

12/11/61

Memorandum No. 60(1961)

Subject: Study No. 53(L) - Personal Injury Damage Awards to Married Persons

At the November 1961 meeting the Commission made several policy decisions with regard to the study relating to personal injury damage awards to married persons. These decisions are noted and discussed below.

REQUEST FOR AUTHORITY TO BROADEN STUDY

The Commission determined to request at the 1962 legislative session that its authority in connection with this study include the doctrine of imputed contributory negligence based on the spousal relation and vehicle ownership. We will need to give final approval to a draft of the 1962 Annual Report at the January 1962 meeting. Accordingly, Exhibit I, attached, is submitted as a proposed draft of the portion of the 1962 Annual Report which will request that the authority in connection with Study No. 53(L) be broadened. Is this draft satisfactory?

Attached as Exhibit II is the draft of a resolution for introduction in the 1962 legislative session that will authorize the Commission to continue its study of topics previously authorized and to study the broadened topic formerly restricted to personal injury damage awards to married persons.

DRAFT STATUTE ON PERSONAL INJURY DAMAGE AWARDS TO MARRIED PERSONS

Repeal of Civil Code Section 163.5. At the November 1961 meeting the Commission determined that Civil Code Section 163.5, which makes personal injury damage awards to married persons separate property, should be repealed and that such awards should be the community property of the spouses. The text of Section 163.5 is set out in full in Exhibit III.

No special problems are noted in accomplishing the repeal of Section 163.5.

Provision that Personal Injury Damages Awards Be Community Property.

The Commission determined at the November 1961 meeting that personal injury damages awards should be community property of the spouses. The question arises as to whether a specific statutory provision is necessary to implement this decision.

It would be possible to rely on the repeal of Section 163.5 to accomplish this without further amendment of the law. Note Sections 162, 163 and 164 of the Civil Code (Exhibit III, attached). It appears unnecessary to declare by statute that rights of action for personal injuries and judgments based on such rights of action are community property; the repeal of Section 163.5 and the amendment of Section 171c (hereafter discussed) will no doubt be sufficient to establish that such are community property. The repeal of Section 163.5 and the amendment proposed in Section 171c will restore the statutory law to its pre-1957 form. Presumably, this would restore the judicial decisions construing this pre-1957 law.

There is one advantage in not attempting to draft a statutory section that specifically makes personal injury damages community property. There is a danger that an attempt to draft such a section will result in a provision that is too restrictive. For example, what is the status of the right of the husband to recover for the loss of services of his injured wife?

If, however, it is thought necessary to state specifically that rights of action for personal injuries are community property there are two alternatives available: (1) Section 164 of the Civil Code can be amended to so state or (2) a new section can be added to the Civil Code to so state.

If Section 164 is amended, the following is a suggested draft:

164. All other real property situated in this State and all other personal property wherever situated, including all rights of action to recover damages, special and general, for personal injury, acquired during the marriage by a married person while domiciled in this State is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property from and after one

year from the filing for record in the recorder's office of such conveyances, respectively.

As used in this section, personal property does not include and real property does include leasehold interests in real property.

An alternative method would be to enact a new section, designated as Section 164.1 which would read as follows:

164.1. All rights of action for damages, general and special, for personal injuries acquired during marriage by a married person while domiciled in this State are community property.

In connection with the determination of the type of statute, if any, that should be added to state that these rights of action for personal injuries are community property, please refer to Exhibit III which sets out the existing statutory scheme.

Provision that Negligence of One Spouse Not Be Imputed to Other Merely Because Damages Recovered Would Be Community Property. At its November 1961 meeting, the Commission determined that making the right of action of one spouse to recover for injuries community property should not result in the negligence of the other spouse being imputed to the injured spouse to bar recovery.

The following section might be added to the Civil Code to accomplish this objective.

164.3. The negligence or contributory negligence of a married person shall not be imputed to his spouse in any action brought by such spouse to recover damages for injury to the person of such spouse solely because of the community property nature of the damages sought to be recovered.

Procedure for Reducing Judgment When Spouse of Injured Person Has Been Contributorily Negligent. Formerly, when personal injury awards were considered community property, the negligence of the other spouse was imputed to the injured spouse to defeat recovery so that the negligent spouse would not be compensated for his own wrong. Accordingly,

when the Commission determined that the negligence of one spouse should not be imputed to the other spouse to prevent recovery by the injured spouse, the question then arose whether the damages should be reduced to prevent compensating the negligent spouse and to be fair to the defendant and the injured spouse.

The Commission determined that if the spouse of an injured person has been contributorily negligent the liability of a third party defendant should be reduced by the amount of the negligent spouse's obligation to contribute if the negligent spouse were adjudged to be a joint tortfeasor with the defendant. The balance of the liability would be recoverable as community property.

There is some theoretical difficulty with treating the negligent spouse as a joint tortfeasor. In the usual automobile collision case, the driver of the car in which the injured person is riding is immune from liability under the guest statute whether or not he is related to the injured person. Moreover, such a person could not be compelled to contribute under the joint tortfeasors law because he cannot be held as a joint judgment debtor to the injured person. Nevertheless, the solution proposed by the Commission will impose a liability to contribute on the community for the action of the driver despite the policy of the guest statute and despite the fact that the community might not be liable to the injured person directly.

In addition, under our contribution statute, contribution is required only when the defendant has been joined as a defendant by the plaintiff and a judgment has been rendered against both defendants. Although Code of Civil Procedure Section 442 has not been construed in

connection with the joint tortfeasors law, it seems probable that a defendant has no right under that section to join an alleged joint tortfeasor as a codefendant. Nevertheless, the solution we are proposing will in substance permit this - although, of course, the husband will not actually be a party.

Another difficulty is that the community property generally is not liable for torts of the wife. Yet, where the wife is negligent and the husband injured, in effect we pay for the wife's negligence out of the community property.

As indicated above, the reason why it is necessary to reduce the amount of the judgment is that if the judgment is made community property the negligent spouse will receive an interest in the judgment despite his own culpability. If compensating a negligent spouse is our primary concern perhaps we should not be concerned with the status of the defendant. It might be better to forfeit the negligent spouse's interest in the community property judgment in all cases; thus, the judgment would be reduced by one-half whenever the spouse of the plaintiff is contributorily negligent. There is some difficulty with this solution, however, because the Commission has determined that the remaining portion of the judgment is not to be the separate property of the injured spouse but is to be community property; and thus it can be argued that the negligent spouse is still receiving compensation for his own negligence (to the extent of one-fourth of the amount of the judgment). Logically speaking, it might be better to forfeit the negligent spouse's interest in the judgment in this case and make the balance of the judgment the separate property of the injured spouse.

If it is believed that the theory of contribution-by-joint-tortfeasors should be made applicable (despite the theoretical difficulties), the following provision is suggested for Commission consideration:

164.5. (a) The contributory negligence of the plaintiff's spouse may be raised as a defense to an action to recover community property money damages for personal injuries suffered by the plaintiff as the result of negligence.

(b) If such a defense is made, the trier of fact shall separately find (1) the amount the plaintiff would be entitled to recover from defendant because of negligence if the defense were not established and (2) whether the defense has been established.

(c) If the trier of fact determines that the defendant is liable to the plaintiff because of negligence and that such defense has been established, the court shall enter judgment for the plaintiff against the defendant in the amount found in subdivision (b)(1) of this section reduced by the amount the contributorily negligent spouse would be liable to contribute under Title 11 (commencing with Section 875) of Part 2 of the Code of Civil Procedure if such spouse were a joint judgment tortfeasor with the defendant.

(d) As used in this section, "community property money damages" includes separate property money damages if such damages or the cause of action therefor were converted from community property into separate property by agreement of the spouses after the cause of action arose.

If, on the other hand, it is believed that the theory of preventing-the-negligent-spouse-from-profiting-by-his-own-wrong should be adopted, the following provision is suggested for Commission consideration:

164.5. (a) The contributory negligence of the plaintiff's spouse may be raised as a defense to an action to recover community property money damages for personal injuries suffered by the plaintiff as the result of negligence.

(b) If such a defense is made, the trier of fact shall separately find (1) the amount the plaintiff would be entitled

to recover from defendant because of negligence if the defense were not established and (2) whether the defense has been established.

(c) If the trier of fact determines that the defendant is liable to the plaintiff because of negligence and that such defense has been established, the court shall enter judgment for the plaintiff against the defendant in an amount equal to one-half of the amount found under subdivision (b)(1) of this section.

(d) As used in this section, "community property money damages" includes separate property money damages if such damages or the cause of action therefor were converted from community property into separate property by agreement of the spouses after the cause of action arose.

Under both alternatives set out above the procedural problems are kept at a minimum. It would, of course, be possible to come out with substantially the same result by providing for the joinder of the husband as a party but this would involve a more complicated statute. It would involve creating a third-party practice procedure limited to spouses and might involve the amendment of the contribution between tortfeasors law. As a matter of fact the contribution between tortfeasors law is somewhat defective, as was pointed out in the 1957 State Bar Journal which summarized the legislation of that year, in that it does not provide for a third-party practice by which a defendant may join his cotortfeasors. The cross-complaint section of the Code of Civil Procedure, Section 442, is similarly defective. It might be desirable for these areas of the law to be revised at some time, but this recommendation concerns only the interests of husbands and wives in personal injury damage awards.

Adjustment of Section 171c of the Civil Code. Section 171c should be amended as indicated below. This amendment merely restores the



language that was deleted in 1957 at the same time that Section 163.5 was enacted.

171c. Notwithstanding the provisions of Sections 161a and 172 of this code, and subject to the provisions of Sections 164 and 169 of this code, the wife has the management, control and disposition, other than testamentary except as otherwise permitted by law, of community property money earned by her, or community property money damages received by her for personal injuries suffered by her until it is commingled with other community property, except that the husband shall have management, control, and disposition of such money damages to the extent necessary to pay for expenses incurred 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, 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.

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary

12/8/61

Memo 60(1961)

EXHIBIT I

EXCERPT FROM ANNUAL REPORT

The Commission has an agenda consisting of 28 studies in progress, some of which are of substantial magnitude, that will require all of its energies during the current fiscal year and during the fiscal year 1962-63. One study involves substantial problems which may be beyond the scope of the Commission's authority to study. Accordingly, the legislative members of the Commission will introduce at the 1962 Session of the Legislature a concurrent resolution authorizing the Commission to examine the following additional subject in connection with this study:

A study to determine whether the doctrine of imputed contributory negligence based upon vehicle ownership should be modified.

The 1957 Legislature directed the 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." The Commission recognizes that a study of this subject involves more than a determination of the nature of property interests in damages recovered by a married person in a personal injury action. Inherent in the property classification of the damages recovered in such actions is the question of the extent to which the contributory negligence of one spouse may be imputed to the other.

Prior to the enactment in 1957 of Section 163.5 of the Civil Code, damages recovered by a married person in a personal injury action were

community property. Because of the property nature of the recovery, the courts imputed the contributory negligence of one spouse to the other so that the negligent spouse would not receive an interest in the compensation paid for an injury for which he was partially responsible. Thus, innocent persons were in many instances totally deprived of compensation for injuries negligently caused by others. Section 163.5 prevents such imputation, but it has created many other problems that need a legislative solution.

The Commission's preliminary study of these problems has revealed another problem which cuts across any recommendation which the Commission might make in regard to the property nature of a married person's personal injury damages. Many, if not most, actions for the recovery of damages for personal injury in which the contributory negligence of a spouse is a factor arise out of automobile accidents. Because contributory negligence is imputed to automobile owners under Vehicle Code Section 17150, when an automobile carrying a married couple is involved in an accident, the potential results in terms of liability are quite varied and complex. Whether the innocent spouse may recover damages from a negligent third party depends in large part upon such factors--not germane to the question of culpability--as whether the automobile was held as community property or as joint tenancy property and whether a husband or a wife was driving when the innocent spouse was injured. In many situations, it is impossible to predict with certainty what the result would be. For example, if a car is community property registered in the name of the husband or in the names of both spouses, the contributory negligence of the husband will not be imputed to the wife, but the

contributory negligence of the wife will be imputed to the husband. If the car is community property registered in the wife's name, the contributory negligence of the wife will probably be imputed to the husband and the husband's contributory negligence may possibly be imputed to the wife, but these results are not predictable with certainty. If the auto is held in joint tenancy, the negligence of one spouse is imputed to the other in all cases.

The problems arising out of Vehicle Code Section 17150 are not confined to cases in which married persons are involved. If an automobile owner is a passenger in his own automobile and is injured by the concurring negligence of the driver and a third person, he could formerly recover damages from the driver but not from the third person, for the driver's contributory negligence was imputed to him. In 1961, Section 17158 of the Vehicle Code, originally enacted to protect against fraudulent claims and collusive suits, was amended to provide that the owner can no longer recover from driver. Hence, an innocent vehicle owner, injured by the concurring negligence of his driver and another, can now recover damages from no one.

The purpose underlying the enactment of Section 17150 is to protect innocent third parties from the careless use of automobiles by financially irresponsible drivers. This protection is certainly achieved by its provision that a vehicle owner is liable to an innocent third party for its negligent operation. However, many writers have questioned whether the policy of protecting innocent third parties is furthered by depriving innocent vehicle owners of all rights of action against negligent third parties. It may be

that fairer ways may be found for allocating the risk of injury from automobile accidents than to impose the entire risk on the one person involved who is totally innocent. Accordingly, the Commission desires to undertake as a part of the primary study already authorized by the Legislature the additional study and analysis of the problems involved in the doctrine of imputed contributory negligence insofar as it is based on vehicle ownership.

EXHIBIT II

WHEREAS, Section 10335 of the Government Code provides that the commission shall file a report at each regular session of the Legislature which shall contain a calendar of topics selected by it for study, including a list of the studies in progress; and

WHEREAS, The commission has submitted to the Governor and the Legislature its 1962 report, containing a list of studies in progress, all of which the Legislature has heretofore approved for study; and

WHEREAS, Section 10335 of the Government Code provides that after the filing of its first report the commission shall confine its studies to those topics set forth in the calendar contained in its last preceding report which are thereafter approved for its study by concurrent resolution of the Legislature; now, therefore, be it

Resolved by the Assembly of the State of California, the Senate thereof concurring, That the Legislature approves for continued study by the California Law Revision Commission the heretofore approved topics on which studies are in progress as listed in the commission's 1962 report; and be it further

Resolved, That the California Law Revision Commission is authorized and directed to make a study to determine whether the doctrine of imputed contributory negligence based upon vehicle ownership should be modified.

CIVIL CODE SECTIONS DEFINING NATURE OF PROPERTY  
ACQUIRED BY MARRIED PERSON

162. Separate property; wife

All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

163. Separate property; husband

All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.

163.5. Separate property; damages for personal injuries

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

164. Community property; presumptions as to property acquired by wife; limitation of actions; leasehold interests

All other real property situated in this State and all other personal property wherever situated acquired during the marriage by a married person while domiciled in this State is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married

woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

As used in this section, personal property does not include and real property does include leasehold interests in real property.

169. Separate property; earnings of wife and children after separation

The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.



169.1. Separate property; earnings and accumulations after  
separate maintenance judgment

After the rendition of a judgment or decree for separate maintenance the earnings or accumulations of each party are the separate property of the party acquiring such earnings or accumulations.

169.2. Separate property; earnings and accumulations after  
interlocutory judgment of divorce

After the rendition of an interlocutory judgment of divorce and while the parties are living separate and apart, the earnings and accumulations of the husband are the separate property of the husband.