#53 11/15/65

Memorandum 65-70

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

Attached to this memorandum are two copies of a tentative recommendation that has been revised to reflect the decisions made at the last meeting.

The following matters should be noted:

Section 163.5

The repeal of Section 163.5 has been previously approved. At the last two meetings, however, we have been unable to agree on whether some vestige of the rule stated in Section 163.5 should be retained so far as interspousal torts are concerned.

So far as we have been able to ascertain, apparently most standard personal liability insurance policies exclude from their coverage liability to the insured's spouse so long as they are living together. Accordingly, we think it can be fairly well assumed that an interspousal tort action is likely to be a legitimate tort action designed to exact payment from the other spouse and not one designed to extract payment from some third party insurance company for the real benefit of both spouses.

Set forth below are two alternative amendments to Section 163.5, either of which may be considered as a way of solving the Commission's problem.

AMENDMENT NO. 1

163.5. All money or other property paid to a person in satisfaction of a judgment for damages for personal injuries to such person or pursuant to an agreement for the settlemen or compromise of a claim for damages for personal injuries to such person is the separate property of such person if he is not married at the time of the judgment or agreement or if he is living separate and apart from his spouse at the time of judgment or agreement.

Comment: Amendment No. 1 is based upon the idea that if a married person is living with his spouse and they have a still viable community of interest, personal injury damages paid to the spouse should be community property. If they have separated, the damages paid to a married person should be his separate property whether the damages are paid by the other spouse or by some third party.

The date of the judgment or settlement agreement is the crucial date instead of the date on which the cause of action arose because of the fact that the tort committed by one spouse on the other before their separation may have been one of the events leading to the separation. In such a case, the amount paid in settlement should be separate property although the parties had not separated at the time of the tort.

AMENDMENT NO. 2

163.5. All money or other property paid by or on behalf of a married person to his spouse in satisfaction of a judgment for damages for personal injuries to the spouse or pursuant to an agreement for the settlement or compromise of a claim for damages for personal injuries to the spouse is the separate property of the injured spouse.

Comment: Amendment No. 2 is designed to deal with only the problem of the interspousal tort. Under this amendment, money paid by one spouse to the other for personal injuries sustained by the latter is separate property. The amendment is based upon the idea that if one spouse insists that the other pay for personal injuries, the payee will receive real compensation only if the payment is separate property.

Under this amendment, the guilty spouse can still pay the award with community property. Half of the injured spouse's share can thus be used to pay the injured spouse. The money as received, is all separate property.

The injured spouse is technically as well off in such a case as he would be if he recovered his personal injury damages from a third person. If a third person pays a $10,000 judgment, $5,000 belongs to the injured spouse and $5,000 to the other spouse as community property. The injured spouse thus receives as a personal asset only $5,000. If the guilty spouse takes $10,000 of community property and pays it to the injured spouse, the injured spouse now has $10,000, $5,000 of which were contributed from the injured spouse's share. Hence, the injured spouse's net increase in worth has been $5,000. Thus, in theory, the injured spouse receives under this system approximately what he would receive in value from a third person.

This theory, however, breaks down to a certain extent when the guilty spouse uses his separate property to discharge the tort liability. In such a case, the injured spouse receives $10,000 as separate property--an increase of value available to the injured spouse only if it is the other spouse who committed the tort.

Section 164.7

Section 164.7 has not been approved because of the Commission's disagreement over the nature of the recovery in interspousal tort situations.

The Commission asked concerning the purpose of the last clause of subdivision (b). That clause is designed to prevent avoidance of Section 164.7. It is designed to meet specifically the contention that a spouse could, after the tortious injury to the other spouse, use community property as consideration for an indemnity contract to indemnify him against his potential liability for the tort. If, at the time of the injury, the guilty spouse has sufficient separate property to purchase such a contract, the principle underlying Section 164.7 requires that he use the separate property for that purpose.

Section 171

In the previous drafts of this tentative recommendation, subdivision (b) of Section 171a was never quite satisfactory to the Commission. Accordingly, we have abandoned our attempt to revise subdivision (b) and, instead, have amended Section 171 of the Civil Code to provide in substance that the wife's separate property and the community property subject to her control is subject to her debts. The liability to the husband's torts of the community property subject to the husband's control is left unstated. Case law will continue to provide the source for that rule.

Sections 183-185

These sections have not been considered in detail by the Commission.

At the last meeting the Commission asked the staff to give some consideration to the problem that might arise if the action were commenced by the third party against a spouse. If the spouse cross-complains, can the original plaintiff then cross-complain to bring in the other spouse.

Section 183 could be amended to provide that "plaintiff" includes cross-complainant and "defendant" includes cross-defendant. Section 184 could be amended to authorize a cross-complaint for contribution by a cross-defendant.

We question, however, whether the amendment is really necessary. It is difficult to visualize a situation where a plaintiff would sue an injured spouse for negligence, the injured spouse would cross-complain against the plaintiff, and the plaintiff would then want to assert a right of contribution against the other spouse on the ground that the other spouse's negligence contributed to the accident.

The situation contemplated is as follows: P sues H for negligence. H cross-complains against P for negligence. P then seeks to cross-complain

against W on the ground that W's negligence contributed to the injury to H.

A far more likely situation (still remote, however) is: P sues H and W for concurrent negligence resulting in an injury to P. W cross-complains against P for her injuries on the ground that they were caused by P's negligence. P now seeks to cross-complain in the same action against H, claiming contribution in case P is held liable to W.

Should the statute be amended to provide for this eventuality?

Section 10

This section has not yet been considered by the Commission.

Respectfully submitted,

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#53 11/15/65

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

The 1957 Legislature directed the Law Revision 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." This topic involves more than a determination of the nature of property interests in damages recovered by a married person in a personal injury action; it also involves the question of the extent to which the contributory negligence of one spouse should be imputed to the other, for the doctrine of imputed contributory negligence has been determined in the past by the nature of the property interests in the award.

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 vehicle accidents. Because contributory negligence is imputed to vehicle owners under Vehicle Code Section 17150, that section creates special problems of imputed contributory negligence between spouses. The problems of imputed contributory negligence under Section 17150 are dealt with in a recommendation that will be separately published. Nevertheless, that recommendation should be considered in connection with this recommendation, for the two recommendations taken together, provide a comprehensive and consistent statutory scheme on the subject of imputed contributory negligence between spouses.

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. Estate of Simoni, 220 Cal. App.2d 339, 33 Cal. Rptr. 845 (1963); 4 WITKIN, SUMMARY OF CALIFORNIA LAW 2712 (1960).

Although Section 163.5 eliminated the doctrine of imputed contributory negligence insofar as that doctrine was based on the community nature of a spouse's personal injury damages (see Cooke v. Tsipouroglou, 59 Cal.2d 660, 664, 31 Cal. Rptr. 60, 381 P.2d 940 (1963)), its sweeping provisions have had other and less desirable consequences. First, it applies to any recovery for personal injuries to a married person regardless of whether the other spouse had anything to do with the injuries, thus changing the law in an important respect

although it was unnecessary to do so to remedy the problem the Legislature was attempting to solve. Second, although earnings are community property--and are usually the chief source of the community property--damages for the loss of future earnings are, incongruously, made the separate property of the injured spouse by Section 163.5. Third, while expenses incurred by reason of a personal injury are usually paid from community property, Section 163.5 seems to make any damages awarded as reimbursement for such medical expense the separate property of the injured spouse, thus preventing the community from being reimbursed for the real losses that it has suffered by reason of the injury.

The reclassification of personal injury damages from community to separate property was not a mere technical change of labels. 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. Some couples may, by commingling the damages award with community property, convert it 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 these undesirable ramifications of Section 163.5, the Commission recommends the enactment of legislation that would again make 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 the husband's liability for his 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 upon the husband's recovery of personal injury damages.

Prior to the enactment of Section 163.5, Section 171c provided that the wife had the right to manage, inter alia, the community property that consisted of her 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, pp. 2-3. 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 (1) 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 (2) require the payment of damages by one spouse to the other from the guilty spouse's share of the community. See Note, 51 CAL. L. REV. 448 (1963). This proposal would merely limit the difficulties and problems created by the existing Section 163.5 to the one situation where there has been an interspousal tort. See discussion, supra, p. 2. The Commission's recommendation, 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 his 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 the other proposal. Under both proposals, the damages are not subject to the guilty spouse's debts, whether in contract or in tort. Under both, 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 outlined above, 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

Although the enactment of Section 163.5 has had undesirable ramifications in its effect on the community property system, it did successfully abrogate the doctrine of imputed contributory negligence and allow an injured spouse to recover for injuries caused by the concurring negligence of the other spouse and a third party. See Cooke v. Tsipouroglou, 59 Cal.2d 660, 664, 31 Cal. Rptr. 60, 381 P.2d 940 (1963). 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.

The doctrine of imputed contributory negligence should be met directly--by providing explicitly that the negligence of one spouse is not to be imputed to the other. This would, however, permit an injured spouse to place the entire tort liability burden on the third party and exonerate the other spouse whose actions also contributed to the injury simply by suing the third party alone; for a tortfeasor has no right to contribution from any other tortfeasor under California law unless the joint tortfeasors are both joined as defendants by the plaintiff and a joint judgment is rendered against them.

A fairer way to allocate the burdens of liability while protecting the innocent spouse would be to provide for contribution between the joint tortfeasors. Contribution would provide 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, thus depriving the plaintiff spouse 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 171, 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 is too drastic. It applies 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 paid with community funds, etc. Damages awarded to compensate for these losses should be treated as community property; they should, for example, 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 is repealed,

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 circuity 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 171 of the Civil Code is amended to read:

171. The separate property of the wife , and the community property of which she has the management, disposition, and control, is liable for her own debts contracted or incurred before or after her marriage, but is not liable for her husband's debts; provided, that ~~the separate~~ such property ~~of the wife~~ is liable for the payment of debts contracted by the husband or wife for the necessaries of life furnished to them or either of them while they are living together; provided, that the provisions of the foregoing proviso shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise, succession, or gift, other than by gift from the husband, after marriage.

Comment. Section 171 has been amended to eliminate any uncertainty over the nature of the property that is subject to the wife's tort liabilities. It is consistent with the existing law to the extent that the existing law can be ascertained. Grolemund 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 Section 171 is not limited to tort liabilities because such a limitation would serve no useful purpose. 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 171a of the Civil Code is amended to read:

171a. ~~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.

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). Accordingly, the language of the section has been revised to clarify its original meaning.

SEC. 6. 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. 7. 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 spouse 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. 8. 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. 9. 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. 10. 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.