

#53(L)

8/5/65

Memorandum 65-53

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

Accompanying this memorandum are two copies of a tentative recommendation (on pink paper) designed to carry out the Commission's decisions that were made at the July meeting. The extra copy is provided so that you may mark suggested revisions upon it and return it to the staff at the next meeting.

The statute has been approved insofar as Sections 163.5, 164.5, 171c, and 185 are concerned. Section 183 was also approved; but it has been revised slightly to facilitate the redrafting of Section 184. The revision consists merely of substituting the word "plaintiff" in appropriate places in the section.

Section 164.7

At the July meeting, the Commission revised the draft of this section by moving the "unless" clause that now appears at the end of subdivision (a) from its former position following the first comma. The Commission also directed a revision in the form of subdivision (b). The Commission did not, however, approve the section. There were insufficient votes for any particular view to obtain Commission approval of that view.

The contending views are discussed on pages four and five of the tentative recommendation. The view taken in the existing draft is that personal injury damages should be community property even when the injury is caused in whole or in part by the other spouse. The liability of a spouse for an injury to the other spouse should be paid as other tort liabilities are--that is, from the guilty spouse's separate

property or the community property subject to his control. The only limitation proposed is that the separate property must be exhausted before the community may be used for this purpose. Under this proposal, the community property subject to the injured spouse's control (that spouse's earnings and personal injury damages) may not be used to satisfy the guilty spouse's liability. The damages received by the injured spouse are subject to the control of the injured spouse and not to the control of the guilty spouse. For most purposes, this gives the injured spouse as much protection as would a scheme requiring some division of the community property. The only significant difference so long as the marriage continues is that the injured spouse is not free to give the property away. Upon dissolution of the marriage, this scheme requires these damages to be treated as community property, not as separate property.

The other view is that the community property should be divided so that the guilty spouse must pay his liability from his share of the community property while the innocent spouse receives the award as separate property. In effect, if H is liable to W for \$50,000 in damages, the community property is divided to permit the husband to pay his entire liability from his share. Thus, \$100,000 of community property is divided between H and W and H then pays W the \$50,000 share allocated to him. Thus, W receives as her separate property \$100,000 if it has all been paid from the community. This proposal avoids the circuitry inherent in the draft. Under the draft scheme, the damages are paid from the community back into the community. The injured spouse's share is used to pay the injured spouse. The guilty spouse owns a half interest in the injured spouse's recovery.

The question for the Commission to resolve is whether to approve the

policy represented by the draft of Section 164.7 (this draft reflects the Commission's decision at the April meeting) or whether to require a division of the community property between the spouses when an interspousal tort occurs.

Section 171a

The Commission asked the staff to reconsider the draft of Section 171a. The Commission was particularly interested in the meaning of the section. The results of our research are indicated on pages 13 and 14 of the tentative recommendation. Until 1913, a husband was liable for the torts of his wife. Hence, all of the community property was subject to the tort liabilities of both spouses. Section 171a was designed to exempt the husband from the liability that previously existed merely because of the marital relationship. Since the husband was the manager (and owner) of the community property, Section 171a made most wives virtually judgment proof so far as tort liabilities were concerned. The husband could be found liable, however, and the community property could be subjected to the liability if an agency relationship could be found. And the cases cited in the tentative recommendation indicate that respondeat superior was applied as a basis of the husband's liability despite the language of Section 171a. The "family purpose" doctrine is not the law in California. A husband is not subject to respondeat superior liability when his wife or some other member of the family is merely engaged in some family purpose. See Spence v. Fisher, 184 Cal. 209 (1920).

We think the revised draft of Section 171a expresses its purpose more clearly than the former language did. Subdivision (b) states explicitly a proposition that only can be inferred under existing law.

Section 184

The Commission directed the revision of the statute to require that the contribution liability be determined in the original action unless personal jurisdiction over the negligent spouse could not be obtained in that action. To accomplish this, Section 184 requires that the defendant cross-complain for the contribution he is entitled to under this statute. If the plaintiff's spouse is a party to the action against the defendant, the issues will thus have to be tried together. In this connection, the statutes require that a cross-complaint be filed at the time of the answer. A cross-complaint may be filed later with the permission of the court. Hence, conceivably a cross-complaint could be filed shortly before the trial, but the judge would have the discretion to refuse to permit such a filing unless it would raise no new factual issues and could be tried together with the main action.

Section 184 envisions the possibility that the guilty spouse may not be subject to personal service. If he cannot be personally served in time to permit the joint trial of the action and cross-action, the judge is required to sever the actions for purposes of trial. Again, it is conceivable that the defendant would refuse to serve the cross-complaint in order to force a separate trial. The guilty spouse could defeat such a purpose merely by appearing in the action. Moreover, Code of Civil Procedure Section 581a requires an action to be dismissed unless summons is issued within one year and served within three years. Some older cases held that this provision did not apply to cross-complaints. Nonetheless, a court has inherent power to dismiss a cross-complaint for want of prosecution where there has been an unreasonable delay in proceeding with the cross-action. See CHADBOURN, GROSSMAN, VAN ALSTYNE, CALIFORNIA PLEADING § 1734 (1961). Thus, there are

some incentives for proceeding diligently while the guilty spouse is amenable to service. This scheme avoids a collateral inquiry in a second suit as to the whereabouts of the guilty spouse at all times during the first suit, the knowledge of the defendant as to the guilty spouse's whereabouts, the ease with which service could be made at such place, etc.

Subdivision (b) is explained the tentative recommendation. Without such a provision, the meaning of Section 417 insofar as this section is concerned would be obscure.

Subdivision (c) has been included to preserve the guilty spouse's right to a jury trial on the issue of fault. Once his fault is determined, the court's determination of the defendant's right to contribution depends on the exercise of its equitable jurisdiction. Accordingly there is no jury trial on a motion for contribution judgment. The jury trial provision is limited solely to the issue of fault.

Subdivision (d) has been included to clarify the relationship of Sections 183 to 185 to the right to contribution under the Code of Civil Procedure. Failure to claim contribution under these sections does not impair any right to contribution that may exist under the Code of Civil Procedure provisions.

Section 9

Section 9 has been added for the reason stated in the Comment on page 23.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

TENTATIVE RECOMMENDATION
of the
CALIFORNIA LAW REVISION COMMISSION
relating to
WHETHER DAMAGES FOR PERSONAL INJURY TO A MARRIED PERSON
SHOULD BE SEPARATE OR COMMUNITY PROPERTY

Personal injury damages as separate or community property

Prior to the enactment of Civil Code Section 163.5 in 1957, damages awarded for a personal injury to a married person were community property. CIVIL CODE §§ 162, 163, 164; Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949); Moody v. So. Pac. Co., 167 Cal. 786, 141 Pac. 388 (1914). Each spouse thus had an interest in any damages that might be awarded to the other for a personal injury. Therefore, if an injury to a married person resulted from the concurrent negligence of that person's spouse and a third party, the injured person was not permitted to recover damages, for to allow damages would permit the negligent spouse, in effect, to recover for his own negligent act. Kesler v. Pabst, 43 Cal.2d 254, 273 P.2d 257 (1954).

Civil Code Section 163.5, which provides that damages awarded to a married person for personal injuries are separate property, was enacted in 1957. Its purpose was to prevent the contributory negligence of one spouse from being imputed to the other to bar recovery of damages because of the community property interest of the guilty spouse in those damages. 4 WITKIN, SUMMARY OF CALIFORNIA LAW 2712 (1960).

Although Section 163.5 eliminated the doctrine of imputed contributory negligence, its sweeping provisions have had other and less desirable

consequences. It applies in any action for personal injuries to a married person regardless of whether the other spouse had anything to do with the injuries. Although earnings are community property--and are usually the chief source of the community property--damages for the loss of future earnings are made the separate property of the injured spouse by Section 163.5. Expenses incurred by reason of a personal injury are usually paid from community property, yet Section 163.5 seems to make the entire damages award for such medical expense the separate property of the injured spouse. Thus, the statute prevents the community from recovering for the real losses that it has suffered by reason of the injury.

As separate property, the damages received for personal injury may be disposed of by gift or will without limitation. They are not subject to division on divorce. In case of an intestate death, the surviving spouse receives all of the community property, but may receive as little as one third of the separate property. Many couples may convert the award to community property and inadvertently incur a gift tax liability upon which penalties and interest may accrue for years before it is discovered.

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

Management of personal injury damages; payment of tort liabilities generally

In Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641 (1941), the Supreme Court held that the community property is subject to liability for the husband's torts. In McClain v. Tufts, 83 Cal. App.2d 140, 187 P.2d

818 (1947), it was held that the community property is not subject to liability for the wife's torts. Both of these decisions were based on the husband's right to manage the community property, and both were decided before the enactment of Civil Code Section 171c, which gives the wife the right to manage her earnings. The rationale of these decisions indicates that the community property under the wife's control pursuant to Section 171c is subject to liability for her torts and is not subject to liability for the husband's torts; but no reported decisions have ruled on the matter. Cf. Tinsley v. Bauer, 125 Cal. App.2d 724, 271 P.2d 116 (1954)(wife's "earnings" derived from embezzlement are subject to the quasi-contractual liability incurred by the wife as a result of the embezzlement under Civil Code Section 167).

Because a wife's personal injury damages are her separate property under Civil Code Section 163.5, they are now subject to her management and control and to liability for her torts. It is unnecessary and undesirable to change these aspects of the existing law even though personal injury damages are made community property.

If personal injury damages were made community property subject to the husband's management, the law would work unevenly and unfairly. A judgment creditor of the wife, who would have been able to obtain satisfaction from the wife's earnings, would be unable to levy on damages paid to the wife for the loss of those earnings. A husband's creditor would be able to levy on the damages paid for the wife's lost earnings even though he could not have reached the earnings themselves. The wife's asset, her earning capacity, would be converted in effect to the husband's asset by a damages award. Yet no such conversion takes place when the husband recovers personal injury damages. When

Section 171c was enacted, the wife was given the right to manage the community property that consisted of her earnings and personal injury damages. Upon repeal of Section 163.5, Section 171c should be amended to again give the wife the right to manage her personal injury damages. At the same time, legislation should be enacted to make clear that the tort liabilities of each spouse may be satisfied only from the separate property of the liable spouse or from the community property subject to that spouse's management and control.

Payment of tort liabilities--interspousal torts

Under existing law, it seems likely that a spouse's tort liabilities may be satisfied from either his separate property or the community property subject to his control. See discussion, supra, p. . When the liability is incurred because of an injury inflicted by one spouse upon the other (see Self v. Self, 58 Cal.2d 683, 26 Cal. Rptr. 97, 376 P.2d 376 P.2d 65 (1962), and Klein v. Klein, 58 Cal.2d 692, 26 Cal. Rptr. 102, 376 P.2d 70 (1962), which abandon the rule of interspousal tort immunity), it seems unjust to permit the liable spouse to use the community property (including the injured spouse's share) to discharge the liability when the guilty spouse has separate property with which the liability could be discharged. The guilty spouse should not be entitled to keep his separate estate intact while the community property is depleted to satisfy an obligation arising out of an injury caused by the guilty spouse to the co-owner of the community.

Accordingly, the Commission recommends the enactment of legislation that would require a spouse to exhaust his separate property to discharge a tort liability arising out of an injury to the other spouse before the community property subject to the guilty spouse's control may be used for that purpose.

The Commission considered, but does not recommend, a proposal that would retain the rule that personal injury damages are separate property when the injury results in whole or in part from the fault of the other spouse and would require the payment of such damages from the guilty spouse's share of the community. See Note, 51 CAL. L. REV. 448 (1963). The Commission has disapproved the suggestion because it would merely limit the difficulties and problems created by the existing law to the one situation where there has been an interspousal tort. See discussion, supra, p. . Permitting a spouse to satisfy a liability arising out of an injury to the other spouse with the community property subject to the guilty spouse's control (after exhaustion of the separate property) and providing that the damages when received are community property subject to the injured spouse's control gives the injured spouse protection substantially equivalent to that which might be provided by a rule requiring the division of the community property. The damages are not subject to the guilty spouse's debts, whether in contract or in tort. Control over the amount paid shifts from the guilty spouse to the injured spouse (except that a gift cannot be made without the consent of the other spouse). Yet, the difficulties that exist when personal injury damages are separate property are avoided. Damages given to replace lost earnings are treated just as the earnings would have been. No unexpected tax consequences ensue if the parties commingle the funds with community property or otherwise treat them as community property. The property descends as community property would descend.

Accordingly, the Commission does not recommend any legislation requiring a division of the community property for the purpose of satisfying one spouse's tort liability to the other.

Imputed contributory negligence

Under the pre-1957 law, the doctrine of imputed contributory negligence barred an innocent spouse from any recovery for an injury caused by the negligence of the other spouse and a third party. The enactment of Section 163.5 in 1957, in effect, permitted the injured spouse to place the entire tort liability burden upon the third party and exonerate the other spouse whose actions also contributed to the injury. The enactment of legislation making personal injury damages awarded to a married person community property will again raise the problem that Section 163.5 was enacted to solve.

A fairer way to allocate the burdens of liability while protecting the innocent spouse would be to utilize the principle of contribution between joint tortfeasors. The principle of contribution provides a means for providing the innocent spouse with complete relief, relieving a third party whose actions but partially caused the injury from the entire liability burden, and requiring the guilty spouse to assume his proper share of responsibility for his fault.

The existing contribution statute (CODE CIV. PROC. §§ 875-880) does not provide an effective right to contribution when one of the joint tortfeasors is the spouse of the plaintiff. Under the existing statute, the plaintiff is in virtually complete control of a defendant's right to contribution; for the contribution right does not exist unless there is a common judgment against the joint tortfeasors. A defendant has no right to cross-complain for contribution against a person not named as a defendant by the plaintiff. Cf. Thornton v. Luce, 209 Cal. App.2d 542, 26 Cal. Rptr. 393 (1962). Thus a plaintiff may shield his spouse from contribution liability by the simple expedient of refusing to name the spouse as a defendant. The close relationship of the parties would encourage a plaintiff to utilize this control

over the defendant's right to contribution merely to shield the plaintiff's spouse from responsibility for his fault. Therefore, to create an adequate right to contribution when the plaintiff's spouse is involved, legislation should be enacted which gives a defendant the right to cross-complain against the plaintiff's spouse for the purpose of seeking contribution, and the plaintiff should be deprived of the power to exonerate the guilty spouse from contribution liability.

PROPOSED LEGISLATION

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

An act to repeal Section 163.5 of, to amend Sections 171a and 171c of,
and to add Sections 164.5, 164.7, 183, 184, and 185 to, the Civil
Code, relating to tort liability by and to married persons.

SECTION 1. Section 163.5 of the Civil Code is repealed.

~~163.5.--All-damages,-special-and-general,-awarded-a-married
person-in-a-civil-action-for-personal-injuries,-are-the-separate
property-of-such-married-person.~~

Comment. Prior to the enactment of Section 163.5 in 1957, damages
awarded for personal injuries were community property. The repeal of
Section 163.5 will restore the former rule. See Civil Code Sections 164
and 171c (as amended herein).

SEC. 2. Section 164.5 is added to the Civil Code, to read:

164.5. If a married person is injured by the negligent or wrongful act or omission of a person other than his spouse, the fact that the negligent or wrongful act or omission of the spouse of the injured person was a concurring cause of the injury is not a defense in any action brought by the injured person to recover damages for such injury except in cases where such concurring negligent or wrongful act or omission would be a defense if the marriage did not exist.

Comment. Section 163.5 was enacted in 1957 in an effort to overcome the holding in Kesler v. Pabst, 43 Cal.2d 254, 273 P.2d 257 (1954), that an injured spouse could not recover from a negligent tortfeasor if the other spouse were contributively negligent, for to permit recovery would allow the guilty spouse to profit from his own wrongdoing because of his community property interest in the damages. Section 163.5 made personal injury damages separate property so that the guilty spouse would not profit and his wrongdoing could not be imputed to the innocent spouse. The remedy provided by Section 163.5 was too drastic. It applied to any personal injury damages--even when no guilty spouse was involved. Moreover, much of any personal injury damages award to a married person compensates for direct losses to the community--loss of future earnings, medical expenses, etc. Damages awarded to compensate for these losses should be treated as community property; they should be divisible on divorce, they should descend to heirs and devisees in the manner that community property descends, and the recipient of the damages should not be privileged to give it away without consideration. Accordingly, Section 163.5 has been repealed in this statute,

and, instead, Section 164.5 deals directly with the problem of imputed contributory negligence or imputed wrongdoing. Section 164.5 provides directly that the contributory negligence or wrongdoing of the other spouse is no defense to an action for personal injury damages brought by an injured spouse. Instead of giving a tortfeasor a complete defense to an action by the innocent spouse, Sections 183-185 give the tortfeasor a right to obtain contribution from the guilty spouse.

SEC. 3. Section 164.7 is added to the Civil Code, to read:

164.7. (a) For injury to a married person caused in whole or in part by the negligent or wrongful act or omission of the other spouse, the community property may not be used to discharge the liability of the tortfeasor spouse to the injured spouse or his liability to make contribution to any joint tortfeasor until the separate property of the tortfeasor spouse, not exempt from execution, is exhausted unless the injured spouse gives written consent after the occurrence of the injury.

(b) This section does not affect the right to indemnity provided by any insurance or other contract to discharge the tortfeasor spouse's liability, whether or not the consideration given for such contract consisted of community property, if such contract was entered into prior to the injury.

Comment. In Self v. Self, 58 Cal.2d 683, 26 Cal. Rptr. 97, 376 P.2d 65 (1962), the California Supreme Court held that one spouse may be liable to the other spouse for personal injuries tortiously inflicted. Prior to the enactment of Section 164.5, the court had followed the rule that a spouse was immune from tort liability to the other spouse for the reason, among others, that the damages would be paid from the community property and would be community property when received. Hence, an interspousal tort action would be circuitous.

The repeal of Section 163.5 once more creates the possibility of such circuitry of action. Section 164.7 is added to the Civil Code to require that the tortfeasor spouse resort first to his separate property to satisfy a tort obligation arising out of an injury to the other spouse. And in

Section 171c, the injured spouse is given the right of management over the damages paid.

Subdivision (a) provides that the tortfeasor spouse may use community property before his separate property is exhausted if he obtains the written consent of the injured spouse after the occurrence of the injury. The time limitation in subdivision (a) is designed to prevent an inadvertent waiver of the protection provided in subdivision (a) in a marriage settlement agreement or property settlement contract entered into long prior to the injury.

Subdivision (b) is designed to permit the tortfeasor spouse to rely on any liability insurance policies he may have even though the premiums have been paid with community funds.

SEC. 4. Section 171a of the Civil Code is amended to read:

171a. ~~(a) For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor,~~ A married person is not liable for any injury or damage caused by the other spouse except in cases where he would be jointly liable with her therefor if the marriage did not exist.

(b) Damages for which a married person is liable may be recovered only from the separate property of such married person and the community property of which he has the management, disposition, and control,

Comment. Prior to the enactment of Section 171a in 1913, a husband was liable for the torts of his wife merely because of the marital relationship. Henley v. Wilson, 137 Cal. 273, 70 Pac. 21 (1902). Section 171a was added to the code to overcome this rule and to exempt the husband's separate property and the community property subject to his control from liability for the wife's torts. McClain v. Tufts, 83 Cal. App.2d 140, 187 P.2d 818 (1947). The section was not intended to, and did not, affect the rule that one spouse may be liable for the tort of the other under ordinary principles of respondeat superior. Perry v. McLaughlin, 212 Cal. 1, 297 Pac. 554 (1931)(wife found to be husband's agent); Ransford v. Ainsworth, 196 Cal. 279, 237 Pac. 747 (1925)(husband found to be wife's agent); McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417 (1917)(operation of husband's car by wife with his consent raises inference of agency). Subdivision (a) revises the language of the section to clarify its original meaning.

Subdivision (b) has been added to eliminate any uncertainty over the nature of the property that is subject to each spouse's tort liabilities. It is consistent with the existing law to the extent that the existing law can be ascertained. Grolemond v. Cafferata, 17 Cal.2d 679, 111 P.2d 641 (1941), held that the community property is subject to the husband's tort liabilities because of his right of management and control over the community. McClain v. Tufts, 83 Cal. App.2d 140, 187 P.2d 818 (1947), held that the community property is not subject to the wife's tort liabilities because of her lack of management rights over the community. Under the rationale of these cases, the enactment of Civil Code Section 171c in 1951--giving the wife the right of management over her earnings and personal injury damages--probably subjected the wife's earnings and personal injury damages to her tort liabilities; but no case so holding has been found.

The language of subdivision (b) is not limited to tort liabilities because such a limitation would serve no useful purpose. Subdivision (b) is consistent with Civil Code Sections 167-171 which state the extent to which contractual liabilities may be satisfied from community and separate property. A wife's earnings were subject to her contractual liabilities before Section 171c gave her the general right of management over them. CIVIL CODE § 167; Tinsley v. Bauer, 125 Cal. App.2d 724, 271 P.2d 116 (1954).

SEC. 5. Section 171c of the Civil Code is amended to read:

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 has the 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 and to reimburse his separate property or the community property subject to his management, control, and disposition for expenses paid by reason of the wife's personal injuries .

During such time as the wife may have the management, control and disposition of such money, as herein provided, she may not make a gift thereof, 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.

Comment. Section 171c is here restored to substantially the same form in which it appeared prior to 1957. The provisions giving the wife control over her personal injury damages were deleted in 1957 because Section 163.5 was then enacted to make such damages separate instead of community property. The repeal of Section 163.5 requires the restoration of the pre-1957 language to Section 171c.

SEC. 6. Section 183 is added to the Civil Code, to read:

183. If a money judgment is rendered against one or more defendants in a tort action for an injury to the plaintiff and the negligent or wrongful act or omission of the spouse of the plaintiff is adjudged to have been a proximate cause of the injury, the plaintiff's spouse, whether or not liable to the plaintiff, shall be deemed to be a joint tortfeasor judgment debtor and liable to make contribution in accordance with Title 11 (commencing with Section 875) of Part 2 of the Code of Civil Procedure.

Comment. Sections 183-185 are added to the Civil Code to provide a means for requiring a spouse to contribute to any judgment against a third party for tortious injuries inflicted on the other spouse when the injuries were caused by their concurring negligence or wrongdoing.

Until 1957, the doctrine of imputed contributory negligence forced the innocent spouse to bear the entire loss caused by the negligence of the other spouse and the third party tortfeasor. Section 163.5, in effect, permitted the injured spouse to place the entire tort liability burden upon the third party tortfeasor and exonerate the other spouse whose actions also contributed to the injury. A fairer way to allocate the burdens of liability while protecting the innocent spouse is to require contribution between the joint tortfeasors. These sections provide a means for doing so.

Section 183 establishes the right of a defendant to obtain contribution from the plaintiff's spouse. It applies only if the defendant is held liable to the plaintiff for tortiously inflicted injuries. Thus, no issue of contribution can arise if the defendant is not liable. If the defendant is held liable, he is entitled to contribution from the plaintiff's spouse if

the negligence or misconduct of the plaintiff's spouse is adjudged to have been a proximate cause of the injury involved in the case.

Section 183 requires an adjudication that the negligence or misconduct of the plaintiff's spouse was a proximate cause of the injury before the right to contribution arises. To obtain an adjudication that is personally binding on the spouse, the defendant must proceed against the spouse by cross-complaint and see that he is properly served. See Section 184 and the Comment thereto. Usually the fault of the defendant and the fault of the spouse will be determined at the same time by the same judgment. But if the defendant's cross-action is severed and tried separately, the showing required by Section 183 for an adjudication that the plaintiff's spouse is a joint tortfeasor consists merely of the judgment against the defendant and the fault of the spouse. Section 183 does not permit a contest of the merits of the judgment against the defendant in the trial of the cross-action. Cf. Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949)(nonparty spouse bound by judgment in action for personal injuries brought by other spouse because of privity of interest in the damages sought).

After the defendant has obtained a judgment establishing that the plaintiff's wife is a joint tortfeasor, his right to contribution is governed by Sections 875-880 of the Code of Civil Procedure, relating to contribution among joint tortfeasors. Thus, for example, the right of contribution may be enforced only after the tortfeasor has discharged the judgment or has paid more than his pro rata share. The pro rata share is determined by dividing the amount of the judgment among the total number of tortfeasors; but where more than one person is liable solely for the tort of one of them--as in master-servant situations--they contribute one pro rata share. There is no right to

contribution in favor of any tortfeasor who intentionally injured the injured person. Consideration received for a release given to one joint tortfeasor reduces the amount the remaining tortfeasors have to contribute. And the enforcement procedure specified in Code of Civil Procedure Section 878 is applicable.

Under Section 183 the defendant is entitled to contribution from the plaintiff's spouse even though that spouse might not be independently liable to the injured spouse. For example, if the guilty spouse has a good defense based on Vehicle Code Section 17158 as against the other spouse, he may still be held liable for contribution under Section 183.

SEC. 7. Section 184 is added to the Civil Code, to read:

184. (a) A defendant's right to contribution from the plaintiff's spouse under Section 183 must be claimed, if at all, by cross-complaint in the action brought by the plaintiff. If trial of the cross-action together with the plaintiff's action would unduly delay the trial of plaintiff's action, the court shall order the cross-action severed from the plaintiff's action.

(b) For the purpose of serving the cross-complaint under Code of Civil Procedure Section 417, the cause of action against the plaintiff's spouse is deemed to have arisen when the plaintiff's cause of action arose.

(c) Each party to the cross-action has a right to a jury trial on the question whether the negligent or wrongful act or omission of the cross-defendant was a proximate cause of the plaintiff's injury.

(d) Failure of the defendant to claim contribution under Section 183 in accordance with this section does not impair any right to contribution that may otherwise exist.

Comment. Section 184 prescribes the procedure through which the right to contribution created by Section 183 may be asserted.

Subdivision (a) requires that the right to contribution under Section 183 be claimed by cross-complaint. In the usual case, this will require the issues presented by the principal action and the cross-action to be tried together. The California courts previously have permitted the cross-complaint to be used to join a stranger to pending litigation for the purpose of securing contribution from the stranger. City of Sacramento v. Superior Court,

205 Cal. App.2d 398, 23 Cal. Rptr. 43 (1962). Subdivision (a) requires the use of the cross-complaint so that all of the issues may be settled at the same time if it is possible to do so. If for some reason a joint trial would unduly delay the plaintiff's action--as, for example, if service could not be made on the plaintiff's spouse in time to permit a joint trial--the court is required by subdivision (a) to sever the actions so that the plaintiff's action may proceed to trial in the normal course of events. In addition, the court has the discretion to order a severance if it determines to do so in the interest of justice. CODE CIV. PROC. § 1048; Roylance v. Doelger, 57 Cal.2d 255, 261-262, 19 Cal. Rptr. 7, 368 P.2d 535 (1962).

Section 417 of the Code of Civil Procedure permits a personal judgment to be rendered against a person who is personally served outside the state if he was a resident of the state at the time of service, at the time of the commencement of the action, or at the time the cause of action arose. Subdivision (b) will permit personal service of the cross-complaint outside the state if the cross-defendant was a resident at the time the plaintiff's (the cross-defendant's spouse) cause of action arose.

If the plaintiff's spouse were a codefendant in the principal action, he would be entitled to a jury trial on the issue of his fault. Subdivision (c) preserves his right to a jury trial on the issue of his fault where he is brought into the action by cross-complaint for contribution. After an adjudication that the plaintiff's spouse is a joint tortfeasor with the defendant, neither joint tortfeasor is entitled to a jury trial on the issue of contribution. Judgment for contribution is made upon motion after entry

of the judgment determining that the parties are joint tortfeasors and after payment by one tortfeasor of more than his pro rata share of that judgment. CODE CIV. PROC. §§ 875(c), 878. The court is required to administer the right to contribution "in accordance with the principles of equity." CODE CIV. PROC. § 875(b). As the issues presented by a motion for a contribution judgment are equitable issues, there is no right to a jury trial on those issues.

Subdivision (d) is included to make it clear that a person named as a defendant does not forfeit his right to contribution under Code of Civil Procedure Sections 875-880 if the plaintiff's spouse is named as a codefendant in the original action and he fails to cross-complain against the spouse pursuant to Sections 183 and 184.

SEC. 8. Section 185 is added to the Civil Code, to read:

185. Subdivision (b) of Section 877 of the Code of Civil Procedure does not apply to the right to obtain contribution from the spouse of the injured person as provided in Section 183.

Comment. Section 877(b) of the Code of Civil Procedure provides that a release, dismissal, or covenant not to sue or not to enforce a judgment discharges the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors. The policy underlying this provision of the Code of Civil Procedure is to permit settlements to be made without the necessity for the concurrence of all of the defendants. Without such a provision, a plaintiff's settlement with one defendant would provide that defendant with no assurance that another defendant would not seek contribution at a later time. Here, however, the close relationship of the parties involved would encourage the giving of a release from one spouse to the other merely for the purpose of exacting full compensation from the third party tortfeasor and defeating his right of contribution. To permit such releases to discharge a spouse's duty to contribute under these sections would frustrate the purpose underlying this law. Hence, the provisions of Code of Civil Procedure Section 877(b) are made inapplicable to contributions sought under Section 183.

SEC. 9. This act does not apply to any cause of action arising out of an injury occurring prior to the effective date of this act.

Comment. This act changes the nature of personal injury damages from separate to community property. It also creates a contribution liability on the part of a person who may have been previously immune from liability for his conduct. In order to avoid making any change in rights that may have become vested under the prior law, therefore, the act is made inapplicable to causes of action arising out of injuries occurring prior to the effective date of the act.