STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

Whether Damages for Personal Injury to a Married Person Should Be Separate or Community Property

October 1966

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

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NOTE

This pamphlet begins on page 401. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 8 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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EDMUND G. BROWN, *Governor*

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October 4, 1966

To His Excellency, Edmund G. Brown
Governor of California and
The Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether an award of damages made to a married person in a personal injury action should be the separate property of such married person. The Commission submits herewith its recommendation relating to this subject and the study prepared by its research consultant, Judge George Brunn of the Municipal Court, Berkeley-Albany Judicial District, California. Only the recommendation (as distinguished from the study) is expressive of Commission intent.

Respectfully submitted,

Richard H. Keatinge
Chairman

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Whether Damages for Personal Injury to a Married Person Should Be Separate or Community Property

BACKGROUND

In 1957 the 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 involved more than a consideration of the property interests in damages recovered by a married person in a personal injury action; it also involved 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 recommendation that will be separately published.[1] 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.

RECOMMENDATIONS

Personal Injury Damages as Separate or Community Property

Prior to 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. Southern 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 person, 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).

[1] *Recommendation and Study Relating to Vehicle Code Section 17150 and Related Sections*, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 501 (1967).

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 in order 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, *Community Property* § 7 at 2712 (7th ed. 1960).

While Section 163.5 succeeded in abrogating the doctrine of imputed contributory negligence between married persons insofar as that doctrine was based on the community nature of the damages award (see *Cooke v. Tsipouroglou*, 59 Cal.2d 660, 664, 31 Cal. Rptr. 60, 62, 381 P.2d 940, 942 (1963)), its sweeping provisions have had other and less desirable consequences, including the following:

(1) The section 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 and going far beyond what was necessary.

(2) Although earnings from personal services are usually the chief source of the community property, damages for the loss of future earnings are made the separate property of the injured spouse.

(3) While expenses incurred by reason of a personal injury are usually paid from community property, damages awarded as reimbursement for such expenses are made the separate property of the injured spouse, thus depriving the community of reimbursement for these expenditures.

(4) As separate property, the damages received for personal injury are not subject to division on divorce and may be disposed of by gift or will without limitation.

(5) In case of an intestate death, the surviving spouse, who would inherit all of the community property, may receive as little as one-third of the damages awarded for personal injury because they are separate property.

(6) 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.

(7) Upon the death of the injured spouse, the damages awarded for personal injuries are subject to an inheritance tax even though they are inherited by the surviving spouse, while community property goes to the surviving spouse tax free.

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 tortfeasor spouse would be compensating himself to the extent of his interest in the community property.

Management of Personal Injury Damages as Community Property

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 return to 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 between spouses and, thus, allow an injured spouse to recover for injuries caused by the concurring negligence of the other spouse and a third person. See *Cooke v. Tsipouroglou*, 59 Cal.2d 660, 664, 31 Cal. Rptr. 60, 62, 381 P.2d 940, 942 (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 person and exonerate the other spouse whose actions also contributed to the injury simply by suing the third person 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 be a means for providing the innocent spouse with complete relief, relieving a third person whose actions only 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 con-

tribution; 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:

I

An act to amend Sections 163.5 and 171a of, and to add Sections 164.6 and 164.7 to, the Civil Code, and to add a chapter heading immediately preceding Section 875, in Title 11 of Part 2, of, and to add Chapter 2 (commencing with Section 900) to Title 11 of Part 2 of, the Code of Civil Procedure, relating to married persons, including their community property and tort liability.

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

CIVIL CODE

§ 163.5 (amended)

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 the character of such damages will again be determined by the provisions of Section 164 of the Civil Code.

§ 164.6 (new)

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.

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.

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 the *Kesler* case 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 person 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.

§ 164.7 (new)

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.

§ 171a (amended)

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.

CODE OF CIVIL PROCEDURE

SEC. 5. A chapter heading is added immediately preceding Section 875 of the Code of Civil Procedure, in Title 11 of Part 2, 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 (new)

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 initiated 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 (new)

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 Title 11 (commencing with Section 875) of Part 2 of the Code of Civil Procedure 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 provide a means for requiring a spouse to contribute to any judgment against a third party for tortious injuries, caused by their concurring negligence or wrongdoing, that were inflicted on the other spouse.

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 Civil Code Section 163.5 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. Sections 900–910 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.

Before the right to contribution can arise, Section 901 requires an adjudication that the negligence or misconduct of the defendant's joint tortfeasor was a proximate cause of the injury. 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. If, however, the defendant's cross-action is severed and tried separately, the contribution cross-defendant will be adjudged to be a joint tortfeasor within the meaning of Section 901 if the judgment against the defendant and the concurring fault of the contribution cross-defendant are shown. 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 Code of Civil Procedure Sections 875–880 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. 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, even 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 (new)

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, 11, 368 P.2d 535, 539 (1962).

Under Code of Civil Procedure Section 442, a cross-complaint must be filed with the answer unless the court grants permission to file the

cross-complaint subsequently. 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. 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. Thus, a plaintiff's failure to file his complaint for damages until just prior to the expiration of the applicable statute of limitations will have no effect on the defendant's right to file a cross-complaint for contribution within the time limits prescribed here.

§ 906 (new)

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 (new)

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 judg-

ment 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). Since 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 (new)

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 (new)

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. Since this would frustrate the purpose underlying this law, the provisions of Code of Civil Procedure Section 877(b) are made inapplicable to contribution sought under this chapter.

§ 910 (new)

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 it 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.

SAVINGS CLAUSE

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, the act is made inapplicable to causes of action arising out of injuries occurring prior to the effective date of the act.

II

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:

Civil Code § 171c (amended)

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. Since the amendment of Section 163.5 again makes personal injury damages community instead of separate property, 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.

When act becomes effective

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 recommendation.

A STUDY RELATING TO CALIFORNIA PERSONAL INJURY DAMAGE AWARDS TO MARRIED PERSONS*

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CALIFORNIA PERSONAL INJURY DAMAGE AWARDS TO MARRIED PERSONS

George Brunn*

A. *Statement of the Problem*

In California, until 1957, damages recovered by a husband or wife for his or her personal injuries were community property.[1] Courts came to this conclusion by what seemed like simple logic. The California Civil Code defined separate property as that property owned before marriage or acquired afterwards by gift, bequest, devise or descent; "all other property acquired after marriage" was community property.[2] Inasmuch as a damage award was not acquired by gift, bequest, devise or descent, it was community property.[3]

The characterization of such damages as community property led courts to prevent a spouse from recovering when the injury was caused by the negligence of a third person and the contributory negligence of the other spouse.[4] The reasoning was that since the damages would belong to the community, the negligent spouse would —if recovery were allowed—share in the recovery and thereby profit

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1 Zaragosa v. Craven, 33 Cal. 2d 315, 320-21, 202 P.2d 73, 76-77 (1949); Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56 (1895); McFadden v. Santa Ana O. & T. St. Ry., 87 Cal. 464, 25 Pac. 681 (1891).

2 CAL. CIV. CODE §§ 162-64.

3 *E.g.*, Lamb v. Harbaugh, 105 Cal. 680, 691, 39 Pac. 56, 58 (1895). Most community property states follow this view. Annot., 35 A.L.R.2d 1199 (1954). Nevada and New Mexico hold that the definition of community property as "all other property acquired after marriage" refers to acquisitions by the labor or productive facilities of the spouses; accordingly, in these states damages recovered for personal injuries are separate property. Fredrickson & Watson Constr. Co. v. Boyd, 60 Nev. 117, 102 P.2d 627 (1940); Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952). This seems to accord with the original Spanish conception of community property. 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 225-26 (1943). Louisiana by statute treats damages for personal injury to the wife as her separate property. See note 24 *infra*.

4 Zaragosa v. Craven, 33 Cal. 2d 315, 320-21, 202 P.2d 73, 76-77 (1949); McFadden v. Santa Ana O. & T. St. Ry., 87 Cal. 464, 25 Pac. 681 (1891).

from his own wrong; accordingly, they imputed the contributory negligence to the innocent spouse.[5] This result has been criticized as putting a spouse in a worse position than a friend or acquaintance. It prevents a fictitious "profit" by committing a real injustice—denying an innocent person recovery because of the wrong of another.[6]

Twice before 1957, action by the legislature led optimists to believe that a brighter day had come. In 1913, married women were given the right to sue for personal injuries without joining their husbands.[7] The legislature went so far as to announce in California Code of Civil Procedure section 370, that "When the action concerns her separate property, including injury to her person . . . she may sue alone . . . ."[8] Boalt Hall's Dean McMurray hopefully asked:

> What happens to the ancient judicial myth that the right of the wife to sue for personal injuries is community property, in view of the recent amendment allowing the wife to sue alone for such injuries? If she may sue alone, she certainly can control and manage this portion of the community property, notwithstanding that the husband has, in general, such management or control.[9]

But the rule remained unchanged.[10]

In 1951 the legislature again touched on the problem. It enacted California Civil Code section 171c, giving the wife "management, control and disposition" of damages for personal injuries except for medical expenses paid by the husband.[11] Although this section also provided that it did not transmute damages into separate property, there was again some hope that it had sufficently limited the possibility of a husband "profiting" by his own negligence.[12] But most commentators were pessimistic,[13] and such judicial applica-

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[5] *E.g.*, Kesler v. Pabst, 43 Cal. 2d 254, 273 P.2d 257 (1954); Basler v. Sacramento Gas & Elec. Co., 158 Cal. 514, 111 Pac. 530 (1910).

[6] See, *e.g.*, Comment, 42 CALIF. L. REV. 486 (1954); 24 CALIF. L. REV. 739 (1936); 1 DE FUNIAK, *op. cit. supra* note 3, at 222-33.

[7] CAL. CODE CIV. PROC. § 370.

[8] The section was amended in 1921 to remove the reference to separate property. Cal. Stats. 1921, ch. 110, § 1, at 102. See discussion in Zaragosa v. Craven, 33 Cal. 2d 315, 202 P.2d 73 (1949).

[9] 2 CALIF. L. REV. 161, 162 (1914).

[10] See Giorgetti v. Wollaston, 83 Cal. App. 358, 257 Pac. 109 (1927); Dunbar v. San Francisco-Oakland Terminal Rys., 54 Cal. App. 15, 201 Pac. 330 (1921).

[11] Added by Cal. Stats. 1951, ch. 1102, § 1, at 2860.

[12] See Carter, *Recent Trend in Court Decisions in California*, 5 HASTINGS L.J. 133, 140 (1954); *cf.* 4 WITKIN, SUMMARY OF CALIFORNIA LAW 2711 (7th ed. 1960) [hereinafter cited as WITKIN].

[13] 2 ARMSTRONG, CALIFORNIA FAMILY LAW 1512 (1953); 42 CALIF. L. REV., *supra* note 6, at 848; Comment, 6 HASTINGS L.J. 88, 92 (1954).

tion of the section as occurred was adverse.[14] The attempted self-help by litigants, through the use of agreements providing that the cause of action would be separate property, was also unsuccessful.[15]

Two bills on the subject were introduced in the 1957 session of the legislature. One would have added a section 171d to the California Civil Code as follows:

> The negligence or contributory negligence of one spouse shall not be imputed to the other spouse to deny recovery to such spouse in any action, even though the damages that are recovered are community property.[16]

This bill was not acted upon in committee and apparently was never called up for hearing by its authors.[17] The other bill became California Civil Code section 163.5.[18] It was passed in the form in which it was introduced, with the addition of a non-retroactivity provision, and provides that:

> All damages, special and general, awarded to a married person in a civil action for personal injuries, are the separate property of such married person.[19]

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[14] The principal case is Nemeth v. Hair, 146 Cal. App. 2d 405, 304 P.2d 129 (1956). It did not deal directly with the question of imputed negligence but with another consequence of the damages-as-community-property rule, namely, that the wife is in privity with her husband and that any judgment against him in the prior action is res judicata against her on the issue of his contributory negligence. Zaragosa v. Craven, 33 Cal. 2d 315, 320, 202 P.2d 73, 75 (1949); 1 STAN. L. REV. 765 (1949). See also text accompanying notes 61-62 *infra*. In *Nemeth* the court held that CAL. CIV. CODE § 171c did not change this rule of collateral estoppel. This was tantamount to adhering to imputed negligence because the question of res judicata attains legal significance only if the husband's negligence is imputable to the wife.

Ferguson v. Rogers, 168 Cal. App. 2d 486, 336 P.2d 234 (1959), involving an accident that occurred in 1956, applied the imputed negligence concept to bar a wife from recovery. The court denied retroactive effect to § 171c.

[15] Kesler v. Pabst, 43 Cal. 2d 254, 273 P.2d 257 (1954); Mooren v. King, 182 Cal. App. 2d 546, 6 Cal. Rptr. 362 (1960). *Contra*, Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712 (1909) (post-accident agreement operated to relinquish claim of husband to community property recovery for injury to wife). However, courts created exceptions to the imputation of negligence in a few circumstances where the negligent spouse could not share in the recovery: (a) where the contributorily negligent husband had died, Flores v. Brown, 39 Cal. 2d 622, 248 P.2d 922 (1952); (b) where the parties were divorced or the marriage was annulled after the accident (Washington v. Washington, 47 Cal. 2d 249, 302 P.2d 569 (1956)); Caldwell v. Odisio, 142 Cal. App. 2d 732, 299 P.2d 14 (1956)); and (c) where the parties were domiciled in a non-community property jurisdiction (Bruton v. Villoria, 138 Cal. App. 2d 642, 292 P.2d 638 (1956) (conflict of laws rule)).

[16] California Assembly Bill 3286, 1957 Regular (General) Session.

[17] 1957 ASSEMBLY FINAL HISTORY 1097; ASSEMBLY JOURNAL 6990 (June 12, 1957).

[18] California Senate Bill 1826, 1957 Regular (General) Session.

[19] Cal. Stats. 1957, ch. 2334, § 1, at 4065-66. CAL. CIV. CODE § 171c was amended concurrently to eliminate all reference to personal injury damages.

Witkin mentions a "State Bar statute," 4 WITKIN 2712, but the State Bar has not sponsored any legislation on this subject and the matter was not on the State Bar's

Several discussions of the new section have appeared,[20] but to date judicial application has been limited,[21] probably due in part to the fact that the statute applies only to causes of action arising after its effective date.[22]

The questions raised by the section fall into two general categories:

1. Questions arising directly from the changed property nature of damage awards:

a. Are medical expenses paid out of community funds recoverable as separate property, and if so, is the community protected?

b. Is the community deprived of awards representing lost earnings?

c. What are the effects of section 163.5 on a recovery which is followed by the death of a spouse or by a divorce?

d. Are damages received by way of settlement, as distinguished from judgments, also separate property?

2. Questions concerning actions based on negligence involving a contributorily negligent spouse:

a. Does the section eliminate the problem of collateral estoppel?

b. Does the section eliminate one form of imputed negligence but open up a new form under section 17150 of the California Vehicle Code?

1957 legislative program. See 32 CAL. S.B.J. 13-25 (1957). Witkin's reference may be to a resolution adopted in 1955 by the Conference of State Bar Delegates in favor of legislation which would make a cause of action "for recovery of compensatory damages for pain, suffering, disfigurement and temporary and future disability suffered by a married person" the separate property of the injured spouse. 30 CAL. S.B.J. 499 (1955). Apparently no bill to effectuate this more limited change was introduced.

[20] *Selected 1957 Code Legislation*, 32 CAL. S.B.J. 501, 507 (1957); 45 CALIF. L. REV. 779 (1957); Comment, 9 HASTINGS L.J. 291 (1958); 4 WITKIN 2712.

[21] In Ferguson v. Rogers, 168 Cal. App. 2d 486, 336 P.2d 234 (1959), the court said that the section has no retroactive application. In Cervantes v. Maco Gas Co., 177 Cal. App. 2d 246, 250, 2 Cal. Rptr. 75, 78 (1960), the court held that § 163.5 did not apply to an action by parents for the wrongful death of a child. See text accompanying note 79 *infra*. Several cases have indicated that § 163.5 will not prevent imputation of negligence in appropriate cases under CAL. VEH. CODE § 17150. See note 65 *infra* and accompanying text. In Estate of Simoni, 220 Cal. App. 2d 339, 33 Cal. Rptr. 845 (1963), the court held § 163.5 inapplicable to an award received by the husband from the Industrial Accident Commission, because the legislative purpose was only to eliminate the imputation of contributory negligence and not to create a pervasive change in the law of community property. See also Lichtenauer v. Dorstewitz, 200 Cal. App. 2d 777, 19 Cal. Rptr. 654 (1962) (applying § 163.5 as to recovery of costs in joint action by husband and wife); Wilkins v. Sawyer, 232 Cal. App. 2d 458, 42 Cal. Rptr. 817 (1965).

[22] Cal. Stats. 1957, ch. 2334, § 3, at 4066; see Ferguson v. Rogers, *supra* note 21. The effective date was September 11, 1957. See 32 S.B.J. 507 (1957).

c. Does the section leave unaffected the imputation of negligence in an action by a parent for the wrongful death of or for injuries to a child?

B. *Problems Relating to Changed Property Nature of Damage Awards*

1. Medical Expenses

The specific questions raised by the new enactment with regard to medical expenses paid out of community funds are (1) whether they can be recovered by the injured spouse as separate property, and (2) if so, whether the community is entitled to reimbursement by the injured spouse.

These questions arise because section 163.5 speaks of "all damages, special or general, awarded . . . " and does not adequately specify *what* damages may be awarded. Since each spouse was allowed to recover medical expenses paid from community funds prior to the enactment of section 163.5,[23] it is likely[24] that this result will persist even though such recovery would now apparently constitute separate property of such spouse.[25] The language of

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[23] The rule prior to the enactment of § 163.5 was that the wife could sue alone to recover damages for consequential injury to the community, under CAL. CODE CIV. PROC. § 370, even though the primary right to recover financial loss to the community resides in the husband. Louie v. Hagstrom's Food Stores, Inc., 81 Cal. App. 2d 601, 612-15, 184 P.2d 708, 714-16 (1947); Hyman v. Market St. Ry., 41 Cal. App. 2d 647, 107 P.2d 485 (1940); Purcell v. Goldberg, 34 Cal. App. 2d 344, 93 P.2d 578 (1939); *cf.* Meier v. Wagner, 27 Cal. App. 579, 150 Pac. 797 (1915) (misjoinder of husband and wife harmless error since bars subsequent suit by husband alone to recover consequential damage). *But see* Sanderson v. Niemann, 17 Cal. 2d 563, 110 P.2d 1025 (1941).

[24] Such a result is favored in 45 CALIF. L. REV., *supra* note 20, at 779. Witkin states flatly that medical expenses are recoverable as separate property. 4 WITKIN 2713. See 9 HASTINGS L.J., *supra* note 20, at 299-301, takes the opposite view for reasons that will be discussed below.

[25] Louisiana statutes provide that "actions for damages" are the wife's separate property and that "damages resulting from personal injuries to the wife . . . shall always be and remain the separate property of the wife and recoverable by herself alone." LA. CIV. CODE ANN. arts. 2334, 2402 (1952). Under these sections it has been held that the wife may recover neither medical expenses nor lost earnings; such items of damage are recoverable only by the husband on behalf of the community. Kientz v. Charles Dennery, Inc., 17 So. 2d 506, 511 (La. App. 1944), *rev'd on other grounds*, 209 La. 144, 24 So. 2d 292 (1945); Simon v. Harrison, 200 So. 476, 480 (La. App. 1941); Hollinquest v. Kansas City So. Ry., 88 F. Supp. 905 (W.D. La. 1950). The Louisiana view seems to derive from the fact that, prior to the enactment of the statutes making personal injury damages of the wife her separate property, only the husband, as head of the community, could recover such damages. See Annot., 35 A.L.R.2d 1199, 1223-29 (1954). In California a different situation prevails in light of CAL. CODE CIV. PROC. § 370. See note 23 *supra*.

A Texas statute, similar to the Louisiana provisions, was invalidated as conflicting with a section of the Texas constitution defining the wife's separate property. Northern Texas Traction Co. v. Hill, 297 S.W. 778 (Tex. Civ. App. 1927).

section 163.5 probably disallows treatment as community property of such medical expenses recovered by the injured spouse. Also, to allow such recovery would again open the way for an imputation of negligence, at least to the extent of medical expenses,[26] and thus frustrate legislative intent.[27]

The principal argument against permitting recovery of medical expenses by a wife as her separate property seems to be that if such recovery were allowed, the husband would to that extent "forfeit" his interest in community funds.[28] Cases decided prior to 1957 should no longer control, so the argument runs, since they rested on the premise that the recovery would be community property.[29] These cases had to meet the contention that the wife's recovery of medical bills would interfere with the husband's power of management and control of the community property.[30] As long as the recovery was community property the funds would at least return to the community and to the husband's management, while under section 163.5 this would no longer be the case.

This argument seems weak for a number of reasons. First, the husband has a primary right of action for medical expenses paid for treatment of his wife's injuries.[31] Thus, he can avoid any "forfeiture" of his interest in community funds if he is concerned about the matter. The only time he cannot assert this right is when he has been contributorily negligent; in such a case he is obviously not harmed if his wife recovers the medical expenses. Next, it is doubtful logic to attempt to protect the husband's interest in community funds by an approach that would leave medical expenses paid from community funds entirely unreimbursed in case he is contributorily negligent. Such a result can only be viewed as a net loss to the family and to the community property. In addition,

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New Mexico courts have reached the same conclusion as in Louisiana without a specific statute pertaining to the nature of personal injury damages. The court considered itself free to define damages for pain and suffering as separate property and to recognize at the same time that "the cause of action for the damages to the community for medical expenses, loss of services to the community, as well as loss of earnings, if any, of the wife still belongs to the community, and the husband as its head is the proper party to bring such an action against one who wrongfully injures the wife." Soto v. Vandeventer, 56 N.M. 483, 494, 245 P.2d 826, 833 (1952).

In Nevada, the question has apparently not been resolved, but the discussion in the leading case indicates the same view as held by New Mexico. Fredrickson & Watson Constr. Co. v. Boyd, 60 Nev. 117, 102 P.2d 627 (1940).

[26] 45 CALIF. L. REV. *supra* note 20, at 781 n.12.

[27] See notes 74 and 87 *infra*.

[28] 9 HASTINGS L.J., *supra* note 20, at 299-301.

[29] *Id.* at 300.

[30] See, *e.g.*, Louie v. Hagstrom's Food Stores, Inc., 81 Cal. App. 2d 601, 612, 184 P.2d 708, 714 (1947).

[31] *Ibid;* Sanderson v. Niemann, 17 Cal. 2d 563, 110 P.2d 1025 (1941).

unless recovery of medical expenses were also denied[82] where the husband is the injured party, the wife might be deprived to that extent of her vested interest in the community property. Why should the result be different where the injured party is the wife? Such a difference would not appear to be a reasonable departure from the long development toward equalizing the wife's position in terms of her right to sue and her interest in the community property. Finally, the family could probably avoid the impact of any rule denying the wife recovery of medical expenses paid by the community by the device of a gift from the husband to the wife of sufficient funds to pay doctors' bills. Her use of this newly-acquired separate property[83] would presumably eliminate any restriction on her recovery.[84] In any situation where the husband might have been contributorily negligent, there would be a premium on such strategy. Rules which encourage such subterfuges seem of doubtful wisdom.

A second argument against recovery by the wife of medical expenses where the husband paid the bills might be that she herself did not sustain any damage.[85] This might be true in the situation where the husband paid the expenses from his separate property. But in the more usual situation, where community funds are utilized the wife would seem to have been damaged in view of her equal, vested interest in community property.[86] In light of previous decisions permitting such recovery,[87] this question would no longer seem to be open.

On balance it seems likely that each spouse will continue to be allowed to recover medical expenses. Since such recovery will become separate property this may result in a loss to the community. In the many cases where families do not differentiate between separate and community property, this may make little or no practical difference. By commingling or by agreement between the spouses the recovery can, in whole or in part, become community property.[88] Also, it is probable that the husband will retain the primary right to recover the expenses himself on behalf of the community, as long as he has not been contributorily negligent.[89]

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[82] Denying the husband recovery as well as the wife, however, is advocated by the argument's proponent. See 9 HASTINGS L.J., *supra* note 20, at 303.

[83] See CAL. CIV. CODE § 162.

[84] *But cf.* Kesler v. Pabst, 43 Cal. 2d 254, 273 P.2d 257 (1954).

[85] 45 CALIF. L. REV., *supra* note 20, at 781 n.12. Compare CAL. CODE CIV. PROC. § 427 which speaks of "consequential damages suffered or sustained by the husband alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife . . . ."

[86] See CAL. CIV. CODE § 161a; 4 WITKIN 2741.

[87] See cases cited note 23 *supra*.

[88] See text accompanying note 46 *infra*.

[89] See text accompanying note 31 *supra;* CAL. CODE CIV. PROC. § 427, allowing

The question remains whether one spouse could sue the other to obtain reimbursement for the community property. Such an action would confront a court with a number of problems.

(a) *The legal basis for allowing the action.* Presumably the action would be based on a restitutionary theory: its object would be to prevent the unjust enrichment of one spouse at the expense of the community.[40] The retention by one spouse, as separate property, of compensation for money expended by the community might be unjust, but it remains to be seen whether courts could fit this situation into established quasi-contractual norms.[41] Furthermore, they may feel that to permit such an action would undermine section 163.5 by turning into community property money which the section declares to be separate property.

(b) *Inter-spouse suits.* The former rule barring inter-spouse suits on tort causes of action was eliminated by the California Supreme Court in 1962, both as to intentional and negligent tort actions.[42]

(c) *Contributory negligence in the underlying accident.* Where the husband, who seeks to recover the expenses on behalf of the community, was contributorily negligent in the accident that gave rise to the original action, it is more difficult to make out a case of unjust enrichment. The community could not have recovered for such a loss prior to the enactment of section 163.5 and hence it would be less plausible to argue that it has been unjustly deprived of anything. In fact, litigation under these circumstances may revive the principle forbidding one to reap a profit from his own wrongdoing, from which imputed negligence sprang.

Thus, the community's right to reimbursement for medical expenses is speculative. In some situations, especially in cases of divorce or death,[43] this could lead to unfair results. In the bulk of the cases the question of reimbursement may never become important.

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the husband to join the action for injury to his wife and to recover consequential damages, was not amended in 1957 along with CAL. CIV. CODE § 171c, when § 163.5 was enacted.

[40] See RESTATEMENT, RESTITUTION § 1 (1937); 1 WITKIN 19.

[41] See, *e.g.*, RESTATEMENT, RESTITUTION § 112 (1937).

[42] Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962). Even prior to 1962, inter-spousal suits involving property rights were allowed. Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909); see Langley v. Schumacker, 46 Cal. 2d 601, 297 P.2d 977 (1956).

[43] See text accompanying notes 48-59 *infra*.

2. Impairment of Earning Capacity

Commentators agree that under section 163.5, damages for lost earnings and for impairment of earning capacity will be separate property.[44] They express concern over the fact that the other spouse—usually the wife—will have no interest in the award, even though earnings often make up a major portion of the community property. For example, Witkin states that:

> The husband's earnings are community property and the chief source of family support, but the statutory substitute for them—a lump sum damage award—is now his separate property and subject to his unlimited right of disposition.[45]

Would an action between the spouses lie to recover this portion of the damage award on behalf of the community? Such a solution appears to be still more dubious than in the case of medical expenses. Unjust enrichment would be harder to establish because the spouse in this situation recovers for his own injury and not for expenses paid from community assets. Furthermore, there are obvious practical obstacles to a determination of the portion of the award which constitutes damages for impairment of future earning capacity.

The parties can mitigate the effects of section 163.5 in two ways. They can transmute separate property into community property by agreement.[46] Such an agreement may be oral as long as it is "executed" and California courts have been liberal in finding execution.[47] The agreement may even be implied.[48] Judicial readiness in finding that an agreement has been made and executed may well avoid injustice in some cases.

As an alternative, the parties may commingle the proceeds of a damage award with their community property. If the proceeds so commingled cannot be traced they will be treated as community property.[49] Even though commingling falls short of the point where

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[44] See *Selected 1957 Code Legislation*, *supra* note 20, at 508; 9 HASTINGS L.J., *supra* note 20, at 304; 4 WITKIN 2713.

[45] *Ibid.*

[46] See CAL. CIV. CODE §§ 158-61.

[47] See, *e.g.*, Woods v. Security-First Nat'l Bank, 46 Cal. 2d 697, 299 P.2d 657 (1956) (alternative holding); 4 WITKIN 2752.

[48] Estate of Nelson, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964); Alocco v. Fouche, 190 Cal. App. 2d 244, 11 Cal. Rptr. 818 (1961); see Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1, 94 Pac. 94 (1908); Pruyn v. Waterman, 172 Cal. App. 2d 133, 139, 342 P.2d 87, 91 (1959); Lawatch v. Lawatch, 161 Cal. App. 2d 780, 789, 327 P.2d 603, 607-08 (1958).

[49] 4 WITKIN 2728; Metcalf v. Metcalf, 209 Cal. App. 2d 742, 26 Cal. Rptr. 271 (1962).

tracing becomes impossible, depositing the proceeds in the family bank account and using them for the support of the family may alone be evidence of an agreement to transmute the award into community property.[50]

3. Effect in the Event of Death or Divorce

The change of personal injury damage awards into separate property may have unexpected consequences if the spouse obtaining the award dies or if either spouse subsequently seeks a divorce.

In the event of intestacy, the surviving spouse receives all of the community property,[51] but as little as one-third of the separate property.[52] By will, one spouse may deprive the other of all of the decedent's separate property but of only one-half of the community property.[53]

Inheritance tax consequences will also be different and less favorable to the family. In general, all of the community property going to the surviving spouse is free of inheritance tax.[54] Such favorable tax treatment will be lost unless the spouses have changed the proceeds into community property. However, an inter-spouse transfer from separate into community property may itself give rise to gift tax liability.[55]

The effect of section 163.5 in case of divorce will result from the courts' general lack of authority to award the separate property of one spouse to the other.[56] Perhaps this will not work hardship, at least to the extent that it is possible to protect the wife's right to support by an award of alimony.[57]

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[50] Lawatch v. Lawatch, 161 Cal. App. 2d 780, 790, 327 P.2d 603, 608 (1958).

[51] CAL. PROB. CODE § 201.

[52] See CAL. PROB. CODE §§ 221-24. However, it should be borne in mind that, in essence, if there are surviving children, *all* of the separate property goes to the surviving spouse and children; in case of one child, half goes to the spouse and half to the child; in case of more than one child, one-third goes to the spouse and the balance to the children in equal shares. CAL. PROB. CODE § 221. If there are no surviving children, the surviving spouse gets at least half of the separate property. CAL. PROB. CODE § 223.

[53] CAL. PROB. CODE §§ 20, 21, 201.

[54] CAL. REV. & TAX. CODE § 13551; Barnett, *California Inheritance and Gift Taxes: A Summary*, 43 CALIF. L. REV. 49, 51-52 (1955).

[55] See CAL. REV. & TAX. CODE § 15303; *cf.* RICE, CALIFORNIA FAMILY TAX PLANNING, 134-36 (1959).

[56] Machado v. Machado, 58 Cal. 2d 501, 375 P.2d 55, 25 Cal. Rptr. 87 (1962); Fox v. Fox, 18 Cal. 2d 645, 117 P.2d 325 (1941); Miller v. Miller, 227 Cal. App. 2d 322, 38 Cal. Rptr. 571 (1964); Donovan v. Donovan, 223 Cal. App. 2d 691, 36 Cal. Rptr. 225 (1963); 1 ARMSTRONG, CALIFORNIA FAMILY LAW 359-60, 847-48 (1953). *Cf.* Farley v. Farley, 227 Cal. App. 2d 1, 38 Cal. Rptr. 357 (1964).

[57] See Washington v. Washington, 47 Cal. 2d 249, 253-54, 302 P.2d 569, 571

4. Nature of Damages Received by Way of Settlement

Section 163.5 is framed in terms of damages which are "awarded" to a spouse. This wording leaves some doubt whether the proceeds of a settlement of a personal injury action—as distinguished from the proceeds of a judgment—are also separate property, or whether they retain the community property character they would have had prior to the enactment of the section. Upon the answer may hinge significant consequences in relation to the various problems discussed above.

Commentators disagree on the effect of the statute on settlements. One article takes the language of the section at face value and concludes that "it seems quite likely that the property nature of any recovery by way of *settlement* is not affected."[58] Another concludes that a settlement should be separate property for the following reason: Since recovery by way of judgment is separate property, the cause of action should also be separate property in order not to split the property characterization of the cause of action and the recovery; hence, settlement proceeds should in turn be separate property.[59] Witkin comments, "If the cause of action is still community property, as held by a long list of prior decisions, money paid by way of compromise and satisfaction thereof may likewise be regarded as community property . . . ."[60]

From a practical standpoint, there would appear to be no justification for treating settlements differently from judgments.

C. *Problems Relating to Collateral Estoppel and Imputed Negligence*

1. Collateral Estoppel

Prior to the enactment of section 163.5, a spouse could not maintain a personal injury action against a third party if the other spouse had been found contributorily negligent in a prior suit involving the same accident.[61] Because of the community property nature of the cause of action it was held that the spouses were in "privity" and therefore the prior judgment was res judicata in the later action.[62] It seems to be clear that section 163.5 leaves no room for such an application of collateral estoppel.[63]

(1956) (dictum). *But cf.* Miller v. Miller, 227 Cal. App. 2d 322, 38 Cal. Rptr. 571 (1964) (disallowing lump sum alimony secured by lien on separate property).

[58] 45 CALIF. L. REV. 779, 780 n.2 (1957). See also *Selected 1957 Code Legislation*, 32 CAL. S.B.J. 501, 508 (1957).

[59] Comment, 9 HASTINGS L.J. 291, 304 (1958).

[60] 4 WITKIN 2713.

[61] Zaragosa v. Craven, 33 Cal. 2d 315, 202 P.2d 73 (1949).

[62] *Ibid.*

[63] See 9 HASTINGS L.J., *supra* note 59, at 296-97.

2. Imputation of Negligence under California Vehicle Code Section 17150

California Vehicle Code section 17150 (formerly section 402(a)) provides:

> Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from the negligence in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner, and *the negligence of such person shall be imputed to the owner for all purposes of civil damages.* (Emphasis added.)

This section has been applied to impose liability on one spouse for the negligent driving of the other.[64] It also bars an owner from recovery against third parties if the person who drove with the owner's consent is guilty of contributory negligence.[65]

Prior to the enactment of section 163.5, there had been relatively infrequent occasion for a defensive application of section 17150 to bar the recovery of one spouse because of the contributory negligence of the other; the community property nature of any award of damages for personal injury accomplished this result. However, irrespective of the liberalizing influence of section 163.5, recent cases indicate that section 17150 will bar recovery by one spouse when the other is contributorily negligent and when the vehicle either is owned by both spouses[66] or separately owned by the injured spouse.[67]

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[64] Dorsey v. Barba, 38 Cal. 2d 350, 240 P.2d 604 (1952); Wilcox v. Berry, 32 Cal. 2d 189, 195 P.2d 414 (1948); Rody v. Winn, 162 Cal. App. 2d 35, 327 P.2d 579 (1958); Caccamo v. Swanston, 94 Cal. App. 2d 957, 212 P.2d 246 (1949); O'Neill v. Williams, 127 Cal. App. 385, 15 P.2d 879 (1932).

[65] Cooke v. Tsipouroglou, 59 Cal. 2d 660, 381 P.2d 940, 31 Cal. Rptr. 60 (1963); Lambert v. Southern Counties Gas Co., 52 Cal. 2d 347, 340 P.2d 608 (1959); Milgate v. Wraith, 19 Cal. 2d 297, 121 P.2d 10 (1942); Zabunoff v. Walker, 192 Cal. App. 2d 8, 13 Cal. Rptr. 463 (1961); Mooren v. King, 182 Cal. App. 2d 546, 6 Cal. Rptr. 362 (1960) (alternative holding); Birnbaum v. Blunt, 152 Cal. App. 2d 371, 313 P.2d 86 (1957). *But cf.* Vallejo v. Montebello Sewer Co., 209 Cal. App. 2d 721, 731 n.2, 26 Cal. Rptr. 447, 453 n.2 (1962).

[66] See Cooke v. Tsipouroglou, 59 Cal. 2d 660, 381 P.2d 940, 31 Cal. Rptr. 60 (1963); Zabunoff v. Walker, 192 Cal. App. 2d 8, 13 Cal. Rptr. 463 (1961); Mooren v. King, 182 Cal. App. 2d 546, 6 Cal. Rptr. 362 (1960) (alternative holding). *Cf.* cases cited note 64 *supra*.

[67] Where the automobile is jointly owned in the form of community property and the husband is driving, however, his negligence will not be imputed to the wife to bar her recovery, Lawson v. Lester, 191 Cal. App. 2d 34, 12 Cal. Rptr. 368 (1961) (dictum); Cooke v. Tsipouroglou, 59 Cal. 2d 660, 381 P.2d 940, 31 Cal. Rptr. 60 (1963); Carroll v. Beavers, 126 Cal. App. 2d 828, 273 P.2d 56 (1954) (husband killed in the accident), or to impose liability upon her. Shepardson v. McLellan, 59 Cal. 2d 83, 378 P.2d 108, 27 Cal. Rptr. 884 (1963) (car purchased with community property

To illustrate, in one case the family automobile was owned jointly by husband and wife, and the accident occurred prior to the effect date of section 163.5. The court held that an agreement between the husband and wife that any damages recovered for her injuries would be her separate property, did not prevent imputation; the court then added:

> Moreover, in the case at bar the automobile operated by Mr. Mooren was owned jointly by him and his wife. There is no showing that it was community property. These circumstances would foreclose recovery by the wife in the event her husband was contributively negligent, independent of their husband and wife relationship. Under section 17150 of the Vehicle Code, formerly section 402, the negligence of the operator of an automobile [the husband] is imputed to the owner thereof for all purpose of civil damages.[68]

The same conclusion has been reached in cases involving the issue of contributory negligence in accidents occurring subsequent to the effective date of section 163.5. In one case, plaintiff and her husband apparently owned the automobile as tenants in common.[69] The court did not mention section 163.5 but merely held that the husband's negligent driving was imputed to the plaintiff:

> It should first be noted that negligence on the part of appellant's husband is clearly imputable to her under the facts of this case, for the car was owned by her and she was a passenger. Under these facts, Vehicle Code, section 17150, which provides that the driver's negligence is imputed to the consenting owner, would clearly be applicable. The section has been held applicable as between husband and wife . . . and since it clearly applies to contributory negligence . . . any negligence on the part of appellant's husband can thus be viewed as a complete bar to her recovery.[70]

No further mention of section 17150 was made, the court merely finding sufficient evidence in the record to uphold the verdict and judgment for the defendant.

The California Supreme Court also recently imputed the husband's contributory negligence to the wife to bar her recovery

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funds but registered in husband's name); Cox v. Kaufman, 77 Cal. App. 2d 449, 175 P.2d 260 (1946) (similar to *Shepardson*). See also Wilcox v. Berry, 32 Cal. 2d 189, 195 P.2d 414 (1948). *But see* Dorsey v. Barba, 38 Cal. 2d 350, 240 P.2d 604 (1952) (car registered in wife's name).

[68] Mooren v. King, 182 Cal. App. 2d 546, 552, 6 Cal. Rptr. 362, 366 (1960).

[69] Zabunoff v. Walker, 192 Cal. App. 2d 8, 13 Cal Rptr. 463 (1961). The court's opinion is less than adequate, never specifying the nature of the ownership or who the owners were. While certain language and the failure of the court to mention community property would indicate the car was separately owned by the wife, the last paragraph of the opinion speaks of the plaintiff and her husband as riding in "their car."

[70] *Id.* at 11, 13 Cal. Rptr. at 465.

against third parties, although the automobile was purchased out of community funds, was registered in the names of plaintiff and her husband, and was the sole family automobile. The court first noted that, irrespective of the application of section 163.5, California Vehicle Code section 17150 required imputation:

> This section [163.5] abrogated a rule . . . that a wife was barred from recovery for personal injuries in an action against a third person where her husband was guilty of contributory negligence. The former rule, however, unlike the principles derived from section 17150 of the Vehicle Code, was not dependent upon ownership of property but rather upon the community character of the wife's tort action under the law then existing, and the fact that section 163.5 terminated the community status of the wife's cause of action for personal injuries does not indicate an intent to also preclude imputation of negligence on the basis of permission to drive given by one joint tenant or tenant in common to another.[71]

The court then held that the tenancy in common presumption of California Civil Code section 164[72] was applicable because the certificate of ownership was an "instrument in writing" within the meaning of that section and the parties were not described therein as husband and wife. The evidence that the automobile was community property was held insufficient to rebut this presumption. Fortunately, the effect of this holding was nullified by the enactment in 1965 of California Vehicle Code section 17150.5,[73] provid-

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[71] Cooke v. Tsipouroglou, 59 Cal. 2d 660, 664, 381 P.2d 940, 942, 31 Cal. Rptr. 60, 62 (1963). Although the precise language the court uses here in describing the effect of § 163.5 would seriously restrict its application even in a situation not involving CAL. VEH. CODE § 17150, it is doubtful the court really meant to do so. In such a situation, the California Supreme Court would probably adopt the policy interpretative method followed in Estate of Simoni, 220 Cal. App. 2d 339, 343, 33 Cal. Rptr. 845, 848 (1963) where the court stated that "it is reasonable to conclude that, by enacting section 163.5 of the California Civil Code, the Legislature intended to eliminate the defense of such imputed contributory negligence."

[72] CAL. CIV. CODE § 164, which provides in part:

> [W]henever any real or personal property . . . is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife . . . the presumption is that such property is the community property of said husband and wife . . . .

[73] CAL. VEH. CODE § 17150.5. "The presumptions created by Section 164 of the Civil Code as to the acquisition of property by a married woman by an instrument in writing shall not apply in an action based on Section 17150 with respect to the acquisition of a motor vehicle by a married woman and her husband."

Also, the legislature in 1965 added §§ 4150.5 and 5600.5 to the California Vehicle Code, providing that co-owners may specify upon registration or transfer of a vehicle whether the vehicle is registered as community property, joint tenancy, or tenancy in common. Failure to designate results in ownership in joint tenancy, if the co-owners' names are joined by "or," or tenancy in common, if the names are joined by "and."

ing that section 164 presumptions are inapplicable to actions based on section 17150.

Thus, while the draftsmen of section 163.5 may well have hoped that it would put an end to any imputation of the contributory negligence of one spouse to the other,[74] some imputation will continue under section 17150. In general, the contributory negligence of the spouse who was driving will be imputed to the other spouse if the latter is an owner of the car and gave the other permission to drive it, within the meaning of the California Vehicle Code section. Factors such as who the legal or registered owner is,[75] whether the car is community, separate or joint property, and which spouse was driving, will be determinative. The table below considers various combinations of these factors and indicates the likely results. In some instances the result is uncertain.

Registered owner	Nature of ownership	Driver	Injured spouse	Can the injured spouse recover when the other spouse was contributorily negligent?
1. Both	C.P.	H	W	Yes. Since H has exclusive management of the C.P., W has no consent to give. Hence, H is not a permissive user of the car.[76]
2. Both	C.P.	W	H	Probably not.[77]

Abbreviations: H—husband; W—wife; C.P.—community property; S.P.—separate property.

[74] See 9 HASTINGS L.J., *supra* note 59, at 295 n.23. (Quoting from a letter written by Senator James A. Cobey who introduced the bill.) "I might say that my intention was to outlaw the imputation of the [contributory] negligence of one spouse to the other . . . ."

[75] In Travis v. Southern Pacific Co., 210 Cal. App. 2d 410, 430-33, 26 Cal. Rptr. 700, 711-13 (1962), the plaintiff was a passenger in a car driven by his son; although both were registered owners, the son was the sole legal owner. The court upheld a jury instruction that the son's negligence was imputable to the plaintiff under § 17150.

[76] Cooke v. Tsipouroglou, 59 Cal. 2d 660, 381 P.2d 940, 31 Cal. Rptr. 60 (1963) (dictum); Lawson v. Lester, 191 Cal. App. 2d 34, 12 Cal. Rptr. 368 (1961) (dictum). *Cf.* Shepardson v. McLellan, 59 Cal. 2d 83, 378 P.2d 108, 27 Cal. Rptr. 884 (1963); Cox v. Kaufman, 77 Cal. App. 2d 449, 175 P.2d 260 (1946).

[77] See Cooke v. Tsipouroglou, 59 Cal. 2d 660, 663, 381 P.2d 940, 941-42, 31 Cal. Rptr. 60, 61-62 (1963) (dictum) (by implication). This is the converse of case 1; while normally the wife would be driving with the husband's consent in the absence of an express prohibition by him, it may be a question of fact whether the husband, as manager of the community property, expressly or impliedly consented to his wife's driving. See also Rody v. Winn, 162 Cal. App. 2d 35, 39, 327 P.2d 579, 582 (1958).

In Friedenthal, *Imputed Contributory Negligence: The Anomaly in California Vehicle Code Section 17150*, 17 STAN. L. REV. 55, 69 (1964), it is flatly stated that recovery will be barred in this situation if the vehicle was purchased with community funds other than the segregated earnings of the wife. If purchased with the wife's earnings, however, Friedenthal states that the results in cases 1 and 2 would probably

Registered owner	Nature of ownership	Driver	Injured spouse	Can the injured spouse recover when the other spouse was contributorily negligent?
3. H	C.P.	H	W	Yes, like case 1.[78]
4. H	C.P.	W	H	Probably not; similar to case 2, with possibly a slightly stronger case that H consented.
5. W	C.P.	H	W	Probably;[79] similar to case 1.
6. W	C.P.	W	H	Probably not but very uncertain; similar to case 2.[80]

Abbreviations: H—husband; W—wife; C.P.—community property; S.P.—separate property.

be reversed, so that the husband would recover here, and the wife would lose in case 1. This analysis is founded on CAL. CIV. CODE § 171c which gives a wife control over her earnings and, presumably, over property she purchases with such earnings, until mingled with other community property.

[78] See Shepardson v. McLellan, 59 Cal. 2d 83, 378 P.2d 108, 27 Cal. Rptr. 884 (1963); Cox v. Kaufman, 77 Cal. App. 2d 449, 175 P.2d 260 (1946). Although these cases involved attempted imposition of liability upon the wife, logically the wife as plaintiff should not be barred from recovery if she is not held liable as a defendant.

[79] This case seems to be essentially the same as case 1. However, there is authority in a liability case indicating that the wife may not be allowed to prove in face of the registration that she is not the sole owner of the car, *i.e.*, she might not be permitted to show that the car is community property. Dorsey v. Barba, 38 Cal. 2d 350, 240 P.2d 604 (1952). In such an event, the situation might be treated like case 11 and the injured wife barred from recovery. See Friedenthal, *supra* note 77, at 70.

But see Rody v. Winn, 162 Cal. App. 2d 35, 39, 327 P.2d 579, 582 (1958): "And it has been held that an automobile acquired during marriage is presumed to be community property notwithstanding that it is registered in the wife's name." Also, the broad dictum in Cooke v. Tsipouroglou, 59 Cal. 2d 660, 663, 381 P.2d 940, 941, 31 Cal. Rptr. 60, 61 (1963), that "where the *husband* drives a *community property* automobile, his negligence may not be imputed to his wife whether or not she has consented to his operation of the automobile" fails to differentiate situations in which the car is not registered in both names, and thus supports recovery here as in cases 1 and 3. Furthermore, the facts in *Dorsey* were peculiar. The spouses had separated, obtained an interlocutory decree of divorce, and the wife had in fact assented to letting her husband keep the car. However, Professor Friedenthal apparently feels that *Dorsey* will be interpreted to impute the husband's agligence to the wife to bar her recovery from third persons. See Friedenthal, *supra* note 77, at 70.

[80] A practical approach would treat a community automobile registered in the wife's name as if it belonged to her alone; this approach should prevail, particularly if the automobile was purchased with the unmingled earnings of the wife. See *id.* at 69-70. Thus, the husband would not be barred. *But see* Rody v. Winn, 162 Cal. App. 2d 35, 327 P.2d 579 (1958), where the court reversed a nonsuit granted the defendant husband. The car had been purchased with community funds but was registered in the wife's name. This case could possibly be distinguished, however, since evidence was presented that the insurance company had insured the defendants as co-owners.

In the event the community property nature of the ownership may not be established under the rule of Dorsey v. Barba, 38 Cal. 2d 350, 240 P.2d 604 (1952), recovery would be allowed as in case 12.

Registered owner	Nature of ownership	Driver	Injured spouse	Can the injured spouse recover when the other spouse was contributorily negligent?
7. Both	Joint	H	W	No, driving with consent of co-owner.[81]
8. Both	Joint	W	H	No, like case 7.
9. H	S.P.	H	W	Yes, here H is driving his own car.
10. H	S.P.	W	H	Probably not; W would normally be driving with H's consent.
11. W	S.P.	H	W	Generally not, similar to case 10; H would normally be driving with W's consent.[82]
12. W	S.P.	W	H	Yes, here W is driving her own car.

Abbreviations: H—husband; W—wife; C.P.—community property; S.P.—separate property.

3. Parents' Recovery for Death of or Injury to Children

Recovery for the wrongful death of a spouse is not community property in California.[83] But parents' recovery for the wrongful death of a child is community property; one parent's contributory negligence is therefore imputed to the other with the effect that recovery is prevented. It has recently been held that section 163.5 does not change this result because its scope is limited to actions for personal injuries and does not extend to wrongful death actions.[84]

Recovery by parents for injuries to their children has also been treated as community property, with the usual consequences as to imputation of one parent's contributory negligence to the other.[85]

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[81] Cooke v. Tsipouroglou, 59 Cal. 2d 660, 381 P.2d 940, 31 Cal. Rptr. 60 (1963); Wilcox v. Berry, 32 Cal. 2d 189, 195 P.2d 414 (1948); Zabunoff v. Walker, 192 Cal. App. 2d 8, 13 Cal. Rptr. 463 (1961). In Bruce v. Ullery, 58 Cal. 2d 702, 375 P.2d 833, 25 Cal. Rptr. 841 (1962) and Krum v. Malloy, 22 Cal. 2d 132, 137 P.2d 18 (1943), the court said that upon proof of co-ownership the normal inference is that the use of the property by one co-owner is with the consent of the other. Where both spouses are in the car at the time of the accident, this inference would appear to be even stronger. See Zabunoff v. Walker, 192 Cal. App. 2d 8, 13 Cal. Rptr. 463 (1961); Mooren v. King, 182 Cal. App. 2d 546, 6 Cal. Rptr. 362 (1960) (by implication).

[82] O'Neill v. Williams, 127 Cal. App. 385, 15 P.2d 879 (1932). Consent is even more likely to be found where both husband and wife are in the car. *Cf.* Zabunoff v. Walker, 192 Cal. App. 2d 8, 13 Cal. Rptr. 463 (1961), discussed *supra* note 69.

[83] Redfield v. Oakland Consol. St. Ry., 110 Cal. 277, 42 Pac. 822 (1895); Fiske v. Wilkie, 67 Cal. App. 2d 440, 154 P.2d 725 (1945).

[84] Cervantes v. Maco Gas Co., 177 Cal. App. 2d 246, 2 Cal. Rptr. 75 (1960). Witkin predicted this result. 4 WITKIN 2713-14.

[85] Katsoka v. May Dep't Stores Co., 60 Cal. App. 2d 177, 140 P.2d 467 (1943) (dictum). See also Crane v. Smith, 23 Cal. 2d 288, 301, 144 P.2d 356, 364 (1943).

Whether section 163.5 affects this situation remains to be seen. It could be interpreted to apply to this kind of action since, literally, a suit by a parent for injuries to his child could result in "damages . . . awarded to a married person in a civil action for personal injuries." It has been argued, however, that the section should be construed to apply only to injuries sustained by a spouse.[86]

D. *Conclusions and Recommendations*

Section 163.5 was designed to abolish a rule deemed unjust—the imputation of negligence between spouses.[87] An assessment of this statute raises two basic questions: (1) Does it achieve its aim? (2) Does it entail other, undesirable consequences?

The answer to the first question points to only partial success. In some situations contributory negligence in all likelihood will continue to be imputed to a spouse under California Vehicle Code section 17150. The imputation will no longer be based on the nature of the recovery but on the ownership of the car and on an issue of consensual driving. It could be said that spouses are legally in no worse position under section 17150 than anyone else—that the section applies to them "independent of their husband and wife relationship"[88]—and that section 163.5 removed a special imputation rule which was applicable only to husbands and wives.

Yet it is difficult to look at the chart which outlines the probable operation of section 17150 without being appalled at the complexity, the uncertainty, and the unfairness of its operation. One wonders why the rights of an innocent spouse to recover for injuries should hinge on accidentals of ownership, registration, and who was driving the car. For example, how much sense does it make to say that a wife who brought a car into the marriage cannot recover if the husband was driving and contributorily negligent,[89] although she can recover if the car had been purchased after the marriage from community funds.[90] Such distinctions have little if anything to justify them and are hardly the kind which engender public respect for the law. Why should not spouses out for a drive be treated alike as far as imputation of negligence is concerned, irrespective of who drives and the form of ownership and registration?

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[86] 9 HASTINGS L.J., *supra* note 59, at 297-98.

[87] See Estate of Simoni, 220 Cal. App. 2d 339, 343, 33 Cal. Rptr. 845, 848 (1963): "[I]t is reasonable to conclude that, by enacting section 163.5 of the Civil Code, the Legislature intended to eliminate the defense of such [between spouses] contributory negligence."

[88] Mooren v. King, 182 Cal. App. 2d 546, 552, 6 Cal. Rptr. 362, 366 (1960).

[89] See Table, case 11, *supra*.

[90] See Table, cases 1, 3, and 5, *supra*.

In addition to imputation under California Vehicle Code section 17150, imputation of contributory negligence between spouses will continue in actions by parents for the wrongful death of children and, possibly, for injuries to children. Such imputation appears to have as little rational justification as the imputation abolished by section 163.5.

Turning to other effects of the section, there are some uncertainties and some unexpected consequences. The property status of settlements, as distinguished from judgments, is uncertain. It is also uncertain to what extent the community property can be protected with respect to community funds expended for medical costs. Unanticipated results of the section include the deprivation to the community of recovery for past and future lost earnings, and changes in the treatment of recoveries in the event of divorce or death. However, possible hardship is likely to be minimized in many cases where the parties, either deliberately or inadvertently, transform the proceeds of the recovery into community property.

Changes in the present law appear desirable to accomplish dual objectives: completely eliminating the imputation of negligence between spouses, and ending the hazards brought about by the conversion of personal injury awards into separate property. In determining what changes should be recommended, it should be recalled that the problem of imputing negligence between spouses arose because of the mechanical application of community property concepts to negligence cases. Section 163.5 represents an attempt at a mechanical solution—it pins a different label on the recovery. Such a formalistic approach seems neither desirable nor necessary and creates more problems than it solves. It seems far more desirable to abolish imputation directly without changing the property nature of the recovery.

Accordingly, the following legislative scheme is suggested:

First, that California Civil Code section 163.5 be repealed and that section 171c of the California Civil Code be amended to restore its pre-1957 wording.

Second, that section 163.5 be replaced with a provision, either in the California Civil Code or in the California Vehicle Code, which states directly that the negligence of one spouse shall not be imputed to the other. Such a provision might read as follows:

> The negligence of one spouse shall not be imputed to the other spouse as owner of a motor vehicle under Vehicle Code section 17150 or for any other reason.[91]

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[91] *But see* Friedenthal, *supra* note 77, at 71-72, where this solution is criticized

Legislation along this line would accomplish the two objectives set forth above: it would entirely eliminate imputed negligence between spouses and it would return to the traditional treatment of a personal injury cause of action as community property and thus obviate the concerns aroused by section 163.5.

Such a change would not diminish an owner's financial responsibility to third parties under section 17150 and following of the California Vehicle Code. A spouse who owns a car would continue to be liable for the negligence of the other spouse within the limits of the financial responsibility law. This is so because an owner's liability to third parties is established directly by the statute and does not depend on imputed negligence.[92] However, should there be any doubt in this respect, it can be resolved by the addition of an appropriate sentence to the draft statute. As an alternative, section 163.5 could be replaced with a provision to the effect that the negligence of one spouse shall not be imputed to the other, but without making reference to the California Vehicle Code.[93]

A final comment is necessary on the possibility of amending section 163.5 to provide that some portions of the recovery be separate property and other portions community property. For example, a resolution approved in principle by the 1959 Conference of State Bar Delegates would amend the section "to provide that special damages recovered as reimbursement for expenditures made out of community funds are community property but that there shall be no imputation of negligence between husband and wife due to the community nature of such special damages."[94]

The desirability of such an approach seems doubtful. Aside from the fact that it would not do away with all imputed negligence, it is a piecemeal effort to deal with the problem.[95] Furthermore, splitting the recovery into part community and part separate property would introduce an additional element of complexity and an

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since it abolishes imputation of negligence under § 17150 only between spouses. Professor Friedenthal recommended the repeal of CAL. VEH. CODE §§ 17150, 17154, 17159.

[92] In fact, the imputation clause which forms the last part of CAL. VEH. CODE § 17150 was a later addition to the provisions for an owner's liability to third persons. Cal. Stats. 1937, ch. 840, § 1, at 2353.

[93] Compare California Assembly Bill 3286, 1957 Regular (General) Session. See note 18 *supra* and text accompanying.

[94] 35 CAL. S.B.J. 66, 75 (1960) (Resolution No. 57). The Board of Governors of the State Bar referred the resolution to the Law Revision Commission for its information. *Ibid.* Compare the resolution adopted at the 1955 Conference of State Bar Delegates referred to *supra* note 19.

[95] This resolution was designed to deal with the problem of medical expenses. See Statement of Reasons accompanying Resolution No. 57, *supra* note 94, as contained in copy of resolution transmitted by the State Bar to the Law Revision Commission.

added source of dispute into an area which is already abundantly difficult. There is a genuine need for simplification which law revision can meet. For these reasons amendment of section 163.5 is not recommended. The legislature instead should be afforded the opportunity to separate the imputation problem from formalistic property concepts. Adoption of a straightforward provision abolishing imputed negligence—whether or not the provision extends to imputation under California Vehicle Code section 17150—would be law revision in the best sense of the term.

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