#F-672

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08/28/90

First Supplement to Memorandum 90-70

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

Attached to this Supplement as Exhibit 1 is a letter from Professor William Bassett of the University of San Francisco School of Law. Professor Bassett agrees with the staff recommendation in the basic memo that the Commission should take no further action on this proposal. His reasons are threefold:

(1) Present law allows the court to divide personal injury damages using broad equitable principles, and this should not be restricted by mechanical property rules.

(2) Apportioning personal injury damages between community and separate property at the time of verdict or settlement would put the personal injury attorney for the injured spouse in an untenable conflict of interest situation.

(3) After-the-fact litigation on apportionment would increase the expense of resolving property issues in marital dissolution cases, which are already too complicated and expensive.

Respectfully submitted,

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August 27, 1990

Robert J. Murphy III
California Law Revision Committee
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Dear Mr. Murphy:

Dean Folberg gave me your letter of May 3, 1990, with the staff memorandum 90-45 and Douglas Schroeder's article respecting the feasibility of reclassifying personal injury damages. Unfortunately, it became part of the summer mail that I am only now able to address.

My basic position, after several years of pondering the issue, is that the statutes should not be changed at this time. While it is very worthwhile to bring California into line with the other community property states, the inherent structural differences between our community property system and those of the other community property states suggest to me that the present mix of law and equity provided by Sections 5126 and 4800(b)(4) is a good solution.

In addition to the reasons provided by the staff for resisting change, let me add some further considerations. In view of the observation in Devlin, that personal injury recoveries are a unique form of property, so unique, indeed, that they should not be subject to interspousal transmutation preempting subsequent court jurisdiction, the role that equity may play in future assignment on dissolution must be fairly large, I believe. Thus, section 4800(b)(4) gives a good and rare injection of equity into the courts in dealing with property division. I think it is a mistake to remove this equity by a close definition of new rules and standards.

Secondly, we all know that, while the theory of compensation for disparate elements of personal injury loss is reasonable, in fact, most cases are settled on a less than perfect calculus. Attorney fees and costs must be paid, so the injured spouse receives a net, not a gross award. This may or may not be the role of pain and suffering compensation. In any case a strict apportionment of separate and community elements would not only

be artificial in most cases, but would put the attorney representing an injured spouse into a difficult conflict of interests position vis-a-vis the other spouse. Should the noninjured spouse also be represented independently? This, it seems to me, would lead to undesirable results in California.

Thirdly, after-the-fact litigation on the issues of apportionment would become yet another expensive factor introduced into the dissolution and Family Law scenes. Dissolution and property division are already too complicated and expensive.

If personal injury damages are unique and non-transmutable, this, perhaps, should have some bearing upon post-mortem succession and testamentary capacity. While the noninjured spouse may be restricted, should he or she die during the lifetime of the injured spouse, I see no reason for a contrary rule. Furthermore, to apportion the classification of damages in a post mortem context could adversely effect the incentive a surviving spouse may have, or an estate representative, in pursuing surviving claims.

At present, therefore, I agree with the wisdom of Zarogoza v. Craven and find the present statutory scheme does not present sufficiently serious problems to warrant a change that could cause much more complications.

Thank you.

Cordially,

William W. Bassett
Professor of Law

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