

## Memorandum 90-70

Subject: Study F-672 - Personal Injury Damages as Community or Separate Property (Comments on Schroeder Proposal)

At the April meeting, the Commission considered a proposal by Douglas Schroeder to change the rule that personal injury damages are community property. The staff memo (90-45) discussed the Commission's previous recommendations, the law of other states, Mr. Schroeder's proposal, and practical problems of apportioning damages between those that accrue during marriage and those that accrue before marriage or after marriage dissolution. The staff concluded that it was "not convinced that the practical problems of apportionment are outweighed by its theoretical appeal, particularly since practitioners appear to be satisfied with existing law."

The Commission tabled the proposal, and asked the staff to send the memo to the State Bar Family Law Section, California Trial Lawyers, and family law professors to ask for comments on whether existing law should be changed as suggested by Mr. Schroeder. The staff sent these out on May 2. Neither the Family Law Section nor the Trial Lawyers have responded. Barry Russ says the Family Law Section cannot respond until the questions raised by *Keller v. State Bar of California* have been resolved.

Team 4 of State Bar Probate Section Prefers Existing Law

We do have a response from Team 4 of the State Bar Estate Planning, Trust and Probate Law Section, attached as Exhibit 1. Team 4 says existing law has been in effect for almost 20 years and has worked well. "No compelling reason exists to change current law and for that reason, Team 4 strongly recommends that the Law Revision Commission take no action to change existing law."

Responses of Family Law Professors

We sent the memo to the 41 family law professors to whom we wrote concerning the proposed new Family Code. One letter was returned as undeliverable. Three professors responded but declined to comment. Two professors commented -- former Loyola Law School Professor Sheila Kuehl, now managing attorney for the Southern California Women's Law

Center, and Professor Herma Kay of Boalt Hall. Their letters are attached as Exhibits 2 and 3, respectively.

Sheila Kuehl (Exhibit 2) would keep the rule that personal injury damages are community property if the spouses do not separate or divorce. That would continue application of community property rules at death of one spouse: Half is subject to testamentary disposition of each spouse; in the event of intestacy, all goes to the surviving spouse.

However, she would revise existing law to provide that if the parties separate, non-economic damages (pain and suffering, disfigurement) would be treated as separate property of the injured spouse. This would prevent the family law court from dividing non-economic damages on divorce. She says the existing rule that the court shall assign personal injury damages to the injured spouse unless "the interests of justice require another division" (Civ. Code § 4800(b)(4)) has sometimes been subverted by the courts awarding other community property to the non-injured spouse to offset the award of community property personal injury damages to the injured spouse. She correctly observes that this was not the intent of the Legislature.

Professor Kay (Exhibit 3) thinks California's treatment of personal injury awards is anomalous and confusing. She does not have suggestions for reform, but is willing to comment on tentative drafts.

Staff Recommendation

In view of the strong recommendation of Team 4 of the State Bar Probate Section that we keep existing law, the staff recommends that the Commission take no further action on this proposal.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel

Memo 90-70

EXHIBIT 1

COMM'N  
MAY 31 1990

Study F-672

## STANTON AND BALLSUN

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FILE NO.

BHBA\163.L1

May 31, 1990

BY FAXJohn de Molly  
Executive Secretary  
Law Revision Commission  
4000 Middle Field Road  
Suite D2  
Palo Alto, CA 94303RE: LRC MEMO 90-45, Personal Injury Damages as CP or SP

Dear John:

On May 29, 1990 Team 4 (Harley Spitler, Clark Byam, Robert E. Temmerman, Jr., James Quillinan (Honorary Team 4 Member) and I) of the Executive Committee of the Estate Planning, Trust and Probate Law Section of State Bar discussed the above LRC Memorandum.

The unanimous conclusion of the Team 4 was that current law governing the distribution and characterization of personal injury proceeds had been in existence for almost twenty years and has worked well. No compelling reason exists to change current law and for that reason, Team 4 strongly recommends that the Law Revision Commission take no action to change existing law.

Thank you for your consideration.

Cordially,

*KATHRYN A. BALLSUN*KATHRYN A. BALLSUN  
A Member of  
STANTON AND BALLSUN  
A Law Corporation

KAB/elb

cc: James Quillinan  
Team 4

## Southern California Women's Law Center

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May 22, 1990

Robert J. Murphy III  
Staff Counsel  
California Law Revision Commission  
4000 Middlefield Road, Ste. D-2  
Palo Alto, CA 94303-4739

Dear Mr. Murphy,

Thank you for your inquiry regarding my position on the current and proposed classification of personal injury damages of a married person in California.

Briefly, although it has not been a subject I have thought about over a long period of time, I believe that current law in California does not best serve the interest of an injured spouse. I would, however, divide my answer into the before divorce phase and the during and after divorce phase.

I believe the current law that characterizes the personal injury damages of a married person as community property is fair as it stands. However, I agree, at least, with the general conclusion made by the Legislature in its last revision of this section, that such community property should be treated differently at the time of divorce. I recognize that this might require some tracing on the part of the Court, but, I agree with Professor Reppy that this is no more troubling than other apportionments the Court is called upon to decide.

Essentially, I believe that, from the time of separation, non-economic damages should be treated as though they had been separate property all along. Not only these damages, but any property that had been purchased with these damages would be the separate property of the injured spouse. Current law has created a problem for the practitioner in that several courts, awarding damages to the injured spouse at the time of dissolution, have awarded an equal amount of different community property to the non-injured spouse, under the equal division rule. I don't believe this was the intention of the Legislature, but, nevertheless, courts are confused about what it means to award the damages to the injured spouse as a part of the division of community property.

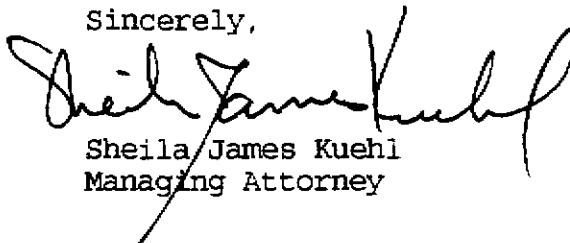
It is true that requiring apportionment of non-economic and economic damages, perhaps years after the damages are awarded, may create another kind of practical problem. However, perhaps there may be a way to encourage courts making these kinds of awards to do that at the time the injury claim is settled or decided.

Economic damages could still be treated as community property and divided at the time of dissolution as they are now, with the bulk of them, at the least, going to the injured spouse.

I hope this isn't too brief to be of any help. Please be advised that I am no longer teaching at the Loyola Law School and am now one of the Managing Attorneys of the Southern California Women's Law Center, the address of which appears above.

Thank you for the opportunity to review this question.

Sincerely,

A handwritten signature in cursive script, reading "Sheila James Kuehl". The signature is written in dark ink and is positioned above the printed name and title.

Sheila James Kuehl  
Managing Attorney

SJK:sam

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JUL 30 1990

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July 26, 1990

Mr. Robert J. Murphy III  
Staff Counsel  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Dear Mr. Murphy:

I have reviewed the law review article you sent to me that recommends changes in the California law concerning classification of personal injury damages received by married persons.

I have been persuaded by Professor Grace Blumberg's treatment of personal injury damages in her coursebook, Community Property in California (Little Brown, 1987), that as she puts it on p. 294, "California's treatment of personal injury awards is anomalous and confusing." The law review article you sent is to the same effect. Without wishing to endorse the recommendations made in the article, I believe the Law Review Commission should undertake renewed study of this subject.

If the Commission decides to authorize such a study, I will be happy to receive and comment on tentative drafts. I urge you to ask Professor Blumberg to do the same.

Sincerely,

Herma Hill Kay  
Richard W. Jennings Professor of Law

cc: Professor Grace Blumberg  
U.C.L.A. Law School