11/2/61

Memorandum No. 55(1961)

Subject: Study No. 53(L) - Personal Injury Damages as Separate Property

In connection with this study, the Commission requested additional research material on several matters. This research material, prepared by the staff, is attached to this memorandum, as follows:

Exhibit I (blue pages) - Imputed contributory negligence between spouses

Exhibit II (yellow pages) - Interspousal tort liability in California

Exhibit III (green pages) - Liability of community property for torts of husband or wife

There are two basic policy decisions that should be made by the Commission. These are presented below.

1. Should a cause of action for personal injuries to a married person, and the amount recovered therefor, be separate or community property?

The staff recommends that the cause of action (and the recovery based thereon) for personal injuries to a married person sustained during the marriage should be community property. Section 163.5 of the Civil Code provides:

> All damages, special and general, awarded to a married person in a civil action for personal injuries, are the separate property of such married person.

Section 163.5 changes the prior California law under which personal injury damages were community property.

Note that Section 163.5 changes the nature of the damages recovered in all personal injury actions in which a married person is involved.

Its main value is the possible abolition of the doctrine of imputed negligence. The desirability of this result may be evaluated by recognizing the fact that the number of cases where imputation of negligence between spouses prevented recovery was only a small percentage of the total number of personal injury actions.

The main problem resulting from the enactment of Section 163.5 arises when the personal injury damages recovered are compensation for the future earnings of the husband. Under these circumstances the wife would be deprived of her share of that "property" which normally makes up the main part of the community property. It is true that under the California law the separate property of either spouse can be converted into community property by mere agreement, either tacit or express, between the spouses. This is not necessarily a solution to the problem, however, because the spouse who recovers damages may be unaware of the property nature of his recovery or for some reason may refuse to turn his separate property into community property. Moreover, there will in some cases be a gift tax imposed on the conversion of the separate property into community property.

Another problem arises on the death of the husband or wife after the recovery of a personal injury judgment. When either spouse dies testate he may deprive the survivor of <u>all</u> of his separate property, and if the injured spouse dies intestate the survivor will generally receive only one-half of the separate property. If personal injury damages were community property, the surviving spouse would at least be entitled to one-half (if decedent died testate) or would receive the

entire amount (if decedent died intestate). Furthermore, if the injured spouse dies while the damages are his or her separate property, there will be a substantial California inheritance tax in some cases, while there is no inheritance tax on community property that goes to a surviving spouse.

Again, if the marriage dissolves in divorce, the court will have no power to divide personal injury damages which are separate property; if such damages were community property they would be subject to division in case of divorce.

In the above discussion the emphasis has been placed on a loss to the community resulting from a personal injury of the husband. If the wife is contributing earnings to the community, any injury interrupting or lowering these earnings is equally, as in the case of the husband, an injury to the community; and the recovery should be the property of the community. Even if the wife is not contributing earnings to the marital community, her services are a definite asset to the marital community; and the community, if wholly or partly deprived of them, suffers a loss which should render the right of action and the compensation therefor the property of the community. This is not alone a question of hospital and medical bills, although these are definitely a drain on the community property; it may be necessary to employ someone to keep house and to look after the children--these are the expenses which definitely tend to indicate the value of the wife's services to the marital community and the loss thereto by deprivation of her services.

Some have suggested that part of the recovery in a personal injury case should be separate property and part should be community property. There is some merit in this view. The physical injury to the spouse, the pain and suffering of the spouse resulting therefrom, disfigurement, the inability of the spouse to pursue allowable separate projects--all of these are, it has been contended, injuries to the spouse as an individual and should be separate property. On the other hand, loss of future earnings, medical expenses, loss of services, etc., are, under this scheme, injuries to the community and should be community property. This approach has a logical appeal and is followed in some community property jurisdictions. However, it presents some difficulties in the trial of the case--the jury must render a verdict for the amount of each of the items of damage. It may otherwise complicate the trial of the case. How are the damages to be apportioned in the usual case--where the case is settled? Moreover, the argument for imputing negligence is much stronger where there is apportionment of damages between the injured spouse and the community. As a practical matter, in most cases the separate property would be converted into community property and there might be gift or inheritance taxes imposed that would not be imposed if the entire recovery were community property. In addition, our present community property law has been criticized because of its unnecessary complexity. It would appear that such refinements as splitting a cause of action for personal injuries into a number of elements, some of which are community property and some of which are separate property, should be avoided if at all possible.

Accordingly, there are persuasive reasons for treating personal injury causes of action and damages as community property. The only reason advanced to justify Section 163.5 which treats them as separate property--to prevent the imputation of negligence--should be taken care of by a direct provision, not by changing the property nature of the cause of action or the damages recovered.

2. What policy should apply where one spouse has sustained a personal injury and the other spouse is guilty of contributory negligence?

As indicated in the study, the reason for the enactment of Civil Code Section 163.5 was to prevent the application of the doctrine of imputed negligence when one spouse's contributory negligence was in part responsible for the injury to the other spouse. Section 163.5 prevented this (to some extent) by changing the nature of the recovery from community property to separate property. The undesirable results of this method of dealing with the imputed negligence problem are pointed out above and it is there suggested that the problem of imputed negligence be dealt with directly.

As pointed out in Exhibit I, attached, the community property jurisdictions are forced to adhere to the imputed negligence rule with far greater frequency than other jurisdictions. In community property jurisdictions, the conventional rationale dooming the plaintiff to failure in his or her cause of action for personal injuries is based on the fear that the other spouse would benefit by his or her own negligent conduct. If recovery were permitted, the courts reason, the negligent spouse would profit from the fruits of his own wrongdoing by virtue of his joint ownership of the community

property. Prior to the enactment of Section 163.5 California on this reasoning imputed negligence from one spouse to the other to deny recovery.

This approach has generally been followed in community property states despite the criticism that in no other field of law is an innocent person denied recovery because of the wrongs of another. It is said that this rule affords a defendant a windfall simply because the passenger was the driver's spouse and not a mere friend. Moreover, at least one community property state has refused to apply the imputed negligence doctrine on the grounds that the recovery merely recompenses the community for a loss sustained rather than resulting in profit to the negligent spouse.

You will recall that at the October meeting, the Commission discussed several alternative solutions to this problem:

(1) Not allow negligence of other spouse to be imputed but reduce the judgment using comparative negligence principles. Should recovery then be separate or community property?

(2) Not allow negligence of other spouse to be imputed but reduce the judgment using principles of contribution between joint tortfeasors. Should recovery then be separate or community property?

(3) Allow full recovery for personal aspects of the injury (pain, suffering and disfigurement, etc.) and provide that the rest of the recovery (loss of earnings, services, etc.) is either barred by imputed contributory negligence or is subject to comparative negligence principles or contribution between joint tortfeasors principles. This complicated solution might create problems in the trial of personal injury cases.

(4) Not impute contributory negligence but provide that the damages recovered are community property with no reduction in the amount of recovery.

(5) San Francisco Bar proposal--amend Section 163.5 to provide for reimbursement of the community for amounts paid by the community (such as medical expenses) but make no other changes in Section 163.5.

In considering the alternative solutions suggested, the interests of all parties should be borne in mind, for a solution that is fair to a plaintiff may be unfair to a defendant. Can a solution be found that will be fair to all parties--plaintiff, defendant and negligent spouse? The staff believes such a solution can be found.

What would be a fair result as far as P, the injured wife, is concerned? Ordinarily an injured person who is not negligent is entitled to recover the entire amount of damages she suffered. To what is P entitled if the recovery is community property? She is entitled to a one-half interest in the community property recovery. Thus, a result that provided that P obtained (as her separate property) an amount equal to one-half of the judgment would be fair to her. It is true that the rights of the spouses in community property are not subject to equal division (except--generally speaking--in case of divorce or on death of one spouse who by will may dispose of one-half of the community property to a person other than the surviving spouse). Thus, giving P, the wife, one-half of the judgment as her separate property would create some theoretical problems but would, it is submitted, be a rough approximation of her interest had the entire judgment been awarded as community property.

What would be a fair result so far as D is concerned? Take the usual negligence case. P, wife, is injured in an automobile accident caused in part by the negligence of D and in part by the negligence of X. P will recover a judgment against both defendants D and X. If D is held fully responsible for payment of the judgment, D may recover half of the judgment from X as a joint tortfeasor. (C.C.P. §§ 875-880.) Thus, in the ordinary case, D would be liable for only a pro rata share of the judgment if his negligence concurred with the negligence of another person in causing an injury. To be fair to D, the result should not be different if the person whose negligence concurred with his own happens to be the spouse of the victim. Looking at the matter from the standpoint of D, a fair result would be one that held D liable but permitted him to obtain contribution from H who was a joint tortfeasor. A result that would permit complete recovery against D without permitting contribution from H who was concurrently negligent would be unfair to D.

What would be a fair result so far as H, the negligent husband, is concerned? Ordinarily a negligent person is not entitled to recover anything and is responsible for the consequences of his negligence. Applying this principle, H should not recover anything and should be responsible to some extent for the consequences of his negligence--he is a joint tortfeasor and applying the principle of contribution between joint tortfeasors he should contribute an amount equal to one-half of the judgment (such amount to be paid out of his separate property or out of the community property).

Can a scheme be devised that will be fair to all parties concerned--one that results in D being held for only one-half of the judgment (on the theory that H, a joint tortfeasor, must contribute the other half), that results in H, the negligent husband, recovering nothing and paying one-half of the judgment (on the theory that he is a joint tortfeasor) and that results in P, the injured wife, recovering an amount roughly equal to what she would have been entitled to receive had there been no husband-wife relationship between her and negligent H? It is submitted that such a scheme can be devised. It is generally outlined below for consideration by the Commission.

The procedure followed when personal injury damages were community property should first be noted, however. P, the injured wife, brings an action against D, the third person who was negligent. D defeats P's action by establishing that H, P's husband, was guilty of negligence also. P's action is defeated because under the doctrine of imputed contributory negligence the negligence of H was imputed to P. This was considered necessary because the courts decided as a matter of policy that D be given a windfall in order to prevent negligent H from profiting by his own negligence.

It is suggested that the Commission adopt the following.

P (injured wife) brings action against D based on D's negligence. Any recovery would be community property unless D by appropriate procedure (to be formulated) brings into the action as a party thereto H, the negligent husband. If H is made a party to the action, the issue of his negligence would be determined by the jury at the same time they determine whether D was negligent. The jury would determine the damages suffered as in any other case, but if H is found to be negligent D would be entitled to have offset against the amount so determined the amount to which he would be entitled as contribution had H been joined as a defendant joint tortfeasor in the action. The remaining amount after the offset would be the wife's separate property. The remaining amount should be her separate property because the theory used here is that the judgment has in effect been divided between the spouses. The husband's share has gone as a contribution toward a judgment based on his responsibility as a joint tortfeasor.

If the husband is the spouse injured and the wife the negligent spouse, the same procedure should apply. There is a theoretical objection to this because the community property is not liable for the wife's torts (with some possible exceptions as indicated in Exhibit III, attached). However, other states have a statutory scheme similar to California's permit payment from community property for the wife's torts and this is probably the better rule. Moreover, under the reasoning outlined above, the result reached under the proposed procedure is fair to the wife, husband and third party defendant where the wife is the negligent spouse.

It would be possible to use principles of comparative negligence rather than principles of contribution between joint tortfeasors in the solution outlined above. However, this is not recommended. It would be difficult to work out a satisfactory comparative negligence procedure to apply in this limited circumstance. Moreover, it would probably result in considerable opposition to the bill, would introduce undue complexity in a very small area and would depart from the general, well established principle applied in other cases (contribution between joint tortfeasors).

Another and separate matter should be considered in connection with this study. As the study points out, the purpose sought to be achieved by the enactment of Civil Code Section 163.5 -- to prevent the application of the doctrine of imputed contributory negligence when a spouse's contributory negligence is in part responsible for the injury to the other spouse -- has not been fully achieved. Under Vehicle Code Section 17150 contributory negligence is still imputed to the injured spouse if the injury arises out of an automobile accident and the injured spouse is an owner with a right of management and control over the automobile. It would appear that there is more reason to impute contributory negligence to prevent recovery of damages by a vehicle owner on the grounds that the recovery would be community property than there is merely because of "ownership" of the vehicle. Where the recovery is community property, the negligent spouse is actually benefiting by his own negligence -- his estate is increased. Where, however, recovery is denied merely on the grounds of "ownership" of the vehicle, the spouses who will not be able to

recover were not themselves negligent. Nevertheless, unless some adjustment is made to Vehicle Code Section 17150, that section will remain as a basis for defeating recovery.

At the October meeting the Commission requested that material be provided for its consideration that would assist the Commission in evaluating the doctrine of imputed negligence -- both as far as the doctrine applies because of the community property relationship and because of the motor vehicle owner's liability statute. The following analysis is taken (almost verbatim) from Chapter XXIII of Harper and James, the Law of Torts (1956).

Our system of liability based on fault is part of an economic and social philosophy of individualism. Quite naturally then an individual is generally held only for his own fault and not the fault of another. Innocent A is not usually liable for injuries caused by guilty B. It is commonplace, however, that he sometimes is. That is where there is a relationship between A and B to which the law attaches the consequences of vicarious liability. Such relationships are those between master and servant and between persons engaged in a partnership or joint enterprise. When the servant, for instance, acting within the scope of his employment negligently injured C, then the innocent master, A, is liable to C for that injury. This means that the servant's negligence is imputed to the master.

The case put does not involve contributory negligence. C has been the innocent victim of B's fault (else he would be barred of recovery by his own negligence). But let us shift the case slightly. Suppose that C has negligently run into and destroyed A's truck, and that A's driver, B,

was also negligent but A was in all respects free from fault. A now sues C for the damage to his truck. By hypothesis he cannot be barred from recovery by his own negligence, for there was none. And under general principles the innocent victim has the choice of suing either or both of two persons whose wrongs contributed to his injury. The question here is whether A is to be barred for the negligence of his employee, B. The law today says that he is. Here again the result is described by identifying master and servant and imputing the latter's negligence to the innocent master. The same result is reached where B is a partner or a joint entrepreneur of A, and B's negligence occurs within the scope of such relationship. This result is generally called imputed contributory negligence.

So far we have been dealing with relationships wherein B's negligence will be imputed to A whether A is plaintiff or defendant. The rule of imputation here works both ways, so that it meets what has been called the "both-ways test." ("It is a poor rule that won't work both ways.") Formerly, however, there were many relationships in which the law imputed B's negligence to A if A was plaintiff but not if A was defendant. (Example: B is driver, A is mere passenger. Formerly held that driver-passenger relationship was enough to impute driver's negligence to passenger if passenger was plaintiff. Of course, if passenger was defendant, negligence was not imputed.) Rules of this kind have been largely repudiated. The wide current acceptance of the both-ways test, with its appealing formal consistency, has created difficult problems, for in recent years there has been both judicial and legislative expansion of vicarious liability -- particularly in the automobile

accident field. This poses the question whether the both-ways test should be applied so as to expand likewise the defense of contributory negligence (by imputing it in relationships where the pre-existing law did not) -- a result which would expand an impediment to liability at the same time liability itself is expanded. This in turn calls for a re-evaluation of the both-ways test to see whether its formal symmetry may not conceal an equal treatment for policies that are diametrically opposed to each other, so that it tends to be self defeating.

A study of the cases indicates that the doctrine of imputation was once used most effectively to implement and even to extend the defense of contributory negligence (as in the cases holding that a passenger-driver relationship was sufficient to impute the driver's negligence to the plaintiff-passenger). As the defense itself came increasingly to be thought harsh, however, it came to be felt that imputation could not generally be justified. So it waned, except where negligence was imputed by rules of general and well-accepted application -- that is, where there was vicarious liability. In this development, and as long as there were vestiges of the older, harsher rules, the both-ways test was the vehicle for humane law reform. It had in addition the strong psychological appeal of all rules cast in the form of balanced and logical symmetry. Small wonder then that its acceptance was almost universal two decades ago when it became ensconced in the Restatement of Torts. There were those, however, who pointed out that "Courts seem unaware that the policies involved in granting or denying the defensive plea may be different from those controlling the responsibility in damages of a master for the conduct of his servant, and that the latter are probably concerned simply with providing a financially responsible defendant."

Even as the last traces of the older imputation of contributory negligence (beyond the scope of vicarious liability) were vanishing, the seriousness and growth of the automobile accident problem and the plight of uncompensated accident victims led to increasing pressure for providing financially responsible defendants. One response to this pressure was the extension of vicarious liability by the court-made "family purpose" doctrine and by statutes having similar (or broader) effect. Some of the latter, for example the California Vehicle Code provision, impose vicarious liability on automobile owners for the negligence of anyone operating the car with the owner's consent. This represented a departure from the fault principle so as to impose liability on innocent parties for reasons similar to those leading to workmen's compensation -- the owners were better distributors of the risks which their lawful activities created than were their victims.

Another response to the automobile accident problem was an extension of the joint enterprise doctrine. In theory this doctrine is one of general application, involves ordinary notions of agency, and meets the both-ways test. There has been, however, a modern extension of it which is in fact concerned almost exclusively with automobile cases(where it is often used in situations more closely akin to the friendly co-operation between neighbors or members of a family for mutual benefit than to typical agency or employment situations) and which is scarcely ever used as a basis for vicarious liability, but nearly always as a ground for cutting off (by imputed negligence) the claim of an innocent automobile guest against a negligent third person. The doctrine is no better than its unlamented deceased forerunner (driver-passenger relationship was basis

for imputing negligence of driver to passenger), except, perhaps, in situations closely resembling an ad hoc partnership for business purposes. California is rather strict in requiring that a right to control be pretty clearly shown before the joint enterprise doctrine will be applied. Compare Bryant v. Pacific Electric Ry., 174 Cal. 737, 164 Pac. 385 (1917) with Howard v. Alta Chevrolet Co., 111 Cal. App.2d 38, 243 P.2d 804 (1952).

Under these statutory and judicial rules expanding vicarious liability beyond the scope of the older law, the question soon arose whether negligence should be imputed to a plaintiff on the same new wider basis. Should the bailee's negligence be imputed to his bailor, or the son's to the father, when the bailor or father sues a negligent third person for damage to the automobile? The formal logic of the both-ways test would give an affirmative answer, and some courts and at least one legislature (California) have imputed the negligence on this basis. But this leads to the paradox that a rule which departed from the common law in response to an urge toward wider liability is being used to curtail liability by expanding the scope of a defense to it. Courts that have perceived this difficulty have re-evaluated the both-ways test. Some of them have found that it lacks validity in this context wherein it would serve as a vehicle of reaction rather than reform (e.g., Minnesota and New York). As the Minnesota court has said, "The very reason for holding the consenting owner liable for the negligence of the operator of his vehicle, that of furnishing financial responsibility to an injured party, is completely absent in the owner's action to recover for damages" done to his car by a negligent third party. Another purpose of such statutes is to induce care by car owners in selecting persons to whom they entrust the car. But

probably the liability which the statutes imposes on the owner is the strongest incidentive to that end, and little will be added to it by denying the innocent owner the right to recover for damages he suffered.

The Law Revision Commission was directed by the Legislature to make 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."

The staff recommends that the Commission (based on the above analysis of the problem presented by the assignment given to it by the Legislature) request at the 1962 legislative session that its authority in connection with this study be broadened to include a study of the doctrine of imputed contributory negligence based on the husband-wife relationship or on vehicle ownership. This request would be made with a view to amending California Vehicle Code Section 17150 so that contributory negligence of the driver of the vehicle would not be imputed to defeat recovery by an injured plaintiff. It does not appear necessary to change the rules in California relating to joint enterprise, and the "family purpose" doctrine does not apply in California.

Respectfully submitted,

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Executive Secretary

EXHIBIT I

IMPUTED CONTRIBUTORY NEGLIGENCE BETWEEN SPOUSES

Noncommunity Property States

At common law, the husband was a necessary plaintiff in an action for injuries to his wife and had the right to any proceeds of the judgment. As a result his contributory negligence barred his recovery for her injuries. Now, however, the marital relationship has been discarded as a grounds for imputing negligence between spouses[1] since the Married Women's Acts have terminated the technical and outmoded concept that the legal existence of the wife merged into that of the husband.[2] Accordingly, the contributory negligence of the husband will not, merely because of the marital relationship, be imputed to the wife in an action brought to recover for personal

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1. Gilmore, Imputed Negligence, 1 Wis. L. Rev. 193 (1921). "There was a time in the history of the law of married women when such imputation rested on a sound basis. When the wife had no standing in law apart from her husband, when he was a necessary party in all actions for the vindication of her rights, and when the damages recovered belonged to him there was good reason for denying a recovery which would rebound to the benefit of the negligent husband. Now that the wife has her own separate action and the damages recovered belong to her separate estate, there is no adequate reason for imputing the husband's negligence to her." Id. at 205.

2. See Notes, 59 A.L.R. 153 (1929) and 110 A.L.R. 1099 (1937) and cases cited.

injuries sustained by her.[3]

Although the marital relationship by itself is not a basis for imputing the contributory negligence of either spouse to the other,[4] there are several principles that have been developed that might be used to impute negligence, primarily in motor vehicle cases.[5] These principles are sometimes applied in personal injury cases involving a married couple. They are discussed below.

Joint enterprise

By analogy to partnership and joint business ventures, a number of American courts have recently developed the "joint enterprise" doctrine. The doctrine has been applied almost exclusively in automobile accident cases where its application has resulted in the negligence

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3. See note 2 supra and Bruton v. Villoria, 138 Cal. App.2d 642, 292 P.2d 638 (1956), where the California court held that a husband's contributory negligence would not be imputed to the wife to bar her recovery in a personal injury action where the husband and wife were Ontario domiciliaries injured in California but were not subject to the community property system. California at the time this case was decided considered personal injury damages as community property and adhered to the imputed negligence rule.
   On the other hand, the plaintiff's own negligence will bar his recovery for loss of services or other injury to his wife. Prosser, Torts 703 (2d Ed. 1955).

4. 65 C.J.S. Negligence § 159. Distinguish a wrongful death action where contributory negligence of the plaintiff-beneficiary will bar recovery, Muller v. Standard Oil Co., 180 Cal. 260, 180 Pac. 605 (1919), as will the contributory negligence of the decedent. Compare Flores v. Brown, 39 Cal.2d 622, 248 P.2d (1952) with Carroll v. Beavers, 126 Cal. App.2d 828, 273 P.2d 56 (1954) and McCranie v. Moorehead, 131 Cal. App.2d 837, 281 P.2d 542 (1955).

5. All states reject the passenger-driver relationship as a basis for imputing negligence. The rejection became unanimous with Bricker v. Green, 313 Mich. 218, 21 N.W.2d 105 (1946), noted, 22 Notre

of the driver of the vehicle being imputed to a passenger riding in it.[6] Considerable confusion surrounds the doctrine,[7] but the requirements for a joint enterprise are generally stated as follows:[8]

(1) A mutual right to control the management or operation of the enterprise; and

(2) A common purpose in which all persons involved have a mutual interest.

A small minority of cases have found a common purpose of the venture or journey sufficient to establish a joint enterprise without a further showing of a mutual right of control. Thus, where friends are riding together on a pleasure trip, a joint enterprise has been found.[9]

The modern trend, however, is to insist more and more strictly upon a showing of a mutual "right of control" over the operation of the vehicle. The passenger must have an equal right to be heard as to the manner in which the vehicle is driven. Whether or not he

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Dame Law 114 (1946). Thorogood v. Bryan, 8 C.B. 115, 137 Eng. Rep. 452 (1849) considered such a relationship sufficient to impute negligence but Mills v. Armstrong, 13 A.C. 1 (1888) abolished the doctrine of the Thorogood case in England.

6. Weintraub, The Joint Enterprise Doctrine in Automobile Law, 16 Cornell L.Q. 320 (1931); Rollison, The "Joint Enterprise" in the Law of Imputed Negligence," 6 Notre Dame Law 172 (1931); Note, 12 Calif. L. Rev. 238 (1924).

7. Ibid.

8. Prosser, Torts § 65 (2d Ed. 1955).

9. Ibid.

exercises this control is not important.[10] The marital relationship by itself will not warrant an inference of a mutual right of control, even where the married couple is using the vehicle for a common purpose.[11]

The ordinary ground for inference of right of the passenger to control the operation of the vehicle is his ownership of the automobile or his being in charge of it or a joint ownership by the driver and the passenger or a joint right of possession as bailees.[12]

Harper and James state:

> It is often said that where the owner is being driven in his own vehicle he has the right to control the actions of the driver unless he has surrendered control by contract or abandoned it; and there is a rebuttal presumption against such surrender or abandonment. Probably the most oft-recurring case of this kind is that of a husband who drives his wife's car when she is with him, or a wife driving her husband's car when he rides with her. Joint enterprise has often been based upon such a showing. This has ordinarily meant that an innocent spouse's recovery from a negligent third person is barred by the contributory negligence of the other spouse. Such a harsh ruling in this typical family situation has caused considerable judicial dissatisfaction. This in turn has produced a trend to modify the rule in this kind of case by (1) an increasing willingness to find exceptions to it through an abandonment or surrender of control to the driver spouse and (2) an increasing unwillingness to let a finding of control be based on technical ownership in these cases. Thus where a husband has general permission to use his wife's car and he takes her along for company on an errand of his own, she has

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10. Ibid. Compare Glanville v. Cannick, 182 Cal. App.2d 514, 6 Cal. Rptr. 175 (1960) (automobile was provided by passenger and operated by driver for passenger's own benefit; driver held as a matter of law to be passenger's agent).

11. 2 Harper & James, Torts 1415 (1956).

12. Prosser, Torts § 65 (2d Ed. 1955); 2 Harper & James, Torts 1416 (1956).

been found to be a "guest in her own automobile," having abandoned the right to control. And even where the mission serves a mutual purpose, a number of courts simply do not base control on technical ownership, at least where it is the wife.

* * *

The case in which driver and passenger have joint or common ownership or possession of the vehicle has sometimes been given as a classic example of the nonbusiness joint enterprise. Yet here again where husband and wife are co-owners there is a growing judicial reluctance to find the requisite control from that fact alone.[13]

It should be noted that community property states, including California, may also invoke the joint enterprise doctrine to impute negligence from one spouse to the other. The joint enterprise doctrine does not, however, normally prevent recovery by the wife in a community property state, for although the presumptions favoring community property[14] usually satisfy the "common ownership" test of joint enterprise, they also negate the requirement of the "right to control" in the wife [15] for the management and control of the community automobile is vested in the husband.[16] Where, however, the automobile is owned

13. Id. at 1416-17 (footnotes omitted).

14. E.g., Cal. Civ. Code §§ 162, 163, 169; 1 de Funiak, Principles of Community Property § 60 (1943).

15. Cf. Pacific Tel. & Tel. Co. v. Wellman, 98 Cal. App.2d 151, 219 P.2d 506 (1950); Cox v. Kaufman, 77 Cal. App.2d 449, 175 P.2d 260 (1946) (wife not vicariously liable for husband's negligence since wife had no right of control over the community automobile).

16. Harris v. Traglio, 24 F. Supp. 402 (D. Ore. 1938), noted, 28 Calif. L. Rev. 211 (1940) (concurring negligence of plaintiff's son in driving the community automobile imputed to the husband to bar his recovery but not to the plaintiff wife).

in cotenancy, or separately by the wife, the requisite control by the wife may be present.[17] And the court may refuse to permit the wife to show that an automobile held in cotenancy or separately by the wife is actually community property.[18]

Harper and James state that the joint enterprise doctrine "does little good as a means of distributing accident losses, and it does much harm in preventing compensation to innocent plaintiffs through the imputation of contributory negligence. It should be discarded."[19]

Prosser criticizes the doctrine as follows:

> If the question were now to be raised for the first time, arguments might be advanced against the vicarious liability of the passenger who is engaged in a "joint enterprise." The "control" which is ascribed to him is usually only too obviously a fiction, upon which is erected a second fiction, that the driver is his servant. In the usual case, he has not physical ability to control the operation of the car, and no opportunity to interfere with it. Unless the limitation to business ventures approaching a partnership is to be accepted, the doctrine will most often be applied to enterprises which are not commercial and are matters of friendly cooperation and accomodation, where there is not the same reason for placing all risks upon the enterprise itself. Normally it is the driver, and not the passenger who might be expected to

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17. Cf. Wilcox v. Berry, 32 Cal.2d 189, 195 P.2d 414 (1948) (automobile owned jointly); Ransford v. Ainsworth, 196 Cal. 279, 237 Pac. 747 (1925) (wife's separate property).

18. See Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952) (auto registered in wife's name alone, and court refused to permit her to rely on presumption of community property to avoid vicarious liability). Compare, Pacific Tel. & Tel. Co.v. Wellman, 98 Cal. App.2d 151, 219 P.2d 506 (1950) with Caccano v. Swanston, 94 Cal. App.2d 957, 212 P.2d 246 (1949).

19. Id. at 1419 (footnotes omitted).

carry insurance. The apparent restriction of the doctrine to vehicle cases suggests that its real basis is the fear of the hazards of traffic.[20]

Family purpose doctrine

The "family purpose" or "family car" doctrine is another form of vicarious liability developed by the courts in an effort to impose liability upon a financially responsible defendant. Under this doctrine, when a motor vehicle is provided and maintained for the purpose and enjoyment of its owner's family, its use for that purpose, with the owner's express or implied consent, puts the owner and driver in the position of master and servant.[21] About half of the states have adopted this doctrine.[22] Prosser states the circumstances when the doctrine is applicable as follows:

> [T]he defendant must own the automobile, or at least have some recognized property interest in it or supply it, and he must have made it available for family use, rather than for use in his business. The driver must be a member of the defendant's immediate household, as distinguished from a more distant or collateral relative such as a brother-in-law. The fact that the driver is an adult son is held, however, not to prevent the agency relation where he is still a member of the household. The car must be found to have been driven at the time with the permission or acquiescence of the defendant, although his consent may be inferred from a failure to protest at frequent violations of his orders not to use the car. His liability does not extend to any use beyond the "family purpose," which, however, will include all normal family activities, including mere driving for the pleasure of an individual.[23]

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20. Prosser, Torts 367 (2d Ed. 1955).

21. Prosser, Torts 369 (2d Ed. 1955).

22. 2 Harper and James, The Law of Torts 1420 (1956).

23. Prosser, Torts 370 (2d Ed. 1955).

No cases were found where the family purpose doctrine was used as a basis of imputing the negligence of the driver to the passenger-owner of the vehicle to prevent recovery by the passenger-owner from a third person. It would appear, however, that in an appropriate case the doctrine might be used to impute negligence.

California does not recognize the family purpose doctrine.[24] However by statute California has imposed liability on the owner of a motor vehicle for the negligence of anyone using or operating the vehicle with his express or implied consent.[25]

The family purpose doctrine has been criticized as a fiction that is merely a partial and inadequate step in the direction of an ultimate rule which will hold the owner of a vehicle liable in all cases for the negligence of the driver to whom he entrusts it.[26]

Owner's liability statutes

California and a few other jurisdictions have enacted statutes that impose liability on the owner of a motor vehicle for the negligence of anyone using or operating it with his express or implied consent. Generally, under these statutes, proof of ownership affords an inference of consent which may be rebutted by evidence to the

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24. Spence v. Fisher, 184 Cal. 209, 193 Pac. 255 14 A.L.R. 1083 (1920).

25. See infra.

26. Prosser, Torts 371 (2d Ed. 1955).

contrary.[27] In California the statute has been construed to impute the contributory negligence of the driver to the owner[28] but other states have refused to give their statutes such an interpretation.[29] It should be noted that the California statute was amended specifically for the purpose of imputing contributory negligence.[30]

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27. E.g., Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868 (1942).

28. Milgate v. Wraith, 19 Cal.2d 297, 121 P.2d 10 (1942). To the same effect, see Secured Finance Co. v. Chicago R.I. & P.R. Co., 207 Iowa 1105, 224 N.W. 88, 61 A.L.R. 855 (1929).

29. Mills v. Gabriel, 259 App. Div. 60, 18 N.Y.S.2d 78 (1940); Christenson v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406 (1943).

30. Milgate v. Wraith, 19 Cal.2d 297, 121 P.2d 10 (1942).

Community Property States

Damages or compensation recovered for personal injuries sustained by a spouse belong to the community estate under the general rule followed in most community property states.[1] The reason generally given is that the right to recover damages for personal injuries is a chose in action and property which, because it is acquired during the marriage, is community property. Consequently, the damages or compensation recovered are also community property.

Almost without exception the states which treat personal injury damages or compensation as community property impute the negligence of one spouse to the other. This is done, they say, to prevent the negligent spouse from profiting by his own wrong or in spite of his own wrong.

The following summary covers the various community property states. It indicates whether a cause of action for damages for personal injuries to a spouse is separate or community property. It also indicates whether the community property system in a particular state results in the application of the doctrine of imputed negligence. This summary is general. It makes no attempt to break down a cause of action into various elements (such as, pain, suffering and disfigurement, loss of earnings, loss of services, medical expenses, etc.). See the research

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[1] de Funiak, Principles of Community Property § 82 (1943).

consultant's study, note 24, for information on the breakdown of damages.

Arizona

The status of a cause of action for damages for personal injuries to a spouse, or the proceeds thereof, as separate or community property, has not been clearly defined.[2] The cases suggest that it is community property.[3]

It has been held, however, that contributory negligence of a husband or wife will defeat an action for damages for personal injuries to the other spouse. The reason given is that the proceeds will constitute community property and that any other result would permit the negligent spouse to benefit from his or her negligence.[4]

Idaho

A cause of action for damage for personal injuries to a spouse, or the fruits thereof, is community property.[5]

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[2]Annot., 35 A.L.R.2d 1199, 1202 (1954)

[3]See, e.g., Pickwick Stages Corp. v. Hare, 37 Ariz. 570, 295 P. 1109 (1931)

[4]Tinker v. Tobbs, 80 Ariz. 166, 294 P.2d 659 (1956) (divorce after accident did not preclude imputation of wife's contributory negligence to husband since wife would be entitled to part of recovery); Pacific Constr. Co. v. Cochran, 29 Ariz. 554, 243 Pac. 405(1926) (husband's contributory negligence imputed to wife).

[5]See, e.g., Swager v. Peterson, 49 Idaho 785, 291 P. 1049 (1930).

Although there apparently are no Idaho cases in point, the Nevada court held that under Idaho law the contributory negligence of one spouse is to be imputed to the other.[6]

Louisiana

Damages for personal injuries to a married woman are her separate property.[7] Therefore, the contributory negligence of the husband does not bar an action by the wife for personal injuries.[8] However, the wife may recover neither medical expenses nor lost earnings; such items of damage are recoverable only by the husband on behalf of the community.[9]

Damages for personal injuries to the husband are community property.[10] But contributory negligence of the wife will not bar his recovery.[11] In McHenry v. American Employers' Ins. Co., the court indicated that, even though a recovery of damages for the husband's injuries constitutes

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[6]See Choate v. Ranson, 74 Nev. 100, 323 P.2d 700 (1958) (husband's contributory negligence imputed to wife).

[7]See e.g., Johnson v. Sundberry, 150 So. 299 (La. App. 1933).

[8]Vitale v. Checker Cab Co., 166 La. 527, 117 So. 579 (1928).

[9]Hollenquist v. Kansas City So. Ry., 88 F. Supp. 905 (W.D.C. La. 1950).

[10]See, e.g., McHenry v. American Employers' Ins. Co., 206 La. 70, 18 So.2d 656 (1944).

[11]Ibid.

community property, neither he nor his wife is enriched; the community is simply restored, the effect of the payment of the judgment being "to repair a damage which the community has sustained." [12]

New Mexico

The wife's cause of action for personal injuries, and the resulting pain and suffering, is her separate property.[13] However, the cause of action for medical expenses, loss of services to the community and loss of earnings apparently is community property.[14]

There are no decisions as to whether a cause of action for personal injury to the husband is community or separate property. Moreover, there have been no decisions found upon the issue of imputation of negligence. But from the reasoning of the court in Soto v. Vandeventer,[15] it can be inferred that New Mexico will hold that the husband's cause of action belongs to the community, and furthermore, that New Mexico will follow the Louisiana treatment of imputation of negligence.

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[12] Id. at 71, 18 So.2d at 659.

[13] Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952).

[14] Id. at 828, 245 P.2d at 833.

[15] 56 N.M. 483, 245 P.2d 826 (1952).

Nevada

Contributory negligence of a husband constitutes no bar to an action by his wife to recover damages for her personal injuries since the cause of action is her separate property.[16] Apparently there have been no decisions concerning the husband's cause of action. However, since the Nevada statutory scheme was taken from California, probably Nevada will hold that the husband's cause of action is community property and allow the wife's negligence to bar his action.

Puerto Rico

A cause of action for recovery of damages for personal injuries to a married woman constitutes community property and under the related statutes the husband is a necessary party to the action.[17]

No cases have been found on the imputation of negligence.

Texas

Damages for personal injuries to either the husband[18] or wife,[19] when recovered, are community property.

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[16]Frederickson & Watson Const. Co. v. Boyd, 60 Nev. 117, 102 P.2d 627 (1940).

[17]Vazquez v. Valdes, 28 Puerto Rico 431 (1920).

[18]Flowers v. Smith, 80 S.W.2d 392 (Tex. Civ. App. 1934).

[19]Ezell v. Dodson, 60 Tex. 331 (1883).

Moreover, the negligence of one spouse is imputed to the other to bar recovery in personal injury actions.[20]

Washington

Damages for personal injuries to the husband[21] or wife[22] are community property.

Contributory negligence of the husband has been imputed to prevent recovery by the wife on the grounds that the husband cannot profit through his own negligence.[23]

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[20] Welch v. Bauer, 186 F.2d 1002 (5th Cir. 1951) (neg. of driver imputed to husband defeating wife's claim); Bell v. Phillips Petroleum Co., 278 S.W.2d 407 (Tex. Civ. App. 1954) (contributory negligence of husband imputed to wife although husband died shortly after the accident).

[21] Apker v. Hoquiam, 51 Wash. 567, 99 Pac. 746 (1909).

[22] Hawkins v. Front Street Cable Ry., 3 Wash. 592, 28 Pac. 1021 (1892).

[23] Ostheller v. Spokane & I.E.R. Co., 107 Wash. 678, 182 Pac. 630 (1919).

EXHIBIT II

INTERSPOUSAL TORT LIABILITY IN CALIFORNIA

At common law a husband or wife could not maintain any action in tort against his or her spouse. The primary reason was that the husband and wife were one, a single entity, in the eyes of the law. Albertsworth, Recognition of New Interests in the Law of Torts, 10 Calif. L. Rev. 461, 471, (1922).

In California, however, the right of one spouse to maintain an action against the other for the protection of contract and property rights seems always to have been recognized. This is apparently because California abandoned the common law theory of the husband and wife being a single entity when it incorporated a Married Women's Act into the Constitution of 1849. Cal. Const. of 1849, Art. XI, § 14. But a distinction has always been maintained between tort actions involving property rights and those involving personal rights: Actions are permitted for torts involving property rights, but (except as noted below) actions cannot be maintained between husband and wife for personal torts.

The effect of the statutes permitting suits between spouses was considered in Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909). In that case the court denied the husband the right to maintain an action against his wife for injuries inflicted upon him by her act of deliberately wounding him with a gun. The court interpreted a number of sections of the California codes which permitted suits between spouses and held that these provisions related solely to contract and property rights. With

respect to these sections, the court stated in 156 Cal. at 36 (103 Pac. at 221):

> They recognize the separate property of husband and wife and authorize contracts between them concerning the same. This necessarily implies that actions by one against the other for the protection of such property and the enforcement of contracts relating thereto can be maintained. Our code system authorizes but one form of action in all cases either in law or equity. Suits between husband and wife have long been permitted in equity, and in actions for divorce the husband and wife were necessarily upon opposite sides of the case. It was necessary, therefore, in a code providing for but one form of action, to make a rule covering all cases. Hence, in the chapter of the Code of Civil Procedure relating to the parties to the single form of action provided, it was declared that in actions between herself and her husband a married woman can sue and be sued alone . . . . It would be a forced interpretation to attempt to discern in that declaration, or in any of the provisions of the Civil Code, an intent to make a departure from the common law so radical, and so opposed to its general policy, as the authorization of a suit by the husband or wife against the other for injuries to the person or character.

Several subsequent District Court of Appeal decisions reaffirmed the Peters case rule of interspousal immunity for personal torts, stating that any change in this rule should be made by the Legislature and not by the courts. Paulus v. Bander, 106 Cal. App.2d 589, 235 P.2d 422 (1951); Cubbison v. Cubbison, 73 Cal. App.2d 437, 166 P.2d 387 (1946).

In Watson v. Watson, 39 Cal.2d 305, 246 P.2d 19 (1952) the California Supreme Court reaffirmed the rule of the Peters case, stating that it is the established rule generally and the law in California that where the parties are lawful spouses one may not sue the other for damages for a personal tort.

The rule of spousal disability is not strictly applied in every situation, however. The decision in Foote v. Foote, 170 Cal. App.2d 435, 339 P.2d 188 (1959), adopts, in a parallel factual situation, the opinion by the same court in Carver v. Ferguson, 254 P.2d 44 (Cal. App. 1953).

In the Ferguson case, which was dismissed because of settlement after a hearing had been granted by the Supreme Court, the court reversed dismissal of the wife's action for damages for personal injury on the ground that the injury occurred before marriage and that a cause of action for damages for personal injury, being a chose in action, was personal property. The court held that the wife's cause of action for personal injuries sustained before her marriage to the defendant while riding in an automobile operated by the defendant, being a chose in action and hence property, and being property owned prior to the marriage, was the wife's separate property in which the husband had no interest. Accordingly, the plaintiff wife was not deprived of her right to litigate because of her subsequent marriage. (See also Morissey v. Kirkelie, 5 Cal. App.2d 183, 42 P.2d 361 (1935), where the court affirmed a judgment for damages for personal injury to the plaintiff wife where the injury was sustained before her marriage to defendant husband, and also holding that the husband's contributory negligence would not be imputed to the wife so as to defeat recovery since they were not married at the time of the injury.) But neither the Carver nor the Foote case directly holds that an action in tort between spouses lies for personal injuries. Both cases base the decision on the theory of recovery of personal property and not on the right to recover damages for personal injuries.

In Spellens v. Spellens, 49 Cal.2d 210, 317 P.2d 613 (1957) a putative wife recovered damages (in a cross-action) against her husband for abuse of process. In the cross-action, the wife alleged only that she suffered mental anguish, nervous and emotional shock, etc.;

she did not allege any damage to property. The majority opinion did not discuss the principle of interspousal immunity nor whether an action for abuse of process is for injury to property or for personal injury, but the court noted that compensatory damages include recovery for mental suffering. However, Justice Schauer, concurring and dissenting, did raise the immunity problem. He argued that, if interspousal immunity for personal torts is to remain the rule in this State, then the majority should have applied the rule in this case unless the court was willing to overrule the holding of the Peters case and the cases which follow the Peters case. Justice Schauer then stated that inasmuch as the rule was formulated by the Supreme Court (in the Peters case) in reliance on a now "outmoded common law rule," the court should not hesitate to change the rule if convinced the rule is unwise.

It should be noted that a majority of jurisdictions in the United States continue to apply the common law rule of spousal disability for tort actions for personal injuries. In North Carolina and Wisconsin, the right of action for personal injuries is allowed to the wife against the husband but is denied to the husband against the wife. In Oregon and Missouri, a qualification to the immunity rule has been introduced in the case of wilful or wanton injuries: Recovery is permitted for a wilful ar wanton injury; but recovery is not allowed in case of negligence only. A minority of jurisdictions have allowed actions between spouses for both negligence and for intentional torts. Included in the minority are Oklahoma and Connecticut.

EXHIBIT III

LIABILITY OF COMMUNITY PROPERTY FOR TORTS OF HUSBAND OR WIFE

The following material is based in part on California Law Revision Commission's , Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere, I-22-I-23-I-26 (1960). Refer to that study for citations to authority not included in this memorandum.

Introduction

There are two separate types of community property in California having different characteristics--the general community property and the wife's earnings and property derived therefrom. Although they remain community property, the wife's earnings are to a certain extent subject to her management and control, liable for her debts and not liable for her husband's debts.

General community property

The general community property is liable for the torts of the husband on the theory that he has the management and control of the property and should pay for his tortious conduct. But the general community property is not liable for the torts of the wife. The reasoning underlying this result is based upon Section 171a of the Civil Code which states: "For injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist." The exemption granted the husband by this section extends to

the community property, which is subject to his management and control, as well as to his separate property. McClain v. Tufts, 83 Cal.2d 140, 187 P.2d 818 (1947). However, McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949), distinguishes the California cases on the ground that in New Mexico under statutes similar to the California statutes the wife has a "vested interest" in community property. Therefore, the husband's power of management and control of community property does not preclude the wife's interest from being liable for her torts. In Texas, under statutes similar to those found in California, the community property is liable for the wife's torts. Crim v. Austin, 6 S.W.2d 348 (Tex. 1928).

Wife's earnings which are community property

There are several pertinent statutory provisions found in the Civil Code:

> 167 . . . . Except as otherwise provided by law, the earnings of the wife are liable for her contracts heretofore or hereafter made before or after marriage.
>
> 168. The earnings of the wife are not liable for the debts of the husband . . . .
>
> 171c. Notwithstanding the provisions of Section 161a and 172 of this code and subject to the provisions of Section 164 and 169 of this code, the wife has the management, control and disposition, other than testimentary except as otherwise permitted by law, of community property money earned by her until it is commingled with other community property.
>
> 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, or dispose of the same without a valuable consideration, without the written consent of the husband.
>
> This section shall not be construed as making such money the separate property of the wife, nor as changing the respective interests of the husband and wife in such money, as defined in Section 161a of this code.

161a. The respective interests of the husband and wife in community property during the continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

171a. For civil injuries committed by a married woman, damages may be recovered from her alone and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist.

Sections 167 and 168 provide that the earnings of the wife are liable for her "contracts" but are not liable for the "debts" of the husband (other than his debts for necessaries). The question has not been decided whether the "debts" of the husband for which the wife's earnings are exempt would include his tort liabilities, although two cases have indicated in dicta that such tort liabilities would be included. It is fairly obvious, since the statute imposing liability for the wife's acts specifies only "contracts," that her earnings would not be liable for her own tort liabilities. However, it is possible that Section 171c, giving the wife the management and control of her earnings while in the form of "money," may have impliedly made such earnings liable for her torts as long as they remain in that form. See 1 Armstrong, California Family Law 706 (1953). This seems to follow if the "control test" is retained as a basis of immunity of community property from liability for the wife's torts. Also such earnings might be liable for her torts in a case where the husband, and therefore all of the community property, would be vicariously liable under some agency principle or a statute imposing liability, unless the exemption from liability for his "debts" under Section 168 includes such vicarious liability of the husband.

There is a good deal of confusion as to when the wife's earnings are no longer "money" and when the "earnings" lose their identity as such. Although Section 171c has not been interpreted, under it the wife would apparently have the management and control of the acutal cash received by her as her earnings and possibly of the separate bank account in which they were deposited. A doubt is raised here since strictly speaking in the latter case the earnings are no longer in the form of "money" but of a debt owed by the bank to the wife. However, it would appear that if the earnings were used to purchase General Motors stock, the wife would no longer have the right to manage and control the stock.

On the other hand, the provisions of Sections 167 and 168 relating to the wife's "earnings" apply not only to a bank account into which such earnings are deposited but also to personal property which is purchased with such earnings if the earnings can be clearly traced and identified. The exemption under Section 168 of the wife's earnings from the husband's debts is lost if the earnings are so commingled with other community property that they cannot be identified, or if the earnings constitute only a part of the purchase price of personal property with the other part being paid out of general community funds. On the other hand, it has been held that the commingling of the wife's earnings with other community property does not destroy the liability of such earnings under Section 167 for the wife's contracts, even though they can no longer be identified; the burden is upon the husband as against an attaching creditor of the wife to show how much of a particular fund or asset was derived from the community property other than her earnings.

There has been no indication in the decisions as to whether the exemption of the wife's "earnings" from the husband's debts and the liability of her "earnings" for her contracts extend also to the income from property in which such earnings are invested. It is probable that these rules would not apply to such income.

Thus, difficult construction problems exist with respect to the wife's earnings. It is not clear whether they are liable for her tort as well as her contract obligations, whether their exemption from liability for the husband's "debts" includes his tort obligations and at what point such liability and exemption cease because of a "commingling" of the property with community property.