#F-672

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Memorandum 90-45

Subject: Study F-672 - Personal Injury Damages as Community or Separate Property

At the last meeting, the Commission considered a suggestion that the Commission-recommended rule that personal injury damages are community property should be changed. See Schroeder, *Adding Insult to Injury: California's Community Property Classification of Personal Injury Damage Awards -- Proposed Statutory Reform*, 16 W. St. U.L. Rev. 521 (1989). The Commission wanted to see its previous recommendation on this subject, and asked the staff to research the law of other community property states and to report back.

Existing Law

Personal injury damages compensate both for economic losses (medical expenses, loss of earnings) and non-economic losses (pain and suffering, disfigurement). California law generally classifies both kinds of personal injury damages as community property. See Civ. Code §§ 4800(b)(4), 5126. However, when personal injury damages are divided on dissolution of marriage, the usual community property rules are modified by Civil Code Section 4800(b)(4):

> Community estate personal injury damages shall be assigned to the party who suffered the injuries unless the court, taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such a case, the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of the damages shall be assigned to the party who suffered the injuries.

The result of this provision is that, on dissolution, personal injury damages are treated differently than other community property: The court awards personal injury damages to the injured spouse unless the interests of justice require otherwise. At death, personal injury damages apparently are treated the same as community property generally.

Property purchased with personal injury damages keeps the same character, and thus is ordinarily awarded to the injured spouse on

dissolution of marriage. *In re* Marriage of Devlin, 138 Cal. App. 3d 804, 189 Cal. Rptr. 1 (1982). Personal injury damages lose their special character only if commingled with other community property where it is impossible to trace the source of the property or funds. *Id.* at 808-10; see Civ. Code § 4800(b)(4).

If the personal injury cause of action arose after dissolution of marriage or after the spouses separate, the damage award is separate property. However, the community is entitled to reimbursement from the separate property of the other spouse or from community property for expenses paid because of the injuries. Civ. Code § 5126.

Practitioners have told the staff that this scheme generally works well and seems to produce equitable results.

Commission Recommendations

Before 1968, the California rule was that personal injury damages were separate property of the injured spouse. The present statute was enacted in 1968 on a Commission recommendation that personal injury damages should be community property. Among the reasons for the Commission recommendation were the following:

(1) Medical and other expenses are usually paid from community funds. The separate property rule unfairly deprived the community of reimbursement.

(2) Damages for lost earnings during marriage, which would have been community property when earned, are unfairly converted by the rule into separate property of the injured spouse.

The Commission made two recommendations on this subject. The Assembly rejected the first recommendation because it did not apportion damages for loss of earnings to pre-divorce and post-divorce earnings. The Assembly did not want the non-injured spouse to share in the injured spouse's damages for post-divorce (separate) earnings.

In response to the Assembly's objection, the Commission submitted a new recommendation proposing that on dissolution of marriage, all personal injury damages should go to the injured spouse unless justice requires a division. The Commission thought that, because of the variety of possible fact situations, the statute:

> should not undertake to provide exact rules for determining whether to make a division and, if so, what division to make. Rather, the statute should require the court to take

into account the economic conditions and needs of the parties, the time elapsed since the damages were recovered, and any other pertinent facts in the case.

The Legislature enacted the Commission's second recommendation. A copy of the Commission's second recommendation is attached as Exhibit 2.

All Other Community Property States Apportion Damages

All eight community property states other than California apportion personal injury damages between economic and non-economic damages: All eight treat non-economic damages (pain, suffering and disfigurement) as separate property of the injured spouse. All eight treat damages for medical expenses paid by the community and for loss of earnings during marriage as community property. Some do not distinguish between loss of earnings during marriage and loss of earnings after the marriage ends. A summary of the law of these eight states is set out in Exhibit 1.

Mr. Schroeder's Apportionment Proposal

Mr. Schroeder would change existing law to provide instead that the non-economic portion (pain, suffering, disfigurement) of personal injury damages is separate property of the injured spouse. If this were done, on dissolution of marriage the court could not award any non-economic damages to the non-injured spouse. Mr. Schroeder would provide that the economic portion (medical expenses paid from community funds, loss of earnings) is presumed to be community property. The injured spouse could rebut the presumption by showing that some of the award is for lost earnings that would have been earned after dissolution of marriage. Damages for post-dissolution earnings would be the injured person's separate property not subject to division.

Mr. Schroeder's proposal requires a determination of the portion of personal injury damages that is separate property and the portion that is community. The damages must be apportioned between those for economic loss (community property) and those for non-economic loss (separate property). The amount for lost earnings must be further apportioned to the amounts that would have been earned before and after dissolution of the marriage. The difficulty of apportionment caused the Commission not to adopt this scheme when it made its 1967 recommendation on this subject.

Most personal injury claims are settled before trial. Settlements

ordinarily do not fix the elements of damages. Mr. Schroeder recommends that counsel drafting a settlement agreement should apportion damages in the agreement. Schroeder, *supra,* at 552. His proposal permits the court to consider the settlement agreement, unless the court finds that it was made under circumstances that indicate a lack of trustworthiness. *Id.* at 558.

Trial verdicts ordinarily do not apportion damages either, although counsel may request a special verdict to do this. See 7 B. Witkin, Summary of California Law *Trial* § 321, at 322-23 (3d ed. 1985). Mr. Schroeder's proposal permits the court in apportioning damages to consider a special verdict. Schroeder, *supra,* at 557.

Mr. Schroeder acknowledges that there are practical problems in making an apportionment: He observes that "no court or legislature in a community property state has yet reported an efficient and consistent method of apportioning" between damages for economic loss and damages for non-economic loss. Schroeder, *supra,* at 550.

How would Mr. Schroeder's scheme work in an actual case? In *In re* Marriage of Devlin, 138 Cal. App. 3d 804, 189 Cal. Rptr. 1 (1982), the trial court determined that all the couple's community property, consisting of a mobilehome and equity in real property, was traceable to the husband's personal injury damages. The court awarded all that property to him. The appellate court held the trial court had properly exercised its discretion, since the evidence showed the mobilehome had been specially adapted for the husband, who was a paraplegic. The trial court found that the husband would probably live in poverty for the rest of his life, even with the property award. The wife had the education and ability to find employment and be self-supporting.

The *Devlin* case is just on its facts. It did not require an inquiry into the elements of damages or an apportionment. In contrast, under Mr. Schroeder's scheme, the economic portion (for medical expenses and loss of earnings) is presumed to be community property. The injured spouse could rebut the presumption by showing that some of the award is for lost earnings that would have been earned after dissolution of marriage. Damages for post-dissolution earnings would be the injured person's separate property not subject to division by the court. The apportionment is formulistic, and not based on the

equities under the circumstances of the particular case as under existing California law.

Professor Reppy Favors Apportionment

Professor William Reppy of Duke University Law School is a consultant to the Commission on community property and probate law. He has written a law review article on some of the problems caused by the present California rule that does not apportion personal injury damages. He has served as expert consultant in family law litigation on the apportionment question.

The staff discussed the apportionment problem with Professor Reppy. He agreed that ordinarily there is no apportionment in a personal injury settlement or verdict, and therefore the question must be resolved later in the marital dissolution proceeding. However, he said the problem is no more difficult than the present apportionment problem when a spouse contributes community property services to a separate property business.

Professor Reppy thinks the California rule should be the same as in the other community property states. He said that by classifying all personal injury damages as community property, the California rule causes the following problems:

(1) Post-marital creditors of the non-injured spouse can reach community assets. However, in California, personal injury damages are exempt from execution to the extent necessary for support. Code Civ. Proc. § 704.140.

(2) If the non-injured spouse dies before the injured spouse, the non-injured spouse may dispose of half the personal injury damages by will. This is unfair to the injured spouse. This is a good point, and should be dealt with in the California statute.

(3) California's new comparative negligence rule may have revived the old doctrine of imputed contributory negligence between spouses, since the statute says contributory negligence of the non-injured spouse is not "a defense" to an action for damages by the injured spouse. Civ. Code § 5112. Under comparative negligence, contributory negligence is not a defense at all, but merely reduces the plaintiff's recovery. Professor Reppy has no problem with reducing the recovery of the injured spouse for economic damages. But, for non-economic damages

(pain, suffering, disfigurement), he says it is unjust to reduce the recovery of the injured spouse for contributory negligence of the non-injured spouse. Reppy, *The Effect of the Adoption of Comparative Negligence on California Community Property Law: Has Imputed Negligence Been Revived?,* 28 Hastings L.J. 1359, 1377-78 (1977). If this is a problem, the Commission can recommend a revision of Civil Code Section 5112 to deal with it.

Practical Problems With Apportionment

Apportionment is theoretically appealing, but it will not yield mathematically calculable or necessarily equitable results. California courts appear to reach satisfactory results under the present statute, which gives the court discretion to achieve just results.

If the jury apportions damages by special verdict, the non-injured spouse is not a party and should not be bound. If the case is settled, counsel may provide for apportionment in the settlement agreement, and have the non-injured spouse sign a written consent to the apportionment. Counsel who wants to bind the non-injured spouse should insist that the non-injured spouse have independent counsel before signing a written consent.

Only rarely will the settlement or verdict apportion damages, so the question will have to be resolved in the dissolution proceeding. This may be many years after the settlement or verdict. The injured spouse may commingle damages with other community property or use them for purchases, causing difficult tracing problems. Spent money may not be traceable to other assets. How can untraceable portions be charged against the shares of the spouses?

If the injured spouse has paid a contingent attorney's fee, should the fee be prorated among community and separate property? Should out-of-pocket expenses such as medical bills be reimbursed in full? In a recent case decided under the present statute, the insurer paid the medical bills of $85,000 directly to the medical provider. By separate check, the insurer paid $225,000 to the injured spouse and her attorney. Apparently the attorney's contingent fee was computed only on the latter amount, and did not include a percentage of the medical payments. See *In re* Marriage of Jackson, 212 Cal. App. 3d 479, 260 Cal. Rptr. 508 (1989). If non-economic damages are classified as

separate property, should the separate property be charged with the entire contingent attorney's fee, and the community portion none?

If damages include an amount for loss of future earnings, how should that amount be apportioned between earnings that would have accrued during marriage and earnings that would have accrued after marriage dissolution? Should the family law court be able to reexamine the appropriateness of the award for lost earnings in light of later developments, such as whether the injured spouse's loss of earnings turns out to be greater or less than determined at the time of the award?

After considering these problems, the Commission may decide that the existing California scheme, which awards damages to the injured party unless justice requires otherwise, should be kept, and that any deficiencies in the existing statute should corrected by narrowly drawn provisions.

One of the three problems identified by Professor Reppy was that creditors of non-injured spouse may reach personal injury damages. There is an exemption from execution for the portion of personal injury damages necessary for support. The Commission can review this exemption to determine whether it provides enough protection for the injured spouse against creditors of the non-injured spouse.

The problem of possible revival of imputed contributory negligence could be dealt with by a statute narrowly drawn to deal specifically with that problem.

The third problem raised by Professor Reppy is more difficult: Do we need a special rule concerning the right to dispose of personal injury damages by will? Should the non-injured spouse have the right to dispose of any part of the personal injury damages by will? The present rule, which permits the non-injured spouse to dispose of half the damages by will, may deprive the injured spouse of assets necessary for his or her support.

Although the surviving injured spouse is entitled to a family allowance notwithstanding the will of the deceased non-injured spouse, the allowance must terminate when the estate closes. Prob. Code §§ 6540, 6543. The estate may not be held open just to pay a family allowance, unless the court determines the recipient needs the

allowance for necessaries and this need is not outweighed by the needs of other estate beneficiaries. *Id.* § 12203. The Commission might consider revising this provision to give more protection to the surviving injured spouse when there are personal injury damages in the estate.

If we decide the non-injured spouse should have no power of testamentary disposition over personal injury damages, should we nevertheless give the injured spouse the right to dispose of half (but not more) of the damages on that spouse's death? To adopt such rules would be generally consistent with the rules on dissolution of marriage.

The Commission may prefer to reclassify the non-economic portion of personal injury damages as separate property, and to try to find satisfactory solutions to the practicable problems of apportionment. However, the staff is not convinced that the practical problems of apportionment are outweighed by its theoretical appeal, particularly since practitioners appear to be satisfied with existing law.

Does the Commission want the staff to draft a Tentative Recommendation? If so, what approach does the Commission prefer? Should we reclassify non-economic damages as separate property and require apportionment? Or should we draft narrow provisions (1) further to limit the right of creditors of the non-injured spouse to reach personal injury damages, (2) to make clear that comparative negligence does not bring back imputed contributory negligence, and (3) either to limit the power of testamentary disposition of the non-injured spouse over personal injury damages, or to strengthen the right of the surviving injured spouse to a family allowance?

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

SUMMARY OF LAW OF OTHER COMMUNITY PROPERTY STATES
ON CLASSIFICATION OF PERSONAL INJURY DAMAGES
AS SEPARATE OR COMMUNITY PROPERTY

Arizona: Damages for pain and suffering are the injured spouse's separate property. Damages for medical expenses and loss of wages are community property. Jurek v. Jurek, 124 Ariz. 596, 606 P.2d 812 (1980).

Idaho: Damages for pain and suffering and for post-divorce earnings are the injured spouse's separate property. Damages for earnings during marriage are community property. Cook v. Cook, 102 Idaho 651, 637 P.2d 799 (1981).

Louisiana: Damages for pain and suffering and for post-divorce earnings are the injured spouse's separate property. Damages for community expenses and loss of community earnings are community property. La. Civ. Code Ann. art. 2344 (West 1985).

Nevada: Damages for pain and suffering are the injured spouse's separate property. Damages for loss of comfort and society, loss of services, and medical expenses are community property. Nev. Rev. Stat. § 123.121 (1987).

New Mexico: Damages for pain and suffering are the injured spouse's separate property. Damages for medical expenses paid by the community, loss of services to the community, and loss of earnings are community property. Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952).

Texas: Damages for pain and suffering are the injured spouse's separate property. Damages for loss of earnings during marriage are community property. Tex. Fam. Code Ann. § 5.01(a)(3) (Vernon 1975).

Washington: Damages for pain and suffering and for post-divorce earnings are the injured spouse's separate property. Damages for loss of earnings during marriage and for injury-related expenses incurred by the community are community property. *In re* Marriage of Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984).

Wisconsin: Damages for pain and suffering are the injured spouse's "individual" (separate) property. Damages for expenses paid from "marital" (community) property and for loss of income during marriage are marital property. Wis. Stat. Ann. § 766.31 (West Supp. 1989); see also *id.* § 861.01.

APPENDIX XIII

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Damages for Personal Injuries to a Married Person as Separate or Community Property

September 1967

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

STATE OF CALIFORNIA

RONALD REAGAN, Governor

CALIFORNIA LAW REVISION COMMISSION
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Ex Officio

September 1, 1967

To His Excellency, Ronald Reagan
Governor of California and
The Legislature of California

The California Law Revision Commission was directed by Resolution Chapter 202 of the Statutes of 1957 to make a study relating to whether an award of damages made to a married person in a personal injury action should be the separate property of such person.

The Commission published a recommendation and study on this subject in October 1966. 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 Comm'n, Rep., Rec. & Studies 401 (1967). Senate Bills Nos. 245 and 246 were introduced at the 1967 session of the Legislature to effectuate this recommendation. The bills passed the Senate but died in the Assembly.

The Commission submits herewith a new recommendation on this subject. In preparing this new recommendation, the Commission has taken into account the objections that were made to the recommendation submitted to the Legislature in 1967.

Respectfully submitted,

Richard H. Keatinge
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Damages for Personal Injuries to a Married Person as Separate or Community Property

BACKGROUND

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 has involved more than a consideration of the property interests in damages recovered by a married person in a personal injury action; it has also required 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.

RECOMMENDATIONS

Personal Injury Damages as Separate or Community Property

Before 1957, damages awarded for personal injuries 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. Southern 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, the injured person was not permitted to recover. To have allowed recovery would have permitted 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 to prevent the contributory negligence of one spouse from being imputed to the other in order 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, *Community Property*, § 7 at 2712 (7th ed. 1960). The enactment of Section 163.5 effectively abrogated the doctrine of imputed contributory negligence between married persons insofar as that doctrine was based on the community property nature of the damages recovered.[1] But the effect of the section

[1] See Cooke v. Tsipouroglou, 59 Cal.2d 660, 664, 31 Cal. Rptr. 60, 62, 381 P.2d 940, 942 (1963). Section 163.5 was not completely effective in abrogating the doctrine in its application to motor vehicle accidents. However, other legislation enacted upon recommendation of the Commission eliminates imputed contributory negligence in motor vehicle cases insofar as that doctrine barred recovery because of the marital relationship or the nature of the spouse's interest in their vehicle. Cal. Stats. 1967, Ch. 702. See *Recommendation and Study Relating to Vehicle Code Section 17150 and Related Sections*, 8 CAL. LAW REVISION COMM'N, REP., REC., & STUDIES 501 (1967).

goes far beyond elimination of imputed contributory negligence between spouses. In making any recovery for personal injuries separate property, it operates whether or not the other spouse has anything to do with the accident.

This change in the nature of all personal injury damages recovered by married persons has had unintended and unfortunate consequences. It results in injustice to the spouse of the injured party in a number of circumstances:

(1) Even though expenses incurred as a result of personal injuries are 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 those expenditures. See Brunn, *California Personal Injury Damage Awards to Married Persons*, 13 U.C.L.A. L. REV. 587, 591–594 (1966).

(2) Although earnings from personal services are community property (and often the chief source of such property), damages that represent lost earnings at the time of trial and the loss of future earnings are made the separate property of the injured spouse. Had the injured spouse suffered no loss of earning capacity, the community would have received the benefit of such earnings, but the community does not receive the benefit of the damages received in lieu of such earnings. This can be most unjust, for example, where the parties are divorced after the injured spouse has fully recovered and returned to work, for the damages received for personal injuries are not subject to division on divorce even though such damages represent earnings that would have been subject to division.

(3) In the case of intestate death, the surviving spouse, who inherits all the community property, may receive as little as one-third of the damages awarded for personal injuries.[2]

(4) As separate property, the recovery for personal injuries may be disposed of by gift or will without limitation.

In addition, changing the character of personal injury damages from community to separate property has had significant and unfavorable tax consequences. There is no California gift tax on transfers of community property between spouses[3] and community property passing outright to the surviving spouse is not subject to the inheritance tax.[4] Personal injury damages, being separate property, do not receive this favorable treatment.

Moreover, most couples probably commingle the recovery with community property and may thus convert it into community property.[5]

[2] To avoid this injustice in case of intestate death, a workmen's compensation award has been held to be community property. Estate of Simoni, 220 Cal. App.2d 339, 342, 344, 33 Cal. Rptr. 845, 847, 848 (1963). Civil Code Section 163.5, of course, precludes such a holding in the case of an award of personal injury damages.

[3] REV. & TAX. CODE § 15301.

[4] REV. & TAX. CODE § 13551(a).

[5] If the funds recovered cannot be traced, they will be treated as community property. See 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 award in the family bank account and using it for support of the family may alone be evidence of an agreement to transmute the recovery into community property. Weinberg v. Weinberg, 67 Cal.2d ___ [67 A.C. 567, 580-581] (1967). See also Lawatch v. Lawatch, 161 Cal. App.2d 780, 790, 327 P.2d 603, 608 (1958).

The tax consequences of such conversion are significant. When one spouse converts his separate property into community property, the donee's one-half interest is subject to the California gift tax at date of conversion.[6] Yet the conversion of such property into community property does not permit it to pass to the surviving spouse free from state inheritance tax as is the case with other community property; Revenue and Taxation Code Sections 13560 and 15310 characterize the equal interests of spouses in community property converted from separate property as separate property for inheritance tax purposes. Thus an inability to trace funds that represent personal injury damages may have disastrous tax consequences when those funds are converted into community property and commingled with other community property.[7]

To eliminate these undesirable ramifications of Section 163.5, the Commission recommends enactment of legislation that would again make personal injury damages awarded to a married person against a third party community property. The problem of imputed contributory negligence should be dealt with in a way less drastic than converting all such damages into separate property.

Although personal injury damages awarded to a married person against a third party should be community property, the Commission recommends retention of the rule that such damages are separate property when they are recovered for an injury inflicted by the other spouse. If damages recovered by one spouse from the other were regarded as community property, the tortfeasor spouse or his insurer would, in effect, be compensating the wrongdoer to the extent of his interest in the community property.

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

[6] REV. & TAX. CODE §§ 15201 and 15104. Conversion of separate property into community property may also result in a federal gift tax at date of conversion. See United States v. Goodyear, 99 F.2d 523 (9th Cir. 1938).

[7] In Martin & Miller, *Estate Planning and Equal Rights*, 40 CAL. S.B.J. 706, 711 (1965), it is stated:

> It would seem prudent to keep community property which has resulted from the conversion of separate property segregated from other community property, or else the inheritance tax authorities might assume that all the community property came from separate property, with disastrous tax consequences. Tracing thus remains a serious concern of tax practitioners in this area.

injuries vested by operation of law in the injured party upon dissolution of the marriage by divorce.[8]

Division on Divorce or Separate Maintenance

Although earnings from personal services often are the chief source of the community property, Civil Code Section 163.5 makes personal injury damages for the loss of earnings the separate property of the injured spouse. As separate property, such damages are not subject to division on divorce or separate maintenance. This inflexible rule seems especially unjust in its application to cases in which a substantial portion of the damages was awarded to compensate the victim for lost earnings that would have been received during the period of the marriage prior to the divorce or separate maintenance action. These cannot be divided between the spouses even though the earnings themselves would have been subject to division.

On the other hand, enactment of legislation that would again make personal injury damages community property would make the award subject to division even though a substantial portion of the award represents the loss of earnings that would be received after the judgment of divorce or separate maintenance. This aspect of the Commission's previous recommendation caused it to be rejected by the Assembly because, under that recommendation, personal injury damages could have been apportioned between the spouses in a divorce action brought shortly after the damages were recovered. The Assembly concluded that it would be undesirable to create the possibility that a court might award one spouse a share of the damages recovered by the other spouse under these circumstances.

To overcome this problem, and because of the generally unique nature of property received as personal injury damages, the Commission recommends enactment of a special provision governing disposition of such property on divorce or separate maintenance. Even though such property should be made community property, all of it should be awarded to the spouse who suffered the injury unless the court determines from all of the facts of the particular case that justice requires a division. The decision whether a division is required

[8] In 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.]

should be made without regard to which spouse is granted the divorce or separate maintenance. Because of the variety of situations, the special provision should not undertake to provide exact rules for determining whether to make a division and, if so, what division to make. Rather, the statute should require the court to take into account the economic conditions and needs of the parties, the time elapsed since the damages were recovered, and any other pertinent facts in the case.

Management of Property Representing Personal Injury Damages

Because Civil Code Section 163.5 makes a wife's personal injury damages separate property, they are now subject to her management and control. It would be unnecessary and undesirable to change this rule even though personal injury damages should be made community property.

If the wife's personal injury damages were made community property without other modifications, they would be subject to the husband's management and control. The law would thus 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 damages representing the wife's lost earnings even though he could not have reached the earnings themselves. See CIVIL CODE § 168. In effect, the award of damages would operate to convert an asset of the wife, her earning capacity, into an asset of the husband. Yet, no reciprocal conversion would take place upon the husband's recovery of personal injury damages.

Before enactment of Section 163.5, Section 171c permitted the wife to manage, *inter alia*, the community property that consisted of her personal injury damages. If Section 163.5 is amended to make personal injury damages community property, Section 171c should be amended to return to 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 those decisions indicates that the community property under the wife's control is subject to liability for her torts and is not subject

to liability for the husband's torts, but no reported decision has decided the question. *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).

The Commission recommends enactment of legislation to make it 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.

A tort liability may be incurred by one spouse because of an injury inflicted 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 community property (including the injured spouse's share) to discharge that liability if the guilty spouse has separate property with which to discharge the liability. The guilty spouse should not be entitled to keep his separate estate intact while the community property is depleted to satisfy an obligation to the co-owner of the community.

Accordingly, the Commission recommends 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 effects on the community property system, it did overcome the doctrine of imputed contributory negligence between spouses. Enactment of legislation making personal injury damages community property will again raise the problem that Section 163.5 was enacted to solve.

The problem of imputed contributory negligence should be met directly by providing explicitly that the negligence of one spouse does not bar recovery by the other unless such concurring negligence would be a defense if the marriage did not exist. This would retain the desirable and intended effect of Section 163.5.

PROPOSED LEGISLATION

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

I

An act to amend Sections 146, 163.5, and 171a of, and to add Sections 164.6, 164.7, and 169.3 to, the Civil Code, relating to married persons, including their community property and tort liability.

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

CIVIL CODE

§ 146 (amended)

SECTION 1. Section 146 of the Civil Code is amended to read:

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) ~~If~~ *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) ~~If~~ *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. 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.

~~(c)~~ *(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.

~~(d)~~ *(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.

Comment. Subdivision (c) 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 163.5 and 169.3.

Subdivision (c) 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.

Subdivision (c) 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 (c) permits the court to avoid the injustice that sometimes resulted under former law.

Subdivision (c) 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 (c) 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 (c) 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).

§ 163.5 (amended)

SEC. 2. 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. Before enactment of Section 163.5 in 1957, damages received by a married person for personal injuries were community property. *Zaragosa v. Craven*, 33 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.

§ 164.6 (new)

SEC. 3. Section 164.6 is added to the Civil Code, to read:

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.

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.

§ 164.7 (new)

SEC. 4. 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.

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.

§ 169.3 (new)

SEC. 5. Section 169.3 is added to the Civil Code, to read:

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).

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 in-

jured 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.

§ 171a (amended)

SEC. 6. 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. 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).

SAVINGS CLAUSE

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. To avoid making any change in rights that may have become vested under the prior law, the act is made inapplicable to causes of action arising out of injuries that occurred prior to its effective date. Note, however, that the amendment to Section 171a appears to codify preexisting law.

II

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:

Civil Code § 171c (amended)

SECTION 1. Section 171c of the Civil Code is amended to read:

171c. Notwithstanding the provisions of Section 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 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 ~~other~~ 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.*

~~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 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 ~~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. 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.

When act becomes effective

SEC. 2. This act shall become effective only if Assembly Bill No. ___ is enacted by the Legislature at its 1968 Regular Session, and in such case this act shall take effect at the same time that Assembly Bill No. ___ takes effect.

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