:

> (f) Such policy [automobile liability policy] may contain a provision that the insurance coverage applicable to such motor vehicles afforded a person other than the named insured . . . shall not be applicable if there is any other valid and collectible insurance applicable to the same loss covering such person as a named insured . . . under a policy with limits at least equal to the financial responsibility requirements specified in Section 16059 of the Vehicle Code; and in such event, the two or more policies shall not be construed as providing cumulative or concurrent coverage and only that policy which covers the liability of such person as a named insured . . . shall apply. In the event there is no such other valid and collectible insurance, the coverage afforded a person other than the named insured . . . may be limited to the financial responsibility requirements specified in Section 16059 of the Vehicle Code.

This section provided, in essence, what Mr. Agay desires. But in 1965, the first line of the subdivision was revised to read:

> (f) Where two or more policies are applicable to the same loss and one of such policies affords coverage to a named insured engaged in selling, repairing, servicing, delivering, testing, road testing, parking, or storing automobiles, such ~~policy~~ policies may contain . . . .

Mr. Agay's suggestion would restore the former provision in the narrow area where the extended coverage applies to the operator's contribution liability.

Inasmuch as subdivision (f) seems to be involved in some pulling and hauling between various special interest groups and the Legislature appears to be aware of what it is doing, we believe that we should stay out of the battle.

Uninsured motorists

Mr. Agay asks whether the defendant's rights are assignable to the plaintiff. He seems to be asking whether an uninsured defendant can, instead of paying the judgment, satisfy the judgment by assigning his right to contribution from the operator to the plaintiff. The plaintiff could then enforce the contribution right of the defendant and collect at least one-half of his judgment.

This is a problem that now exists in regard to the general contribution statute. Our statute merely incorporates by reference the enforcement provisions of the general statute. Under the general statute, it seems unlikely that the requirement of payment by the tortfeasor claiming contribution could be so satisfied. In any event, Mr. Agay's problem is that, assuming assignability, does this mean that the plaintiff is not entitled to his uninsured motorist's coverage because his own insurance or the operator's insurance is available to the extent of the operator's contribution liability? We do not believe so, for even if the defendant's claim were so assignable and gave rise to rights without meeting the requirement of payment, the plaintiff's claim against the operator would not be a right, but would be at the mercy of the defendant. The defendant need not cross-complain for contribution, nor need he assign his rights. Since the plaintiff has no right to get at the operator's insurance, we do not see how the operator's insurance helps relieve the defendant of the onus of being an uninsured motorist.

We suggest that an addition of a remark to the comment should make it clear that a right of contribution does not make an insured motorist out of one who is uninsured.

Section 905

We believe that Mr. Agay's problem relating to pleading has been taken care of by the amendment directed by the Commission at the last meeting.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

1st supp. Memo 66-47 EXHIBIT I

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August 8, 1966

IN REPLY PLEASE REFER TO:

AIR MAIL

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

RE: Tentative recommendation relating to Vehicle Code Section 17150 and related sections

Gentlemen:

Below I offer comments and suggestions with respect to the above tentative recommendation.

With respect to Civil Code Section 902 (b) I personally was somewhat confused by the verb tense. Should not the subsection read "the plaintiff is a person who would be liable for the negligent or wrongful act or omission of the operator under Section 17150, 17154, 17159, 17707 or 17708 of the Vehicle Code;".

While the change you have suggested to Section 17150 under the Vehicle Code and indeed the entire purpose of the recommendation appears most sound, a comment which was included on page 25 does bother me somewhat.

It appears that if an employer and an employee decide to leave their office together on some business appointment, the probable off-hand choice of whose vehicle to use will become extremely crucial in determining if the passenger would be entitled to relief for the negligence of a third party. If the employee takes his car and drives, then, in the event of injuries to the employer as a result of an accident for which a third party and the employee are both negligently responsible the employer is totally without remedy. This apparently results, according to your comment because, of the imputation of contributory negligence to a master from his servant.

Now I could understand such imputation if the employee were driving the employer's car and the employer then sought property damages to his vehicle. To extend it to denying him relief for personal injuries seems ridiculous especially in light of the fact that if fortuitously and the employer had decided to drive his car, then the employee passenger could collect from a negligent third party even though his employer had likewise been negligent in the operation of that vehicle.

I would certainly suggest that this illogical result be eliminated under this new Chapter 1 covering contribution among joint judgment tortfeasors.

Another problem which bothers me in connection with section 902 concerns insurance. It is my understanding that generally the primary insurer is the insurer of the owner of the vehicle as opposed to the non-owning operator thereof. Would that mean that the net result of section 902 would be that the plaintiff's own insurance carrier wold end up paying half of the loss? That would not seem entirely proper and perhaps some specific consideratin should be given to establishing who in this instance would be the primary insurer.

Another question which has puzzled me is whether or not the defendant's rights are assignable to the plaintiff. If so and if the plaintiff or the contribution cross defendant has insurance but the defendant does not have insurance, would the plaintiff then be entitled to seek payment under uninsured motorist protection, or does his own insurance or that of the contribution cross defendant bar such recovery. Certainly it should be made clear that it does not bar recovery since at best he would only be receiving from himself or from the contribution cross defendant half of what he was justly entitled to.

It would seem to me that section 905 would require an amendment of section 442 of the Code of Civil Procedure so as to specifically provide for the filing of a cross complaint as a matter of right at a time other than the filing of the answer in order to be consistent with section 905.

Thank you for the privilege of submitting these suggestions and comments.

Yours very truly,

RICHARD D. AGAY

RDA:mg

At the same session at which it directed the Commission's study, the Legislature enacted

RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

VEHICLE CODE SECTION 17150 AND RELATED SECTIONS

BACKGROUND

In 1957, the Legislature directed the Law Revision Commission to make a study to determine whether damages awarded to a married person for personal injuries should be separate or community property. The underlying reason for the study was that under the then existing law a married person was barred from recovering damages against a negligent third person when the negligence of his spouse contributed to his injury because any damage award would be community property. Therefore, to allow recovery would permit the negligent spouse, in effect, to recover for his own negligent act. Section 163.5 of the Civil Code providing that damages awarded to a married person for personal injuries are the separate property of the injured spouse, thereby removing the reason for the imputation of the contributory negligence of one spouse to the other based on the property interests in the award. Section 163.5 has created other problems, however, which required the Commission to proceed with the study directed by the Legislature. See Recommendation and Study Relating to Whether Damages for Personal Injury to a Married Person Should be Separate or Community Property, 8 CAL. LAW REVISION COM'N, REP., REC. & STUDIES _____ (1966-67).

During the course of its study, the Commission realized that any recommendation it might make concerning the nature of the property interests in a personal injury damage award to a married person would not solve the problem that existed, for many if not most actions for damages in which the contributory negligence of a spouse is a factor arise out of vehicle accidents. Under Vehicle Code Section 17150, the contributory negligence of a person operating a vehicle with the permission of the owner is imputed to the owner, with the result that the nature of the property interests in the vehicle involved in an accident causing personal injuries can be determinative on the issue of imputed contributory negligence between spouses regardless of their interests in any damages awarded. Therefore, the Commission sought and was granted authority in 1962 to study whether Vehicle Code Section 17150 should be revised or repealed insofar as it imputes the contributory negligence of the operator of a vehicle to its owner.

The Commission's study of imputed negligence under Vehicle Code Section 17150 revealed other sections involving the same problem. Moreover, the study revealed important defects in these and other sections involving related problems, for consideration of the policies underlying imputed contributory negligence necessarily involved consideration of the extent to which a vehicle owner should be responsible for damages resulting from the operation of the vehicle by another. In 1965, at the Commission's request, the legislature extended its authority to consider all relevant aspects of Vehicle Code Section 17150 and related sections.

RECOMMENDATIONS

Vicarious liability of vehicle owners, bailees, and estate representatives

Vehicle Code Section 17150 provides that a vehicle owner is liable for the damages caused by the "negligence" of a person operating his vehicle with his permission. Vehicle bailees and estate representatives are subjected to similar liability by Sections 17154 and 17159.

These sections were enacted to provide the public with protection against the "growing menace of death or injury in the operation of motor vehicles" by the "financially irresponsible." See Bayless v. Mull, 50 Cal. App.2d 66, 69-71, 122 P.2d 608 (1942). They were based on the view that an automobile is "a dangerous instrumentality . . . in the hands of an incompetent or irresponsible driver." Ibid. Since the sections impose liability only when the operator is negligent, however, they do not apply in cases where the reason that gave rise to their enactment is of greatest force. Under existing law, the sections are inapplicable when the operator is guilty of wilful misconduct or drives while intoxicated. Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183 (1937) (intoxication and wilful misconduct in attempting to embrace passenger); Jones v. Ayers, 212 Cal. App.2d 646, 28 Cal. Rptr. 223 (1962)(wilful misconduct in disregarding boulevard stop sign and entering intersection at high speed); Stober v. Halsey, 88 Cal. App.2d 660, 199 P.2d 318 (1948) (intoxication and wilful misconduct in driving at high speed and removing hands from steering wheel). In rare cases, a person injured as a result of the operator's wilful misconduct or intoxication can recover from the owner on the theory that the owner negligently entrusted the operator with the vehicle. Benton v. Sloss, 38 Cal.2d 399, 240 P.2d 575 (1952). But in the absence of such proof, the owner is immune from liability for injuries caused by the wilful misconduct or intoxication of the operator.

Thus, an owner may be held liable under Section 17150 for the simple negligence of an operator, but, incongruously, he is immune from liability for the wilful misconduct or intoxication of an operator. The more irresponsible

the operator, the more difficult it is to impose liability on the person who provided the operator with the vehicle and the less financial protection the public has against injuries caused by the operator.

The courts have reached the holdings cited above by construing the word "negligence" narrowly to exclude "wilful misconduct." Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183 (1937). The term "wilful misconduct" is not used in Section 17150. The term is used in Section 17158 to describe the kind of conduct for which an operator is liable to his guest. Nevertheless, the courts have held that the terms are mutually exclusive and that an owner cannot be held liable under Section 17150 for an operator's conduct that constitutes "wilful misconduct" under Section 17158. Benton v. Sloss, 38 Cal.2d 399, 240 P.2d 575; Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183 (1937); Jones v. Ayers, 212 Cal. App.2d 646, 28 Cal. Rptr. 223 (1963); Stober v. Halsey, 88 Cal. App.2d 660, 199 P.2d 318 (1948).

To treat the terms as mutually exclusive disregards the diverse purposes underlying the two sections. Section 17158 is designed to prevent collusive or fraudulent suits. Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955); Ahlgren v. Ahlgren, 185 Cal. App.2d 216, 8 Cal. Rptr. 218 (1960). Section 17150 is designed to protect third persons against the improper use of automobiles by financially irresponsible persons. Bayless v. Hull, 50 Cal. App.2d 66, 122 P.2d 608 (1942). To shield himself from liability, the owner must either make sure that the operator is financially responsible or obtain insurance against his own potential liability. The exclusion of "wilful misconduct" from Section 17150 tends to defeat the purpose for which the section was enacted, for the injured third person in a "wilful misconduct" case cannot look to the owner for relief, and it may be that the operator's

conduct cannot be covered by insurance because of the restrictions of Insurance Code Section 533. See Escobedo v. Travelers Ins. Co., 227 Cal. App.2d 353, 38 Cal. Rptr. 645 (1964); Escobedo v. Travelers Ins. Co., 197 Cal. App.2d 118, 17 Cal. Rptr. 219 (1961). Thus, [redacted] Section 17150 provides no protection against financial loss in the very cases where danger of death or injury is greatest.

Recent cases interpreting "wilful misconduct" under Section 17158 will accentuate the problem if there continues to be an immunity from liability under Section 17150 for such conduct. These cases construe the term [redacted] as including conduct virtually indistinguishable from negligence. For example, in Reuther v. Viall, 62 Cal.2d 470, 42 Cal. Rptr. 496, 398 P.2d 792 (1965), [redacted] the court held that an operator who had taken her [redacted] eyes off the road for a brief time and bent down to pick up the heat element of the car's cigarette lighter, [redacted] been guilty of wilful misconduct within the meaning of the guest statute. [redacted] Negligence frequently involves the wilful doing of some act when a reasonable person should be able to foresee that some harm will result therefrom. The operator of a vehicle may wilfully do many acts which cause harm such as driving too fast, going through a stop sign, or looking away from the road ahead. Such misconduct [redacted] under the Reuther case, may well subject the operator to liability to a guest. It should not, however, exonerate the

owner of the vehicle from the vicarious liability imposed by Section 17150.

Sections 17707 and 17708 of the Vehicle Code make certain persons (parents and signatories to drivers license applications) liable for damages caused by minors in the operation of vehicles. As originally enacted, these sections created vicarious liability only for negligence. Gimenez v. Rissen, 12 Cal. App.2d 152, 55 P.2d 292 (1936). When it became apparent that the sections provided no vicarious responsibility for the kinds of irresponsible driving that minors are apt to engage in, the sections were amended to provide for vicarious liability for wilful misconduct as well as negligence. See Gimenez v. Rissen, supra.

The Commission recommends a similar revision of Sections 17154 and 17159 of the Vehicle Code.

Imputed contributory negligence

Vehicle Code Section 17150 provides that the owner of a vehicle who permits it to be operated by another is liable for any injury caused by the negligence of the operator. Moreover, the negligence of the operator is imputed to the owner for all purposes of civil damages, thus barring the owner from recovering damages from a negligent third person if the operator was also negligent. Similar imputation provisions appear in Sections 17154, 17159, and 17708 of the Vehicle Code.

The provision of Vehicle Code Section 17150 that imputes the contributory negligence of a driver to the owner of the vehicle was enacted in

[redacted] 1937. Cal. Stats. 1937, Ch. 840, § 1. From that time until Vehicle Code Section 17158[1] (the guest statute) was amended in 1961, this provision merely prohibited the owner from recovering from the negligent third person. It did not affect his remedy against the negligent operator. Thus, in effect, it forced an owner who was injured by the concurring negligence of the operator and a third person to obtain his relief in damages from the operator alone. At a time when contribution between tortfeasors was unknown to the law, the choice thus forced upon an owner of a vehicle was not an unreasonable one. If the owner were not forced to recover his damages from the operator whom he selected, he probably would look only to the third person for relief regardless of the relative fault of the parties. By barring the remedy against the third person, the law prevented the owner from showing such favoritism. Since he selected the operator, the law required him to bear the risk of the operator's negligence and ability to respond in damages.

An amendment to the guest statute in 1961, however, [redacted] deprived an owner of his right to recover from the operator damages for personal injuries caused while the owner is riding as a guest in his own car. The policy underlying the guest statute--to prevent collusive suits--is undoubtedly as applicable to owners riding as guests as it is to others riding as guests; but the amendment has deprived the innocent owner of his only remedy for personal injuries caused by the concurring negligence of the operator and a third person.

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[1]Section 17158 provides:

> 17158. No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or wilful misconduct of the driver.

Repeal of the provision of Section 17150 that imputes the contributory negligence of the operator to the owner would restore the owner's right to recover from the negligent third person. This, however, would force the third person to bear the whole loss that his negligence caused only in part.

Within recent years California has abandoned the traditional common law view that there is no contribution between tortfeasors. The contribution principle seems to be a fairer one than to require one tortfeasor to bear the entire loss caused only partially by his fault. Applied to the case where an owner is injured by the concurring negligence of the operator and a third person, the principle of contribution offers a means for providing the owner with relief, preventing collusive suits between owners and operators, and requiring both the negligent third person and the operator to share the burden of liability arising from their concurrent wrongful actions.

Accordingly, the Commission recommends the repeal of the provisions of the Vehicle Code that permit a third party tortfeasor to escape liability to an innocent owner because of the contributory negligence of the operator of the vehicle. Instead, the third party tortfeasor, when sued by the owner, should have the right to join the operator as a party to the litigation, and if both are found guilty of misconduct contributing to the injury, the third party should have a right to contribution from the operator in accordance with the existing statute providing for contribution between tortfeasors. See CODE CIV. PROC. §§ 875-880.

It is recommended that an operator be required to contribute when he is guilty of any negligent or wrongful act or omission in the operation of the vehicle. The third party tortfeasor, however, as under the existing contribution statute, should not be permitted to obtain contribution if he intentionally caused the injury or damage.

#53 9/1/66

RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

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

In 1957 the 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 involved more than a consideration of the property interests in damages recovered by a married person in a personal injury action; it also involved a consideration of the extent to which the contributory negligence of one spouse should be imputed to the other, for in the past the determination of this issue has turned in large part on 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 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 negligence under Section 17150 are dealt with in a recommendation that will be separately published.[1] The two recommendations should be considered together, however, since they propose a comprehensive and consistent statutory treatment of the subject of imputed contributory negligence between spouses.

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[1] Recommendation and Study Relating to Vehicle Code Section 17150 and Related Sections, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES ____ (1966-67).

Personal injury damages as separate or community property

Prior to [redacted] 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 person [redacted], 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).

While [redacted] Section 163.5 succeeded in abrogating the doctrine of imputed contributory negligence as between married persons insofar as that doctrine was based on the community nature of the damages award [redacted]s (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:

(1) The Section [redacted] 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 and going far

beyond what was necessary to achieve the legislature's objective.

(2) Although earnings from personal services are usually the chief source of the community property, damages for the loss of future earnings are made the separate property of the injured spouse.

(3) While expenses incurred by reason of a personal injury are usually paid from community property, damages awarded as reimbursement for such expenses are made the separate property of the injured spouse, thus depriving the community of reimbursement 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 and may be disposed of by gift or will without limitation.

(5) In case of an intestate death, the surviving spouse, who would inherit all of the community property, might receive as little as one third of the damages awarded for personal injury because they are separate property.

(6) 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 they realize that the liability exists.

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 to a degree 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 between spouses and allow an injured spouse to recover for injuries caused by the concurring negligence of the other spouse and a third person. 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 present 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 person and exonerate the other spouse whose actions also contributed to the injury simply by suing the third person 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 person 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.