

11/18/68

Memorandum 69-8

Subject: Study 53 - Personal Injury Damages

Upon recommendation of the Law Revision Commission, the 1968 Legislature enacted legislation to make personal injury damages generally community property and to make other related changes. Professor Sato has sent us a number of revisions proposed by faculty members who are concerned with the problems involved in the 1968 statute. See Exhibit I (pink) attached for his letter.

Before considering the suggested revisions, two points should be noted:

(1) The scope of our authority is limited to the study of whether personal injury damages should be separate or community property. Although we liberally interpreted this authority in preparing the 1968 legislation, this limitation on our authority would appear to preclude us from recommending some of the suggested changes. In this connection, several writers have suggested that we undertake a study of community property generally. The Commission might wish to consider requesting authority to study community property generally.

(2) The legislation on personal injury damages was very controversial. The bill passed the Senate in 1967 but was defeated on the Assembly floor--primarily because the bill was considered to be too liberal in permitting division of personal injury damages on divorce or separate maintenance. The bill was introduced in the Senate in 1968. Again, the bill aroused considerable controversy and it was referred to a special subcommittee of the Senate Judiciary Committee for study. This

subcommittee, after holding a long work session on the bill, finally recommended enactment of the bill with certain amendments designed to restrict the power of the court to divide personal injury damages upon divorce or separate maintenance. The subcommittee approved the bill by a 2-1 vote.

Based on the experience with the legislation on this subject at the 1967 and 1968 legislative session, the staff would be most reluctant to have the Commission make a recommendation on this subject unless serious problems exist under the legislation as enacted.

In this memorandum, we will consider each change suggested by the law faculty at Boalt Hall. However, since the decisions on most matters depend on the action the Commission takes on two substantive changes recommended by the law faculty, we consider those changes first before we consider the suggested revisions on a section by section basis.

The first suggested substantive change is outlined by Professor Sato as follows:

1. The property received for personal injuries after the events enumerated in section 169.3 is made separate property. The reason that we made property received after those events separate property even though the cause of action accrued before the events was that we did not know how the cause of action which was yet unsatisfied could be disposed of at the time of divorce or separate maintenance. I have been informed that the judge can make a percentage allocation of the cause of action or retain jurisdiction of the matter until property is received. If this is true, it appears to me that the personal injury cause of action should be brought within section 146 and section 146 has been revised accordingly.

Property received in satisfaction of causes of action accruing after those events are separate property, of course, since other sections so provide.

The following *explanation* from the Commission's Recommendation to the 1968 Legislature discloses that the Recommendation was not based on the problems that would be presented if the rule suggested by the law faculty members were adopted but instead was based on retention of the law as it existed before enactment of Civil Code Section 163.5:

The Commission also recommends that damages for personal injuries be the separate property of the injured spouse if they are recovered (1) after rendition of an interlocutory judgment of divorce and while the injured person and his spouse are living separate and apart, (2) after rendition of a judgment of separate maintenance, (3) while the wife, if she is the injured person, is living separate from her husband, or (4) after the wife has abandoned her husband, if he is the injured person, and before she has offered to return, unless her abandoning him was justified by his misconduct. Earnings and accumulations in general are separate property if acquired under these circumstances. See Civil Code Sections 169, 169.1, 169.2, and 175. Before enactment of Civil Code Section 163.5, it was held that a cause of action for personal injuries vested by operation of law in the injured party upon dissolution of the marriage by divorce.⁸

⁸In *Washington v. Washington*, 47 Cal.2d 249, 253, 302 P.2d 569, 571 (1956), Justice Traynor (writing the court's opinion) reasoned:

It is not unfair to the uninjured spouse to terminate his or her interest in the other's cause of action for personal injuries on divorce. . . . A rule . . . treating the entire cause of action as community property protects the community interest in the elements that clearly should belong to it. . . . Although such a rule may be justified when it appears that the marriage will continue, it loses its force when the marriage is dissolved after the cause of action accrues. In such a case not only may the personal elements of damages such as past pain and suffering be reasonably treated as belonging to the injured party, but the damages for future pain and suffering, future expenses, and future loss of earnings are clearly attributable to him as a single person following the divorce. Moreover, as in any other case involving future earnings or other after acquired property, the wife's right, if any, to future support may be protected by an award of alimony. [Citation omitted.]

The Senate Judiciary Committee, the special subcommittee of that Committee, and the Assembly Judiciary Committee all considered this particular problem. The Commission's staff at one stage in the development of the Recommendation had recommended to the Commission that a cause of action that accrued before divorce or separate maintenance should be community property. The Commission rejected this suggestion, but the State Bar took this position at the 1968 session and made basically the same argument that is made in the quotation from Professor Sato's letter. The Legislature adopted the view advocated by the Commission and was especially persuaded by the extract from Justice Traynor's opinion set out in the footnote from the extract of the Commission's recommendation set out above. The 1968 Legislature was especially concerned about division of personal injury damages upon divorce or separate maintenance. The Legislature took the view that the Commission's recommendation was too liberal in permitting division. The Legislature considered the law faculty proposal and rejected it. The staff is persuaded on the merits that the 1968 legislation provides the correct rule. But even if we were not, we would strongly recommend that we not submit a recommendation to change the rule since it was enacted upon our recommendation and was thoroughly considered by the Legislature and the legislative committees were strongly of the view that the rule recommended by the Commission is the correct one.

The second suggestion contained in Professor Sato's letter is as follows:

2. Section 164.7 has been amended to provide for the right of reimbursement to the injured spouse to the extent that the tortfeasor spouse has used community property to satisfy the claim of the injured spouse. The reason for this is that the tortfeasor spouse, to the extent that he has used community property, was paying one half of his indebtedness with the injured spouse's vested interest.

This suggestion is one that was fully considered on a great number of occasions by the Commission when it drafted the 1968 statute. After considering several alternative methods of accomplishing the objective suggested by Professor Sato, the Commission determined not to recommend the suggested rule.

The following is a consideration of the revisions suggested in Professor Sato's letter. Each section is set out as proposed to be revised by Professor Sato. (For the text of each section as enacted and the official comment to the section, see Exhibit II.)

Section 146. The following revision of Section 146 is suggested:

146. In case of the dissolution of the marriage by decree of a court of competent jurisdiction or in the case of judgment or decree for separate maintenance of the husband or the wife without dissolution of the marriage, the court shall make an order for disposition of the community property and the quasi-community property and for the assignment of the homestead as follows:

(a) Except as otherwise provided in subdivision (c), if the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property and quasi-community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the conditions of the parties, may deem just.

(b) Except as otherwise provided in subdivision (c), if the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property and quasi-community property shall be equally divided between the parties.

(c) Without regard to the ground on which the decree is rendered or to which party is granted the divorce or separate maintenance, community property personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages, and all other facts of the case, determines that the interests of justice require another disposition, in which case the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just under the facts of the case, but in no event shall more than one-half of the community property personal injury damages be assigned to the spouse of the party who suffered the injuries. Except as otherwise provided by Civil Code Sections 163.5, 169, 169.1, and 169.2 As-used-in-this-subdivision , "community property personal injury damages" means all money or other property received by-a-married-person-as-community-property-in-satisfaction-of-a-judgment-for-damages-for-his-or-her-personal-injuries or to be received before or after a decree of separate maintenance or a final decree of divorce in satisfaction of a judgment or pursuant to an agreement for-the-settlement-or-estimate-of-a-claim-for-such-damages,-unless of compromise based on a claim for damages for personal injuries suffered by a married person until such money or other property has been commingled without trace with other community property with the express consent of the spouse who suffered the injuries .

(d) If a homestead has been selected from the community property or the quasi-community property, it may be assigned to

the party to whom the divorce or decree of separate maintenance is granted, or, in cases where a divorce or decree of separate maintenance is granted upon the ground of incurable insanity, to the party against whom the divorce or decree of separate maintenance is granted. The assignment may be either absolutely or for a limited period, subject, in the latter case, to the future disposition of the court, or it may, in the discretion of the court, be divided, or be sold and the proceeds divided.

(e) If a homestead has been selected from the separate property of either, in cases in which the decree is rendered upon any ground other than incurable insanity, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the party to whom the divorce or decree of separate maintenance is granted, and in cases where the decree is rendered upon the ground of incurable insanity, it shall be assigned to the former owner of such property, subject to the power of the court to assign it to the party against whom the divorce or decree of separate maintenance is granted for a term of years not to exceed the life of such property.

This section shall not limit the power of the court to make temporary assignment of the homestead at any stage of the proceedings.

Whenever necessary to carry out the purpose of this section, the court may order a partition or sale of the property and a division or other disposition of the proceeds.

The decision on whether this section should be revised turns on whether the Commission determines to make a cause of action for personal injuries that accrues (but where no damages are received) before divorce or separate maintenance community property. If the decision is to retain existing law, the staff does not believe that any change is needed in Section 146. Insofar as Section 146 deals with commingling, see the official Senate comment to this section on page 2 of Exhibit II. The comment is a much better statement of the applicable rule than would result from the addition of the words "without trace." Moreover, the suggested addition of "with the express consent of the spouse who suffered

the injuries" would result in a rule that is contrary to the general rule that applies under all other circumstances. Insofar as this general rule is proposed to be changed by revision of Section 171c--discussed later--that revision would be beyond our authority and could not be included in a recommendation on personal injury damages as separate or community property.

§ 163.5

Section 163.5. The following revision of Section 163.5 is suggested:

163.5. 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-of~~ of compromise based on ~~of~~ a claim for such damages for personal injuries caused by him to his spouse, is the separate property of the injured spouse.

Professor Sato states that "Section 163.5 has been amended to make clear that it relates to interspousal tort." The staff does not believe any change is needed.

§ 164.6

Section 164.6. The following revision of Section 164.6 is suggested:

164.6. ~~If a married person is injured by~~ The negligent or wrongful act or omission of a married person shall not be imputed to his spouse so as to defeat a cause of action against a third party, except when such negligent or wrongful act or omission would have been so imputed as between unmarried persons ~~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~~.

Professor Sato states that "Section 164.6 has been clarified." The suggested wording may be an improvement, but the staff believes that there is nothing wrong with the section as enacted. See page 4 of Exhibit II for text of section as it now exists and official comment.

§ 164.7

Section 164.7. The following revision of Section 164.7 is suggested:

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 ; and in no event shall community property under the management and control of the injured spouse be used, without his consent, to discharge such liabilities .

(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) To the extent that the tortfeasor spouse satisfies his obligation to his injured spouse out of community property under his management and control, one-half of which community property is vested in each spouse, the injured spouse shall be entitled to reimbursement in amount of one-half of the community property so used--to be paid for, at the option of the injured spouse, either:

(1) From the tortfeasor spouse's separate property whenever acquired thereafter, either before or after the entry of a separate maintenance decree or the dissolution of the marriage by death or divorce, or

(2) From the tortfeasor's share of the community property after partition thereof is made because of entry of a separate maintenance decree or dissolution of the marriage by death or divorce to the extent that the injured spouse has not already been reimbursed.

Nothing in this section shall prevent the spouse under Cal. C.C. § 158, from agreeing, at any time, that the community property shall be partitioned to the extent necessary to reimburse the injured spouse in whole or in part for his vested one-half interest in the community property which was used by the tortfeasor spouse in payment of the injured spouse's claim for damages.

(d) ~~(e)~~ 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.

Whether this section should be revised will be determined by the Commission's decision on the second policy question raised at the first portion of this memorandum. If the Commission determines not to recommend a change in the policy enacted in 1968, no revision of this section is needed.

§ 169.3

Section 169.3. The following revision of Section 169.3 is suggested:

169.3. (a)--All money or other property received by a married person in satisfaction of a judgment for damages for his personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages is the separate property of the injured person if such money or other property is received:

(1)--After the rendition of a judgment or decree of separate maintenance;

(2)--After the rendition of an interlocutory judgment of divorce and while the injured person and his spouse are living separate and apart;

(3)--While the wife, if she is the injured person, is living separate from her husband; or

(4)--After the wife has abandoned her husband, if he is the injured person, and before she has offered to return, unless her abandoning him was justified by his misconduct.

(b)--Notwithstanding subdivision (a), if the spouse of the injured if a married person has paid expenses by reason of his spouse's personal injuries from his separate property or from the community property subject to his management and control, he and the injured spouse has included such expenses as items in his claim for damages, the former is entitled to reimbursement of reimburse his separate property or the community property under subject to his management and control for such expenses from the money or other property received in satisfaction of a judgment for such claim or pursuant to an agreement for the settlement or compromise of such claim separate property received by his spouse under subdivision (a) .

Whether this section needs revision depends upon the Commission's decision on the two basic policy questions presented at the beginning of this memorandum.

§ 171a

Section 171a. The following revision of Section 171a is suggested:

171a. (a) A married person is not liable for any injury or damage caused by the other spouse except in cases where he would be liable therefor if the marriage did not exist.

(b) The liability of a married person to a person other than his spouse for death, or for injury to person or property may be satisfied only from the separate property of such married person and the community property under his ~~of-which-he-has-the~~ management and control.

This revision is needed only if the Commission determines to change the rule provided in Section 164.7.

§ 171c

Section 171c. The following revision of Section 171c is suggested:

171c. Notwithstanding the provisions of Section 161a and 172 of this code, the wife has the management, and control and disposition of the community personal property earned by her, and the community personal property, received by her in satisfaction of a judgment for damages for personal injuries suffered by her or pursuant to an agreement for the settlement or compromise of a claim for such damages, until it is commingled with her written consent with community property subject to the management and control of the husband, except that the husband may use such community property received as damages or in settlement or compromise of a claim for such 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 if such expenses were included as an item in her claim.

The wife may not make a gift 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 earnings or damages or property received in settlement or compromise of such damages the separate property of the wife, nor as changing the respective interests of the husband and wife in such community property, as defined in Section 161a of this code.

The Commission deleted the words "and disposition" as unnecessary in view of the second paragraph of the section which deals with the extent to which the wife may dispose of the property.

The addition of "her written consent" would constitute a change in existing law that is beyond the scope of the Commission's authority (since this section deals primarily with the wife's earnings).

The addition of the words "if such expenses were included as an item in her claim" may be desirable, but the staff would not recommend the addition of such words without further study. Moreover, we do not consider

§ 171c

the change of sufficient importance--if it is ultimately found to be a desirable one--to justify the Commission making it the subject of a recommendation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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November 7, 1968

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Stanford University School of Law
Stanford, California

Dear John:

I am enclosing a draft of Chapters 457 and 458 as revised.
The substantive changes are:

1. The property received for personal injuries after the events enumerated in section 169.3 is made separate property. The reason that we made property received after those events separate property even though the cause of action accrued before the events was that we did not know how the cause of action which was yet unsatisfied could be disposed of at the time of divorce or separate maintenance. I have been informed that the judge can make a percentage allocation of the cause of action or retain jurisdiction of the matter until property is received. If this is true, it appears to me that the personal injury cause of action should be brought within section 146 and section 146 has been revised accordingly.

Property received in satisfaction of causes of action accruing after those events are separate property, of course, since other sections so provide.

2. Section 164.7 has been amended to provide for the right of reimbursement to the injured spouse to the extent that the tortfeasor spouse has used community property to satisfy the claim of the injured spouse. The reason for this is that the tortfeasor spouse, to the extent that he has used community property, was paying one half of his indebtedness with the injured spouse's vested interest. Clarifying amendments have been made as follows:

1. Section 146 has been revised to make certain that the definition of the term "community property personal injury damages" does not include that which is separate property under other specific provisions.

Mr. John H. DeMouilly
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2. Section 163.5 has been amended to make clear that it relates to interspousal tort.
3. Section 164.6 has been clarified.
4. Section 169.3 has been revised to preserve the right of reimbursement.
5. Section 171a has been amended.
6. Section 171c has been amended to reinsert the word "disposition" which we removed and to clarify other matters.

These amendments are being proposed by the faculty members who are concerned with the problems involved in our legislation.

Sincerely yours,


Sho Sato

SS:dcf

Enclosure

[Note: Enclosed draft was not reproduced as a part of this Exhibit. The suggested changes in Chapters 457 and 458 are set out in the Memorandum.]

EXHIBIT II

Civil Code Section 146

146. In case of the dissolution of the marriage by decree of a court of competent jurisdiction or in the case of judgment or decree for separate maintenance of the husband or the wife without dissolution of the marriage, the court shall make an order for disposition of the community property and the quasi-community property and for the assignment of the homestead as follows:

(a) Except as otherwise provided in subdivision (c), if the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property and quasi-community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the conditions of the parties, may deem just.

(b) Except as otherwise provided in subdivision (c), if the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property and quasi-community property shall be equally divided between the parties.

(c) Without regard to the ground on which the decree is rendered or to which party is granted the divorce or separate maintenance, community property personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages, and all other facts of the case, determines that the interests of justice require another disposition, in which case the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just under the facts of the case, but in no event shall more than one-half of the community property personal injury damages be assigned to the spouse of the party who suffered the injuries. As used in this subdivision, "community property personal injury damages" means all money or other property received by a married person as community property in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages, unless such money or other property has been commingled with other community property.

(d) If a homestead has been selected from the community property or the quasi-community property, it may be assigned to the party to whom the divorce or decree of separate maintenance is granted, or, in cases where a divorce or decree of separate maintenance is granted upon the ground of incurable insanity, to the party against whom the divorce or decree of separate maintenance is granted. The assignment may be either absolutely or for a limited period, subject, in the latter case, to the future disposition of the court, or it may, in the discretion of the court, be divided, or be sold and the proceeds divided.

(e) If a homestead has been selected from the separate property of either, in cases in which the decree is rendered upon any ground other than incurable insanity, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the party to whom the divorce or decree of separate maintenance is granted, and in cases where the decree is rendered upon the ground of incurable insanity, it shall be assigned to the

former owner of such property, subject to the power of the court to assign it to the party against whom the divorce or decree of separate maintenance is granted for a term of years not to exceed the life of such party.

This section shall not limit the power of the court to make temporary assignment of the homestead at any stage of the proceedings.

Whenever necessary to carry out the purpose of this section, the court may order a partition or sale of the property and a division or other disposition of the proceeds.

Legislative Committee Comment—Senate

Civil Code Section 146 (amended)

Comment. Subdivision (e) has been added to Civil Code Section 146 to provide a special rule for the disposition of personal injury damages. The subdivision is limited to "community property personal injury damages." Under some circumstances, personal injury damages may be separate property when received. See Civil Code Sections 168.5 and 169.3.

Subdivision (e) requires that the spouse who suffered the injuries be awarded all of the community property that represents damages for his or her personal injuries unless the court determines that justice requires a division. If justice so requires, the court may make such division as is just under the facts of the particular case, without regard to the grounds or to which spouse is granted the divorce or separate maintenance. Thus, the court can award the spouse against whom a divorce is granted more than one-half of such damages if the equities of the situation so require. In no event, however, may the court award more than one-half of such damages to the noninjured spouse.

Subdivision (e) specifically requires the court to take into account the economic conditions and needs of the parties and the time that has elapsed since the recovery of the damages as well as the other facts in the case. If the divorce or separate maintenance action is brought shortly after the damages are recovered, the court—absent special circumstances—should award all or substantially all of such damages to the injured spouse. On the other hand, if a number of years has elapsed since the recovery of the damages, this fact alone may be sufficient reason to assign the personal injury damages to the respective parties in such proportions as the court determines to be just under the facts of the particular case.

Under prior law, personal injury damages were separate property and therefore were not subject to division on divorce or separate maintenance unless they had been converted into community property. This inflexible rule applied even where a substantial portion of such damages represented lost earnings that would have been received during the period of the marriage prior to the divorce. Subdivision (e) permits the court to avoid the injustice that sometimes resulted under former law.

Subdivision (e) applies even though money recovered for personal injury damages has been invested in securities or other property. However, if the amount received has been transmuted into ordinary community property, the subdivision does not apply. Such transmutation can be accomplished by agreement. See Civil Code §§ 158-161. The parties may commingle the proceeds of an award with other community property. If the proceeds so commingled cannot be traced, they must be treated as ordinary community property and subdivision (e) is not applicable. *Cf. Metcalf v. Metcalf*, 209 Cal. App.2d 742, 26 Cal. Rptr. 271 (1962). Even though commingling falls short of the point where tracing becomes impossible, depositing the proceeds in the family bank account and using them for the support of the family may, under some circumstances, be sufficient evidence of an agreement to transmute the award into ordinary community property and to make subdivision (e) inapplicable. *Weinberg v. Weinberg*, 67 Cal.2d [67 A.C. 567, 580-581] (1967). *Cf. Lawatch v. Lawatch*, 161 Cal. App.2d 780, 790, 327 P.2d 603, 608 (1958).

Civil Code Section 163.5

163.5. 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.

Law Revision Commission Comment

Comment. Before enactment of Section 163.5 in 1957, damages received by a married person for personal injuries were community property. *Zaragoza v. Craven*, 38 Cal.2d 315, 202 P.2d 73 (1949). 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). Section 163.5 has been amended so that personal injury damages paid to a married person are separate property only if they are paid by the other spouse. In all other cases, the original rule—that personal injury

damages are community property—applies because the character of such damages is determined by Section 164 of the Civil Code.

Civil Code Section 164.6

164.6. 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.

Law Revision Commission Comment

Comment. Section 164.6 is new. Section 163.5 was added in 1957 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 in *Kesler* 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 has been amended to restore the original rule that personal injury damages are community property. To avoid revival of the rule of the *Kesler* case, Section 164.6 provides directly that the negligence or wrongdoing of the other spouse is not a defense to the action brought by the injured spouse except in cases where such negligence or wrongdoing would be a defense if the marriage did not exist.

Civil Code Section 164.7

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.

Law Revision Commission Comment

Comment. Section 164.7 is new. As a general rule, a married person's tort liability may be satisfied from either his separate property or the community property subject to his control. See Section 171a and the Comment to that section. Section 164.7 has been added to require the tortfeasor spouse to 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 would be 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) permits the tortfeasor spouse to 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 contract entered into long prior to the injury.

Subdivision (c) is included to make it clear that Section 164.7 does not preclude the tortfeasor spouse from relying on any liability insurance policies he may have even though the premiums have been paid with community funds.

Civil Code Section 169.3

169.3. (a) All money or other property received by a married person in satisfaction of a judgment for damages for his personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages is the separate property of the injured person if such money or other property is received:

(1) After the rendition of a judgment or decree of separate maintenance;

(2) After the rendition of an interlocutory judgment of divorce and while the injured person and his spouse are living separate and apart;

(3) While the wife, if she is the injured person, is living separate from her husband; or

(4) After the wife has abandoned her husband, if he is the injured person, and before she has offered to return, unless her abandoning him was justified by his misconduct.

(b) Notwithstanding subdivision (a), if the spouse of the injured person has paid expenses by reason of his spouse's personal injuries from his separate property or from the community property subject to his management and control, he is entitled to reimbursement of his separate property or the community property subject to his management and control for such expenses from the separate property received by his spouse under subdivision (a).

Law Revision Commission Comment

Comment. Section 169.3 treats a recovery for personal injuries to a married person substantially the same as earnings and accumulations are treated under Civil Code Sections 169, 169.1, 169.2, and 175.

In some cases, medical or other expenses incurred by reason of the injury will be paid by the spouse of the injured person from his separate property or from the community property subject to his management and control. Subdivision (b) provides that the spouse of the injured person is entitled to be reimbursed for these expenses from the personal injury damage recovery. In this respect, subdivision (b) adopts the same policy that is expressed in Section 171c.

Civil Code Section 171a

171a. (a) A married person is not liable for any injury or damage caused by the other spouse except in cases where he would be liable 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.

Law Revision Commission Comment

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. The subdivision is consistent with the California law to the extent that it 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.

The fact that separate property has been commingled with community property or that the wife's earnings have been commingled with other community property does not defeat the right of a judgment creditor to trace and reach such earnings. See *Tinsley v. Bauer*, 125 Cal. App.2d 724, 271 P.2d 116 (1954) (commingling of wife's earnings with other community property did not defeat right of judgment creditor to trace and reach such earnings to satisfy judgment based on wife's quasi-contractual liability).

Civil Code Section 171c

171c. Notwithstanding the provisions of Section 161a and 172 of this code, the wife has the management and control of the community personal property earned by her, and the community personal property received by her in satisfaction of a judgment for damages for personal injuries suffered by her or pursuant to an agreement for the settlement or compromise of a claim for such damages, until it is commingled with community property subject to the management and control of the husband, except that the husband may use such community property received as damages or in settlement or compromise of a claim for such 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.

The wife may not make a gift 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 earnings or damages or property received in settlement or compromise of such damages the separate property of the wife, nor as changing the respective interests of the husband and wife in such community property, as defined in Section 161a of this code.

Law Revision Commission Comment

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. Since the amendment of Section 163.5 again makes personal injury damages community instead of separate property, 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. Other damages are made separate property by Section 169.3. Section 171c does not give the husband any right of reimbursement from these damages since they are received as separate property. Section 169.3, however, gives the spouse of the injured person a similar right to reimbursement from damages received as separate property under that section.

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.