

Second Supplement to Memorandum 90-70

Subject: Study F-672 - Personal Injury Damages as Community or Separate Property (Comments of California Trial Lawyers Ass'n)

Exhibit 1 is a letter from the California Trial Lawyers Association commenting on the proposal by Douglas Schroeder to change the rule that personal injury damages of a married person are community property.

In the basic memorandum, the staff recommended we take no further action on the proposal. Attached to the First Supplement is a letter from Professor William Bassett agreeing with this conclusion. The California Trial Lawyers believe that some review in this area of law may be needed, but they say the Schroeder proposal has too many practical problems to make it workable.

The letter from the California Trial Lawyers Association strengthens the staff's conviction that we should take no further action on this proposal.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

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September 11, 1990

Mr. Robert Murphy
California Law Revision Commission
4000 Middlefield Road, Suite B
Palo Alto, CA 94303

RE: STUDY F-672-PERSONAL INJURY DAMAGES AS COMMUNITY
OR SEPARATE PROPERTY

Dear Mr. Murphy:

Thank you for sending the article and corresponding proposal by Douglas Schroeder to CTLA for review.

CTLA agrees that the current system of allocating personal injury awards often leads to inequitable results and that review in this area is necessary. However, the "Schroeder proposal" has many practical problems which deflect from its very purpose, i.e., creating a better allocation system in California.

As you know, the proposed statutory reform would reclassify non-economic damages as separate property and would create a rebuttable presumption of community property for economic damages. The most obvious problems with such a proposal include the following:

(1) The practical effect would be to require breakdown of all awards and settlements into the various categories of damages which is often impossible. To do so would require a special verdict in almost in every case, including the 97% which settle. General, as opposed to special, verdicts are still the authorized norm in trials involving one defendant and in multiple defendant trials where special verdicts are not requested.

(2) The proposal would create conflicts of interest for lawyers. It is common for the injured party's counsel to also represent the spouse for loss of consortium; no conflict of interest is involved since the money goes into a common pot.

(3) The Schroeder proposal could dramatically increase problems associated with both trial and settlement. Each spouse would require separate counsel and it would no longer be possible to act "for the good of the family or community." Instead, the spouse's individual counsel would be ethically bound to maximize recovery in the name of the individual client. The result could be less settlement and more prolonged trials, not to mention the increased tensions placed on the married couple.

(4) Before seriously considering this type of proposal, thought must be given to the societal effect such a plan may have. Given the disparity between average earnings of males and females, removing the "noncommunity" pain and suffering awards from the community would seem likely to penalize, as a group, women. Anecdotal evidence supports the thesis that women end up being primary care providers for children after dissolution. It also seems that the standard of living for husbands/fathers increases after dissolution, while that of wives/mothers decreases. Schroeder's plan would seem to exacerbate that inequity.

Although not perfect, the present system which provides that personal injury awards are community property does allow for equitable adjustments in divorce proceedings without creating the complicated issues that this proposal creates. Perhaps the current inequities could be better addressed by re-examining the family law court's ability to divide the awards as justice requires.

While this area is ripe for review, the Schroeder plan, while well-intended, would only create more problems, and CTLA would oppose the plan in its current form. However, we are extremely willing to examine and comment on other proposals in this area and we are available for discussions on this topic.

Sincerely,



Nancy Peverini
Associate Legislative Counsel