

#53

8/3/66

Memorandum 66-48

Subject: Study 53 - Personal Injury Damages

The attached recommendation is presented for your approval prior to printing. The recommended legislation was approved at the last meeting for printing. We have revised the recommendation and comments to reflect changes suggested by members of the Commission.

We hope that you will have time to read the recommendation prior to the meeting so that this matter can be handled expeditiously.

We plan to have the pamphlet printed after the August meeting and we hope to have the printed pamphlet available late in September. The research study will be photo-offset in the pamphlet from the article printed in the U.C.L.A. Law Review.

Respectfully submitted,

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Assistant Executive Secretary

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

RECOMMENDATION

relating to

WHETHER DAMAGES FOR PERSONAL INJURY TO A MARRIED PERSON
SHOULD BE SEPARATE OR COMMUNITY PROPERTY

September 1, 1966

California Law Revision Commission
School of Law
Stanford University
Stanford, California

9/1/66

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 study involves more than a consideration of the property interests in damages recovered by a married person in a personal injury action; it also involves a consideration of the extent to which the contributory negligence of one spouse should be imputed to the other, for in the past the determination of this issue has turned in large part on 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 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 negligence under Section 17150 are dealt with in a recommendation¹ that will be separately published. The two recommendations should be considered together, however, since they propose a comprehensive and consistent statutory treatment of the subject of imputed contributory negligence between spouses.

¹ Recommendation and Study Relating to Vehicle Code Section 17150 and Related Sections, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES (1966-67).

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; Zaragoza 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 recovery 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 abrogated 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, including the following:

(1) Section 163.5 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.

(2) 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.

(3) 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 out-of-pocket losses that it has suffered by reason of the injury.

(4) As separate property, the damages received for personal injury are not subject to division on divorce.

(5) As separate property, personal injury damages may be disposed of by gift or will without limitation.

(6) 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 damages awarded for personal injury because they are separate property.

(7) Some couples may, by commingling a 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 they realize that the liability exists.

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 even when no contributory negligence is involved.

Although personal injury damages awarded to a married person should be community property as a general rule, the Commission recommends retention of the rule that such damages are separate property when they are paid in compensation for an injury inflicted by the other spouse. If damages paid by one spouse to the other in compensation for a tortious injury were regarded as community property, the payment would be somewhat circular in that the tortfeasor spouse would be compensating himself to the extent of his interest in the community property.

Management of community property personal injury damages

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. It is unnecessary and undesirable to change this aspect of the existing law even though personal injury damages are made community property.

If personal injury damages were community property subject to the husband's management, the law would work unevenly and unfairly. A creditor of the wife, who would have been able to obtain satisfaction from the wife's earnings (CIVIL CODE § 167; Tinsley v. Bauer, 125 Cal. App.2d 724, 271 P.2d 116 (1954)), would be unable to levy on damages paid to the wife for the loss of those earnings. See CIVIL CODE § 167. 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. See CIVIL CODE § 168. 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 amendment of Section 163.5 to make personal injury damages community property, Section 171c should be amended to again give the wife the right to manage her personal injury damages.

Payment of damages for tort liability of a married person

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).

The Commission recommends the enactment of legislation to make clear that the tort liabilities of the wife may be satisfied from the community property subject to her management and control as well as from her separate property. Such legislation will provide assurance that a wife's personal injury damages will continue to be subject to liability for her torts even though they are community instead of separate property.

When a tort 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 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 that 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.

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 measures:

#53(L)

An act to amend Sections 163.5 and 171a of, and to add Sections 164.6

and 164.7 to, the Civil Code, to add a new chapter heading immediately
preceding Section 875 of, and to add Chapter 2 (commencing with Section
900) to Title 11 of Part 2 of, the Code of Civil Procedure, relating to
tort liability of and to married persons.

The people of the State of California do enact as follows:

SECTION 1. Section 163.5 of the Civil Code is amended to read:

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.~~ 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
such damages is the separate property of the injured spouse.

Comment. Prior to the enactment of Section 163.5 in 1957, damages paid
to a married person for personal injuries were community property. Zaragosa
v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949). The enactment of Section 163.5
made all damages awarded for personal injury to a married person the separate
property of such person. Lichtenauer v. Dorstewitz, 200 Cal. App.2d 777, 19
Cal. Rptr. 654 (1962). Under the above amendment of Section 163.5, personal

injury damages paid to a married person will be separate property only if they are paid by the other spouse. In all other cases, the former rule-- that personal injury damages paid to a married person are community property--will automatically be restored because their character will again be determined by the provisions of Section 164 of the Civil Code.

C
SEC. 2. Section 164.6 is added to the Civil Code, to read:

164.6. 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.

C
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. The rationale of the Kesler holding was that 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.

C
Section 163.5 is amended in this act to restore the former rule that personal injury damages are community property. To prevent the rule of Kesler v. Pabst, 43 Cal.2d 254, 273 P.2d 257 (1954), from again being applied in personal injury actions brought by a married person, Section 164.6 provides directly that the contributory negligence or wrongdoing of the other spouse is not a defense to the action brought by the injured spouse except in cases where such negligence or wrongdoing would be a defense if the marriage did not exist. However, to avoid requiring the third party to pay all of the damages in such a case, he is given a right to obtain contribution from the guilty spouse by Sections 900-910 of the Code of Civil Procedure.

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

164.7. (a) Where an injury to a married person is caused in whole or in part by the negligent or wrongful act or omission of his 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.

(b) This section does not prevent the use of community property to discharge a liability referred to in subdivision (a) if the injured spouse gives written consent thereto after the occurrence of the injury.

(c) 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. As a general rule, a tort liability of a married person may be satisfied from either his separate property or the community property subject to his control. See Section 171a and the Comment thereto. 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. When the liability is incurred because of an injury inflicted by one spouse upon the other, it is unjust to permit the guilty spouse to keep his separate estate intact while the community is depleted to satisfy an obligation resulting from his injuring the co-owner of

the community.

Subdivision (b) 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 limitation 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 (c) 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) The liability of a married person for death or injury to person or property may be satisfied only from the separate property of such married person and the community property of which he has the management 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 the wife's tort liabilities. The subdivision is consistent with the California law to the extent that it 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.

SEC. 5. A new chapter heading is added immediately preceding Section 875 of the Code of Civil Procedure, to read:

CHAPTER 1. CONTRIBUTION AMONG JOINT JUDGMENT TORTFEASORS

SEC. 6. Chapter 2 (commencing with Section 900) is added to Title 11 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 2. CONTRIBUTION IN PARTICULAR CASES

900. As used in this chapter:

(a) "Plaintiff" means a person who recovers or seeks to recover a money judgment in a tort action for death or injury to person or property.

(b) "Defendant" means a person against whom a money judgment is rendered or sought in a tort action for death or injury to person or property.

(c) "Contribution cross-defendant" means a person against whom a defendant has filed a cross-complaint for contribution in accordance with this chapter.

Comment. The definitions in Section 900 are designed to simplify reference in the remainder of the chapter. The definition of "plaintiff" includes a cross-complainant if the cross-complainant recovers or seeks tort damages upon his cross-complaint. Similarly, the defined term "defendant" includes a cross-defendant against whom a tort judgment has been rendered or is sought. The "defendant" may actually be the party who initialed the action. "Contribution cross-defendant" means anyone from whom contribution is sought by means of a cross-complaint under this chapter. The contribution cross-defendant may, but need not, be a new party to the action.

901. If a money judgment is rendered against a defendant in a tort action, a contribution cross-defendant, whether or not liable to the plaintiff, shall be deemed to be a joint tortfeasor judgment debtor and liable to make contribution to the defendant in accordance with Chapter 1 (commencing with Section 875) of this title where:

(a) The defendant or the contribution cross-defendant is the spouse of the plaintiff; and

(b) A negligent or wrongful act or omission of the contribution cross-defendant is adjudged to have been a proximate cause of the death or injury.

Comment. Sections 900-910 have been added to the Code of Civil Procedure 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 an injured spouse to bear the entire loss caused by the concurring negligence of the other spouse and a third party tortfeasor. The 1957 enactment of Section 163.5, in effect, permitted the injured spouse to place the entire tort liability burden upon the third party tortfeasor by suing him alone, thus in practical effect exonerating 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 901 establishes the right of the third party tortfeasor to obtain contribution from the plaintiff's spouse. To give a negligent spouse

an equivalent right of contribution, Section 901 also permits a defendant spouse to obtain contribution from a third party tortfeasor.

Section 901 requires an adjudication that the negligence or misconduct of the defendant's joint tortfeasor was a proximate cause of the injury before the right to contribution arises. To obtain an adjudication that is personally binding on the joint tortfeasor, the defendant must proceed against him by cross-complaint and see that he is properly served. See Section 905 and the Comment thereto. Usually the fault of the defendant and the fault of the contribution cross-defendant 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 901 for an adjudication that the contribution cross-defendant is a joint tortfeasor consists merely of the judgment against the defendant and the fault of the contribution cross-defendant. Section 901 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 contribution cross-defendant 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 defendant 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. 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 901 the defendant may be entitled to contribution even though the person from whom contribution is sought might not be independently liable for the damage involved. For example, if the contribution cross-defendant has a good defense based on Vehicle Code Section 17158 (the guest statute) as against the plaintiff he may still be held liable for contribution under Section 901.

905. A defendant's right to contribution under this chapter must be claimed, if at all, by cross-complaint in the action brought by the plaintiff. The defendant may file a cross-complaint for contribution at the same time as his answer or within 100 days after the service of the plaintiff's complaint upon the defendant, whichever is later. The defendant may file a cross-complaint thereafter by permission of the court.

Comment. Section 905 provides that the right to contribution created by this chapter must be asserted by cross-complaint. If the person claiming contribution began the litigation as a plaintiff and seeks contribution for damages claimed by cross-complaint, Section 905 authorizes him to use a cross-complaint for contribution in response to the cross-complaint for damages.

The California courts previously have permitted the cross-complaint to be used as the pleading device for securing contribution. City of Sacramento v. Superior Court, 205 Cal. App.2d 398, 23 Cal. Rptr. 43 (1962). Section 905 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 contribution cross-defendant in time to permit a joint trial--or if for some other reason a joint trial would not be in the interest of justice, the court may order the actions severed. CODE CIV. PROC. § 1048. See Roylance v. Doelger, 57 Cal.2d 255, 261-262, 19 Cal. Rptr. 7, 368 P.2d 535 (1962).

Under existing law a cross-complaint must be filed with the answer unless the court grants permission to file the cross-complaint subsequently. CODE CIV. PROC. § 442. Under Section 905, however, a cross-complaint for

contribution may be filed as a matter of right within 100 days after the service of the plaintiff's complaint on the defendant even though an answer was previously filed. This additional time is provided because it may not become apparent to a defendant within the brief period for filing an answer (10-30 days) that the case is one where a claim for contribution may be asserted. As in the case of a cross-complaint filed under Section 442, Section 905 also permits a cross-complaint for contribution to be filed after the time when it can be filed as a matter of right if the court permits.

Inasmuch as no right to contribution accrues until the liability of the defendant has been adjudicated and he has paid more than his pro rata share of the judgment, there is no time limit on the right to file a cross-complaint for contribution other than the limitation prescribed in Section 905. A plaintiff's delay in filing his complaint for damages until the end of his limitations period will have no effect on the defendant's right to file a cross-complaint for contribution within the time limits prescribed here.

906. For the purpose of service under Section 417 of a cross-complaint for contribution under this chapter, the cause of action against the contribution cross-defendant is deemed to have arisen at the same time that the plaintiff's cause of action arose.

Comment. 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. Section 906 has been included in this chapter to eliminate any uncertainty concerning the time a cause of action for contribution arises for purposes of service under Section 417. Section 906 will permit personal service of the cross-complaint outside the state if the cross-defendant was a resident at the time the plaintiff's cause of action arose.

907. Each party to the cross-action for contribution under this chapter has a right to a jury trial on the question whether a negligent or wrongful act or omission of the contribution cross-defendant was a proximate cause of the injury or damage to the plaintiff.

Comment. If the contribution cross-defendant were a codefendant in the principal action, he would be entitled to a jury trial on the issue of his fault. Section 907 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 contribution cross-defendant 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.

908. Failure of a defendant to claim contribution in accordance with this chapter does not impair any right to contribution that may otherwise exist.

Comment. Section 908 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 a joint tortfeasor is named as a codefendant in the original action and he fails to cross-complain against his codefendant pursuant to this chapter.

909. Subdivision (b) of Section 877 of the Code of Civil Procedure does not apply to the right to obtain contribution under this chapter.

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 tortfeasors. Without such a provision, a plaintiff's settlement with one tortfeasor would provide that tortfeasor with no assurance that another tortfeasor would not seek contribution at a later time. Here, however, the close relationship of the parties involved would encourage plaintiffs to give releases from liability, not for the purpose of bona fide settlement of a claim, but merely for the purpose of exacting full compensation from the third party tortfeasor and defeating his right of contribution. To permit such releases to defeat the third party's right of contribution 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 contribution sought under this chapter.

910. There is no right to contribution under this chapter in favor of any person who intentionally injured the person killed or injured or intentionally damaged the property that was damaged.

Comment. Section 910 may not be necessary. Section 875(d) provides: "There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person." Section 910, however, is included to make clear that this substantive provision in the chapter relating to joint judgment tortfeasors applies to the right of contribution under this chapter. Moreover, Section 910 applies to intentionally caused property damage, whereas Section 875(d) appears to apply only to intentionally caused personal injuries.

SEC. 7. This act does not confer or impair any right or defense arising out of any death or injury to person or property 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.

An act to amend Section 171c of the Civil Code, relating to community property.

The people of the State of California do enact as follows:

SECTION 1. 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, and control and disposition, ~~other than testamentary except as otherwise permitted by law,~~ of the community personal property money earned by her, and the community personal property received by her as damages for personal injuries suffered by her, until it is commingled with ~~other~~ community property subject to the management and control of the husband, except that the husband may use such community property received as damages 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 and control 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~~ of the community property under her management and control, or dispose of the same without a valuable consideration; without the written consent of the husband. The wife may not make a testamentary disposition of such community property except as otherwise permitted by law.

This section shall not be construed as making such money earnings or damages the separate property of the wife, nor as changing

the respective interests of the husband and wife in such money
community property , as defined in Section 161a of this code.

Comment. Prior to 1957, Section 171c provided that the wife had the right to manage and control her personal injury damages. When Section 163.5 was enacted to make such damages separate instead of community property, the provisions of Section 171c giving the wife the control over her personal injury damages were deleted. As the amendment of Section 163.5 again makes personal injury damages community property instead of separate, Section 171c is amended to restore the provisions relating to the wife's right to manage her personal injury damages.

The personal injury damages covered by Section 171c are only those damages received as community property. Damages received by the wife from her husband are separate property under Section 163.5; hence, Section 171c does not give the husband any right of reimbursement from those damages.

Section 171c has been revised to refer to "personal property" instead of "money." This change is designed to eliminate the uncertainty that existed under the former language concerning the nature of earnings and damages that were not in the form of cash. The husband, of course, retains the right to manage and control the community real property under Section 172a.

The reference to Sections 164 and 169 has been deleted as unnecessary; neither section is concerned with the right to manage and control community property.

SEC. 2. This act shall become effective only if Senate Bill No. _____ is enacted by the Legislature at its 1967 Regular Session, and in such case this act shall take effect at the same time that Senate Bill No. _____ takes effect.

Note: The bill referred to is the first of the two proposed measures contained in this tentative recommendation.