Comment

THE IMPACT OF THE COMMUNITY PROPERTY SYSTEM ON TORT SUITS

Imputed Contributory Negligence and Inter-Spouse Tort Suits

Rarely in the space of a few short months has the California Supreme Court shown such a marked contrast in its approach to analogous problems as in the cases of *Watson v. Watson*¹ and *Flores v. Brown*.² The familiar problem common to both was the effect of the plaintiff's marital status on tort recovery. In each there was abundant precedent for denying recovery but in each realistic grounds compelled relief. Yet in *Watson* the court

¹ 39 Cal.2d 305, 246 P.2d 19 (1952).
allowed the outmoded decisions of prior years to govern, while in *Flores* the precedents were boldly overruled.

After examining the reasons which prompted these precedents and noting how thoroughly their logic and usefulness has been spent, it is hoped the court will put a decisive end to the decisions of the past which have continued to plague us. Therefore, anticipating this necessary break with the past, particular emphasis here will be directed to the novel problems caused by the impact of community property laws on this same basic situation—where one spouse is at least partially to blame for the tort for which the other now seeks redress.

**PERSONAL INJURY SUITS AGAINST THIRD PERSONS—**

**IMPUTED CONTRIBUTORY NEGLIGENCE**

In the typical auto collision case when the husband's negligence has combined with an outsider's to cause the injuries for which the wife now seeks redress, an attempt to impute the husband's contributory negligence to plaintiff wife to bar recovery no longer meets with judicial favor. Thus, in England and this country alike there is a unanimous rejection of the *passenger-driver* relationship which once served as a basis for imputing negligence. Similarly, the *marital* relation per se has been discarded as a ground for imputing negligence between spouses, since the Married Woman's Acts are held to have terminated the technical and outmoded "identity of spouses in the eyes of the law." In fact the only remaining vestige on which to base the imputation, aside from agency, is that of "*joint-enterprise*" under which the plaintiff is by some fiction deemed to have been in control of the car and therefore also responsible for the accident. Although scholars criticize the doctrine because of its obvious fiction, and courts disagree on if and when it should be applied, it seems fair to generalize that a common property interest in the vehicle will cause the

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3 For a discussion of the history of the doctrine and typical situations in which "imputed negligence" is employed, see Keeton, *Imputed Contributory Negligence*, 13 Tex. L. Rev. 161 (1935).


5 The rejection became unanimous with Bricker v. Green, 313 Mich. 218, 21 N.W.2d 105 (1946), noted, 22 Notre Dame Law. 114 (1946).


7 Gilmore, *Imputed Negligence*, 1 Wis. L. Rev. 193 (1921). "There was a time in the history of the law of married women when such imputation rested on a sound basis. When the wife had no standing in law apart from her husband, when he was a necessary party in all actions for the vindication of her rights, and when the damages recovered belonged to him there was good reason for denying a recovery which would redound to the benefit of the negligent husband. Now that the wife has her own separate action and the damages recovered belong to her separate estate, there is no adequate reason for imputing the husband's negligence to her." *Id.* at 205.

8 See Notes, 59 A.L.R. 153 (1929) and 110 A.L.R. 1099 (1937) and cases cited.


10 *Id.*
joint enterprise doctrine to be invoked. But aside from this limitation, the common law jurisdictions agree that the concurring negligence of one spouse in operating a car which collides with another driven negligently by defendant will no longer preclude recovery by the innocent spouse.

The community property jurisdictions are forced to adhere to the imputed negligence rule with far greater frequency. Surprisingly to some, the joint enterprise theory is not the villain which thwarts recovery, for although the presumptions favoring community property usually satisfy the common ownership test of joint enterprise, ironically these same presumptions negate the requirement of "control" in the wife by vesting management of the community auto in the husband. Rather, the conventional rationale dooming the plaintiff to failure is based on the fear that otherwise the erring spouse would benefit by his own negligent conduct. If recovery were permitted, the courts reason, the negligent spouse would profit from the fruits of his own wrongdoing by virtue of his joint ownership of the community recovery.

This conventional approach has been followed despite the criticism that in no other field of law is an innocent person denied recovery because of the wrongs of another; that it affords to defendant a windfall gain simply because the passenger was the driver's spouse and not a mere friend; and that the recovery would merely recompense the community for a loss sustained rather than result in "profit" to the negligent spouse. But even more vulnerable to criticism was the extension of the rule to deny recovery when the community had been terminated before suit so that no negligent

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11 Prosser, Torts 495 (1941).
12 The language in Note, 3 Mo. L. Rev. 78 (1938), to the effect that imputation of negligence in California could always be reached on the basis of joint ownership of the auto since such joint ownership necessarily exists in a community property state, is obviously inaccurate. However, the note does accurately point up the conspicuous absence of this theory in reported cases.
13 E.g., Cal. Civ. Code §§ 162, 163, 169; De Funtak, Principles of Community Property § 60 (1943).
15 Where the auto is owned in cotenancy, or separately by the wife, the requisite control by the wife would be present. Cf. Wilcox v. Berry, 32 Cal.2d 189, 195 P.2d 414 (1948) (automobile owned jointly); Ransford v. Ainsworth, 196 Cal. 279, 237 Pac. 747 (1925) (wife's separate property). See also Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952) (auto registered in the wife's name alone, and the court refused to permit her to rely on the presumption of community property to avoid vicarious liability).
16 Harris v. Traglio, 24 F. Supp. 402 (D. Ore. 1938), noted, 28 Calif. L. Rev. 211 (1940) (concurring negligence of plaintiff's son in driving the community auto imputed to the husband to bar his recovery but not to the plaintiff wife).
17 See Weintraub, The Joint Enterprise Doctrine in Automobile Law, 16 Cornell L. Q. 320, 327 (1931).
18 E.g., Basler v. Sacramento Gas & Elec. Co., 158 Cal. 514, 111 Pac. 530 (1910). Since in Louisiana the wife's personal injury damages are her separate property, the husband's negligence is not imputed to her. Vitale v. Checker Cab Co., 166 La. 527, 117 So. 579 (1928).
19 See Note, 24 Calif. L. Rev. 739, 741 n.12 (1936).
spouse remained to share in the "profits." It was this vulnerability which led to the revolutionary decision in *Flores v. Brown*. In the *Flores* case the husband's concurring negligence resulted in his own death and the death and injuries of several passengers, including his wife and children. In the resulting suit brought to recover for these several casualties, the verdict was against the husband and in favor of the wife and children. The trial court ordered a complete new trial, on the grounds of inconsistency in verdicts and the impropriety of granting new trials limited to the question of damages only. Although the California Supreme Court affirmed the order on the latter ground, it very clearly indicated that there would be no inconsistency in finding in favor of the wife and children although the husband had been contributorily negligent, and in fact stressed the impropriety of imputing the husband's negligence to the others in this case.

The opinion begins by reiterating the conventional California view that since damages for the wife's personal injuries and wrongful death of the minor child are community property, the negligence of the husband ordinarily must be imputed to the wife to bar this community recovery which otherwise, because of the husband's joint ownership thereof, would inure to the benefit of the negligent spouse. But, reasoned the court:

> When the husband is dead, not only is the reason for the rule imputing his negligence to the wife gone, but to apply it defeats its own purpose. It is but a windfall to a defendant who negligently injures a wife or causes the death of a minor child that recovery may be barred because the wife's husband was also negligent. Although allowing the negligent defendant to escape liability has been considered a lesser evil than allowing the negligent spouse to profit from his own wrong, surely the former evil may not be balanced by the latter when the latter is no longer present.

The court concludes that since the marriage was dissolved by death, community property complications vanished. Hence, the claims must be decided in accord with the majority rule which refuses to impute the husband's negligence to the innocent wife. While technically the question of recovery on the wife's claim for personal injuries was not before the court since no appeal was taken by her, the court equally included this in its discussion of the claim for wrongful death of the minor child on which an appeal was taken. Since in both types of actions recovery is ordinarily community, once the hurdle caused by a community award is removed the result of granting relief should obtain in either.

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24 *Id.* at 632, 248 P.2d at 927.
26 However, when the wife is living apart from her husband, the damages recovered for wrongful death of the child are separate property, as are the damages for injuries to the wife. Christiana v. Rose, 100 Cal. App.2d 46, 222 P.2d 891 (1950).
Although the result reached is undoubtedly the desirable one, the logic of the court's opinion is difficult to grasp. In effect, the court has authorized separate property awards based on what were community causes of action originally. This apparent inconsistency might have been avoided in one of several ways. One alternative would have been to label the causes of action separate, rather than community, property when they arose. But although this could have been done for the wife's injuries by reverting to a view long since overruled, the cause of action for the child's wrongful death must have been community at the outset since the statute so implies by providing the parents are equally entitled to the services and earnings of their minor child. Again, the court might have declined to classify the causes of action as property of any type. Instead, the nature of the recovery could have been determined by the marital status at the time of suit. However, this would have entailed a drastic departure from numerous cases holding a cause of action is property and from those where a separate property award was granted during marriage. Finally, it would have been possible to arrive at a separate property award by reasoning that, since on dissolution of marriage all interests in community become separate property held by the former spouses, (or the surviving spouse and the deceased's heirs), as tenants in common to an undivided one-half, the community causes of action were likewise transformed into separate property by the husband's death. Yet this would have required a recovery of only one-half of the damages by the surviving spouse who owned but one-half of the cause of action, a result nowhere intimated by the court's opinion.

Therefore, the opinion apparently is but a policy decision which refuses to let community property concepts thwart full recovery when the marriage, which is the basis for the community property rules, has been dissolved. The explanation of the court's logic must be left for future resolution, along with numerous legal niceties such as a determination of when the statute of limitations begins to run on the wife's cause of action for personal injuries, and what other situations might permit an actionable claim to spring up in the future sometime after the event producing the claim occurred. However, it seems worthwhile to speculate here on at least two problems left open by the court; first, what should be the amount of

32 See Ligon v. Ligon, 39 Tex. Civ. App. 392, 87 S.W. 838 (1905), where a community cause of action for the husband's personal injuries was divided on divorce between the spouses, so that presumably recovery was likewise shared equally by the spouses.
33 Since the wife cannot sue for her personal injuries until the marriage is dissolved, or until the damages become separate property rather than community, will the statute of limitations start to run only at this deferred date, pursuant to the general rule that the statute of limitations begins to run only when the claim becomes actionable?
damages awarded to the plaintiff where his or her spouse was contributorily negligent, and secondly, what are the possible extensions of the theory of this case?

*Amount of damages.* A determination of the proper amount of damages is suggested by the court's statement, that:

> When the marriage is dissolved, however, the interests in any of these causes of action become separate property, and it becomes possible to segregate the elements of damages that would, except for the community property system, be considered personal to each spouse. Under these circumstances the objective of preventing unjust enrichment may be accomplished by barring only the interest of the negligent spouse or his estate. (emphasis added)

The implication is that only those damages which would be awarded a married woman in a common law jurisdiction are to be awarded here. Under the majority rule in such jurisdictions on actions for personal injuries of the wife this would mean damages for the invasion of her personal security or for her lost earnings when she pursues an independent calling, but not for the value of her domestic services which the husband alone may recover. It would of course be possible to allow recovery for the entire damages sustained, including those for lost future earnings and domestic services, by treating her as a femme sole now that the marriage is dissolved. Precedent for this is suggested in a New Jersey case, where the court, in discussing whether the contributory negligence of the husband should be imputed to the wife, said:

> . . . her case is not controlled by the decision . . . in which it was held that, in actions by husband and wife for a tort to the wife, his contributory negligence would defeat the suit because of his common law interest in, and control of, the recovery. The present case differs in that there is no husband to exercise any such control, he having perished in the accident; and, as a result, the right of action inures to the wife alone.

However, since the California court speaks of segregating the damages which would be considered personal to each spouse, the wife will probably be limited to the former recovery.

*Possible extensions.* The dominant philosophy of the *Flores* case is that the admitted evil of denying recovery should not prevail once its "evil" counterpart of allowing the negligent spouse to share in the profits of his own wrong is absent. The most probable extension of this policy would be

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35 See Notes, 26 Notre Dame Law. 734 (1951); 151 A.L.R. 479 (1944) and cases cited.
36 Accord: Western Union Tel. Co. v. Kelly, 29 S.W. 408 (Tex. Civ. App. 1894) (alternative holding that since the plaintiff wife's mental suffering occurred after the husband's death, although the tort was committed before, the damages would not be community property).
38 This also accords with the court's statement that the wife's recovery for wrongful death of the child will be limited to the damages suffered by her alone. Flores v. Brown, 39 Cal.2d 622, 631, 248 P.2d 922, 927 (1952).
to cases where the injuries jointly caused by a spouse and a stranger occurred during coverture, but suit was not commenced until after dissolution of the marriage through divorce. There would seem to be no justifiable ground for distinguishing between this and the *Flores* case, since in both instances there is no longer any community property in the technical sense to cause complications. Therefore, relief should be equally forthcoming whether there is dissolution by death or dissolution by divorce.

A further extension might embrace situations where the spouses, after the cause of action arose, relinquished to each other any rights in tort claims which would otherwise have accrued to the benefit of the community. Such a relinquishment might now be valid, since under the *Flores* doctrine it appears to be immaterial that the cause of action was community when it arose, provided that by the time of suit the plaintiff's interest in the cause of action is separate property. This result was reached by a District Court of Appeal in the recent case of *Kesler v. Pabst*. Certainly this goes beyond the *Flores* case in that here the negligent spouse by his own volition could dissolve the barrier to relief. Yet since a relinquishment by this same spouse before the cause of action arose is valid even though subject to this same objection, only by affirming the *Kesler* case would an end be put to the arbitrary premium granted those who by chance give a relinquishment at an early enough date.

In the field of imputed (contributory) negligence seemingly the outermost limit to which the *Flores* case might extend would be to allow the recovery of damages as separate property even in the absence of an agreement to that effect between the spouses or a dissolution of the marriage. Such a result would certainly accord to the basic philosophy of the *Flores* case in that the evil of denying recovery would be absent, and also the negligent spouse would be precluded from sharing in the ownership of the damages. Yet the logic of such a holding would be tenuous; in effect the court would be granting an award of separate property based on a cause of action which would still be community property at the time of suit. Thus although the court in the *Flores* case has certainly taken a step in the right direction, it is doubtful whether the momentum of that step could logically carry to this extreme. Nevertheless, policy-wise it would perhaps be desirable to forsake logic in order to restrict the scope of the contributory negligence doctrine. Since this defense has been criticized by all eminent writers in the field as arbitrary and unfortunate, there would


40 Also, unlike the *Flores* case, here the marriage is still intact so that the negligent spouse undoubtedly would gain some practical enjoyment from his mate's separate property recovery. However, this has never been given as a reason for refusing relief to the innocent party, and in fact has impliedly been rejected by the majority of common law jurisdictions which grant relief despite this likelihood.


42 It has been suggested that such a change be made by statute. See *Prosser, Torts* § 53 (1941).
seem to be even stronger reasons for refusing to apply it in the case where an innocent plaintiff is seeking redress.

Finally, the ramifications of the *Flores* decision need not be confined to cases where the defense of contributory negligence is asserted, particularly since the field of inter-spouse personal injury suits is so needful of revitalized analysis. Even a cursory inspection of this latter field shows the crying need for some major reforms.

**Inter-Spouse Suits for Torts**

Although the origin of the principle remains shrouded in mystery,\(^4^4\) it was well settled at common law that husband and wife were one, a single entity, in the eyes of the law.\(^4^5\) It was also fundamental that the entire management and effective ownership of both the spouses' properties vested in the husband who alone could sue when either of the mate's interests was involved.\(^4^6\) The inevitable consequence of these two rules was that no redress could be had in a civil suit for injuries suffered by the wife or her property at the hands of the husband. Some decisions forbade these suits between spouses on the procedural ground that there was but one party involved, since the spouses were but a single legal entity, and since the husband had to represent both himself and his wife.\(^4^7\) In addition to the infirmity in the parties, there was the very practical consideration that the decree could be of no consequence since the husband's pockets already were lined with the wife's property as well as his own and would remain so regardless of the technical victor in the law suit.\(^4^8\) Thus, for centuries all suits between spouses remained effectively barred because of the "identity" of parties rule and the vesting of the wife's property interests in the husband.

With the rash of Married Woman's Acts enacted in the nineteenth century, the basis for this stalemate was finally overcome. Although the acts varied in some particulars, most gave the wife the right to control her separate property and to bring suit in her own name for its recovery.\(^4^9\) No longer then could the courts refuse to entertain inter-spouse suits because of practical futilities or party infirmities. But still the stalemate remained in part.

Courts began to distinguish between suits for injury to person and to property. It was felt that the Married Woman's Acts, by giving the wife

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\(^{45}\) Id. at 471.


\(^{47}\) Phillips v. Barnet, 1 Q.B.D. 436 (1876). "I was at first inclined to think . . . that the reason why a wife could not sue her husband was a difficulty as to parties; but I think when one looks at the matter more closely, the objection to the action is not merely with regard to the parties, but a requirement of the law founded upon the principle that husband and wife are one person." Id. at 438.

\(^{48}\) See Welch v. Davis, 410 Ill. 130, 133, 101 N.E.2d 547, 548 (1951).

control over her separate property and the right to bring suit to protect it, indicated a legislative policy to allow such suits even against the husband.50 But provisions giving the wife a right to bring suit for personal torts were instead construed narrowly as "not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and husband."53 Yet was not the common law disability dependent on this very procedural difficulty as to parties, together with the realization that as a practical matter nothing could be gained by litigation as long as the husband retained exclusive powers over all the wife's property? By curing this procedural roadblock and by abolishing the vesting of the wife's property in the husband, the foundations for the once meaningful common law rule were shattered.

As added support for their results, the courts began to offer policy arguments that to allow such suits would entail vexatious litigation,53 disturbance of "conjugal tranquillity," and futility because of the "adequate remedy" in the divorce or criminal courts.55 Yet only with tongue in cheek can it be said:66

... that after a husband has beateh his wife, there is a state of peace harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and though the same courts refuse to find any disruption of domestic tranquillity if she sues him for a tort to her property, or brings a criminal prosecution against him.

Although a growing minority has realized the fallacy in such decisions,67 most courts still cling to the unwarranted distinction of allowing suits where property rights have been invaded,68 but not where there is injury to person or character.69

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50 E.g., Madget v. Madget, 85 Ohio App. 18, 87 N.E.2d 918 (1949).
51 CAL. CODE CIV. PROC. § 370.
52 Thompson v. Thompson, 218 U.S. 611, 617 (1910).
54 David v. David, 161 Md. 532, 157 Atl. 755 (1932). This argument is persistently advanced, although as often as not the litigants are already divorced, or annulment proceedings are pending. For an excellent critical analysis, where recovery was allowed for the tort committed after the decree of divorce was entered but before it became final, see Steele v. Steele, 65 F. Supp. 329 (D.C., 1946).
56 PROSSER, TORTS 903 (1941).
58 See Note, 109 A.L.R. 859 (1937) and cases cited.
59 See Note, 160 A.L.R. 1406 (1946); supplementing several earlier annotations on the subject.
It is interesting to note that from its inception California has never had to face the dilemma in inter-spouse suits for injuries to separate property which resulted from the combination of common law rules on infirmity of parties and vesting the wife's property interests in the husband. By incorporating a Married Woman's Act into the California Constitution when it was adopted, the basis for the common law stalemate was undermined immediately. In addition the community property system was continued in force, under which the wife was allowed to sue her husband. Thus, while California courts had no trouble in entertaining inter-spouse suits for torts against property, the generally accepted distinction of refusing suits for torts against person has been adhered to repeatedly.

An example is the case of Watson v. Watson which involved an action for malicious prosecution instituted by plaintiff husband against his putative wife after annulment proceedings had been brought. The suit was dismissed on the authority of the early California case of Peters v. Peters, which held that spouses cannot sue each other in tort for injury to person or character occurring during coverture. The main ground for that decision was the court's belief that it was bound by Political Code Section 4468 to follow the common law rule, since the legislature had nowhere clearly indicated an intent to depart from that rule. Yet an easy answer to this is that, since neither the "identity" argument nor any other tenable basis exists for this rule under California law, the legislature has spoken by the clear mandate of our statute that when the reason for the rule ceases so does the rule. In addition, the Peters case also noted the familiar policy arguments on fear of disturbing conjugal tranquillity and the adequacy of

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61 Id., Art. XI, § 14; Cal. Stats. 1850, c. 103, p. 254.
62 1 De Funix, Principles of Community Property § 151 (1943).
64 A further undesirable complication has been injected into this problem by a suggestion from a Wisconsin court that the wife has even greater rights than the husband; so that even though Married Woman's Acts give the wife a right to sue her spouse, this is not reciprocal. Fehr v. General Acc., F. & L. Assur. Corp., 246 Wis. 228, 16 N.W.2d 787 (1944).
65 Although the litigants' marriage was void for bigamy, the court held plaintiff was estopped from denying the validity of the marriage in order to circumvent the rule barring suits for torts committed during coverture, since plaintiff's false representations on the validity of his divorce decree from first wife had induced the "marriage."
66 As indicated in note 54 supra, this fact is immaterial. See Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637 (1948), where the court denied recovery for negligent injuries occurring during marriage, even though suit was brought after annulment, reasoning that the annulment declaration makes the marriage void ab initio for most purposes, but not all.
67 156 Cal. 32, 103 Pac. 219 (1909) (a battery action against a temperamental wife who had shot her husband in the leg when he attempted to enter her bedroom).
68 Now Cal. Civ. Code § 22.2: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, is the rule of decision in all the courts of this State."
69 See Estate of Hartman, 21 Cal. App.2d 266, 269, 68 P.2d 744, 745 (1937): "Apparently appellant bases his contention on the common law rule that regarded a husband and wife as a single entity and made the wife subject to the will of the husband. That theory has long been abandoned in this state, where the present policy of the law is to recognize the separate legal and civil existence of the wife."
the remedy in the criminal courts.\textsuperscript{71} The absurdity of these arguments, as discussed above, is concretely illustrated by the \textit{Watson} case where the annulment proceedings indicate the "conjugal harmony" to be pure discord and the marriage a nullity unneedful of protection.\textsuperscript{72}.

Although as yet our courts have given no indication of a contemplated break with precedent in this area, neither have they recently scrutinized the reasons behind those time-worn decisions barring inter-spouse personal injury suits. It is reasonable to assume that should this reconsideration occur, the break with the past will be inevitable. In anticipation of that time when the courts silence the dictates of such historic relics, here is presented a consideration of the new host of problems which will confront the court in handling inter-spouse actions.

The powers of a husband over his wife's separate property at common law, which for practical reasons prevented inter-spouse suits, has its parallel today in the extensive powers over community property enjoyed by a husband. Perhaps this facet of our community property laws, or other practical considerations, warrants in part the current distinction between allowing recovery for torts to property as compared to those against the person. This can best be determined by examining and comparing the nature and source of recovery in these two types of suits.

\textbf{Torts Against Separate Property}

Despite the limited definition of separate property in the California statute,\textsuperscript{73} when damages are awarded for torts against separate property the \textit{nature of recovery} must be separate property. This follows by analogy to the judicially created "tracing rule"\textsuperscript{74} whereby property is held to partake of the same nature as the funds or property used as consideration for the exchange.\textsuperscript{75} The logical view of labeling as separate property the damages recovered for torts committed by strangers against separate property has definite support in at least one California case,\textsuperscript{76} and implied sup-

\textsuperscript{71} It is interesting to note that this was said even though the court there recognized that a criminal prosecution was barred.

\textsuperscript{72} See \textit{Watson v. Watson}, 240 P.2d 1005, 1006 (Cal. App. 1952): "But in the action at bar neither the tranquility of the state nor the welfare of a family is at stake. A valid marriage of the parties never existed."

\textsuperscript{73} \textsc{Cal. Civ. Code} §§ 162, 163. Under these sections separate property is only that owned by the spouse before marriage "and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues and profits thereof . . . ."

\textsuperscript{74} "The doctrine that property acquired during marriage by exchange therefor of separate property remains separate property is contrary to the absolute letter of the statute, and was no doubt formulated by the courts out of necessity, and to render the right to separate property effective. If 'all other property acquired after marriage . . . . is community property,' as is declared by the letter of the statute, then . . . [i]f they [husband and wife] have separate property, they must keep it just as it is, else if they sell or exchange it and invest in other property, the property so acquired will become common property. The letter of the statute would bring about this result." \textit{Morris v. Waring}, 22 N.M. 175, 181, 159 Pac. 1002, 1004 (1916).

\textsuperscript{75} \textit{Scoville v. Keglor}, 27 Cal.App.2d 17, 80 P.2d 162 (1938), involved a suit for personal injuries to the spouses and damages to the wife's sedan. The court, although affirming the rule that all damages for personal injuries to either spouse were community, added that the $600 damages for demolition of the car constituted separate property.
port in numerous others. There is no reason to expect the courts to deviate from this rule when the suit is between spouses.

The related question of the proper source of damages in an inter-spouse suit for a tort against separate property is not so easily resolved. A determination of whether the damages may be paid out of community property or whether they must be borne by the defendant spouse out of his own separate property is complicated by theoretical considerations as well as judicial doctrines. However, at least theoretically it can be demonstrated that only by assessing the damages primarily against the defendant’s separate estate, except to the extent that the community benefited by the tort, can an equitable result obtain. This can be exemplified by examining the two types of situations which may arise: (1) where the tort has benefited either the community or separate estate of defendant, and (2) where there are damages above and beyond any benefit.

(1) By failing to make the primary source of recovery that estate which benefited by the tort, the defendant would be allowed to retain some of the benefits from his tortious conduct if he elected to use the community property in payment of the damages where his separate estate reaped the benefits; and conversely, the defendant would be unduly penalized should payment of damages be made from his separate estate where the community property received the benefits. To take some hypothetical examples, assume the community is worth $30,000 and the converted separate property of P is $1,000, so that P’s and D’s net equities in these assets only were $16,000 and $15,000 respectively before the tort. To restore the parties to this same position after payment of the judgment, in a case where the community received the proceeds of the conversion, it is necessary to make the $1,000 award out of community, now worth $31,000. Since P and D jointly own the community, both have been enriched by the $1,000 addition thereto so that an award from D’s separate estate for this full amount would unjustly increase P’s equity to $16,500 (½ of $31,000 community plus $1,000 damages) at D’s expense. On the other hand, where the tort benefited D’s separate estate, it is essential that this estate be made primarily liable since here recovery out of the community would decrease P’s equity in these assets to $15,500 (½ of $29,000 community plus $1,000 damages) to D’s advantage.

Therefore, the proper formula for assessing damages where the tort has resulted in an economic benefit is to make that estate which received the converted property or its proceeds primarily liable to the estate from

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77 But cf. Ainsa v. Moses, 100 S.W. 791 (Tex. Civ. App. 1907) (wife sued for damages to her separate property and the court dismissed, holding that only the husband could sue since any damages would be community property).

78 "Benefit to community" is given a negative definition by the judiciary, that is, where the courts can find no affirmative benefit to the separate estate of either spouse it is presumed that the community "benefited" thereby. Mark v. Title Guarantee etc. Co., 122 Cal. App. 301, 9 P.2d 839 (1932); McGregor v. Johnson, 58 Wash. 78, 107 Pac. 1049 (1910).
which the property was taken. This type of reasoning seems to have been indulged in\textsuperscript{79} by community property courts\textsuperscript{80} in several instances.

(2) The second type of situation alluded to above is that where the tort by one spouse against the property of the other either produced no proceeds,\textsuperscript{81} or the proceeds were not as great as the value of the property converted. In determining the source of damages for this deficiency, again theoretically $D$'s separate estate should be made primarily liable. This would result in $D$ bearing the whole loss from his tort while restoring $P$ to status quo ante, a result ordinarily expected in a tort suit. However, there are several California decisions involving torts against third parties where the court has permitted the defendant husband to tap the community as the source of damages,\textsuperscript{82} thereby casting the loss from his tort equally on the wife as co-owner of the community. Although these cases might suggest that the husband is as free to use the community property to satisfy his tort liability to the wife as to a third party, there are good reasons for refusing to so extend the rule. The origin of this rule is traceable to decisions in the pre-1927 period when the husband not only controlled the community but also was its exclusive owner,\textsuperscript{83} the wife having but a mere expectancy if she outlived her husband. Since the 1927 amendment giving the wife a vested interest in the community,\textsuperscript{84} there is surely less justification now for permitting the husband to use property belonging to the wife to satisfy his tort liability to her. The decisions where the husband has been made to account to his wife when he used community property to improve his own separate estate indicate that the courts will probably distinguish between suits for torts against outsiders and those between the spouses. Furthermore, as will be further discussed below, to permit the husband to so use the community would discriminate unfairly against the wife in that the decisions indicate that she could not make a similar recourse to the community when she is the defendant. Therefore, the rule permitting the husband to freely use community property to satisfy his tort liability should at least be confined to suits brought by outsiders and not extended to suits between spouses.

Even if the court properly determines the primary source of damages is the defendant's separate estate unless the community has been benefited

\textsuperscript{79} Estate of Turner, 35 Cal. App.2d 576, 96 P.2d 363 (1939); Provost v. Provost, 102 Cal. App. 775, 283 Pac. 842 (1929) (husband's separate estate held accountable where he used community to improve his separate estate); Fletcher v. Hodges, 145 La. 927, 83 So. 194 (1919) (proceeds from wife's separate estate applied to improve community, so judgment given wife against the community); Note, 77 A.L.R. 1021 (1932).

\textsuperscript{80} But cf. Klimis v. Klimis, 158 Fla. 159, 28 S.2d 112 (1946) (a common law jurisdiction, where $3,000 had been given plaintiff by her father right before her marriage, the court finding this gift had been intended as plaintiff's separate property; $2,000 of this was spent on the honeymoon by both spouses, and after dissolution of the marriage, the trial court awarded the unspent balance of $1,000 to plaintiff; this was reversed in part on appeal by an award to plaintiff of the full $3,000).

\textsuperscript{81} A negligent or intentional injury to property exemplifies this.

\textsuperscript{82} Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641 (1941).

\textsuperscript{83} Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228 (1897).

\textsuperscript{84} CAL. CIV. CODE § 161a.
COMMENT

by the tort, some other problems must be faced. Because the defendant spouse frequently has insufficient separate property to bear the charge of primary liability, the court in the alternative should make recourse to the community as a secondary source of damages for the balance owing to assure plaintiff adequate relief. However, since the spouses jointly own the community, in effect the plaintiff would be paying half these damages from the secondary source unless certain precautions are taken. Two possible alternatives are available. The court might double the amount of damages payable out of community so that, of the 200% recovery awarded \( P, P \) and \( D \) would have each paid half, resulting in \( P \) receiving the net effective recovery of 100% only; or in the alternative, the damages might be assessed against \( D \)'s half of the community with a record being kept of this so that when the community is ultimately dissolved this deduction will be reflected in computing the share of each spouse. Only by adoption of some such adjustment can adequate relief be assured.

The final problem is that when the wife is defendant, it may be impossible to make recourse to the community as a secondary source of recovery. In the past the wife's tort creditor has been denied redress from the community. The reasoning of the court has been that, though the wife since 1927 has a vested interest in community property, to allow the wife's tort creditor to reach it would be an unwarranted interference with the husband's exclusive control and management. Uncertainty now has arisen from the 1951 amendment giving the wife the right to manage and control her own earnings and recoveries for personal injury. The objection previously raised that to charge the community with liability for the wife's torts would transgress the husband's right to control is no longer tenable as to the wife's earnings and damages. Therefore, if the control test is retained, these items at least will be subject to her tort liability. Yet since the wife more frequently than not leaves the "bread-winning" function to her husband, subjecting to liability these items of community which are under the wife's legal control still leaves the result far from satisfactory to the innocent victim of her follies. Unless the community is made equally liable for the torts of either spouse, the inequity will result of granting recovery

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85 An additional incidental result is that, although the wife's ownership equity would remain constant, she would now have "legal control" over more property than before the tort.
88 Cal. CIV. CODE § 171c.
89 See Note, 24 CALIF. L. REV. 218 (1936). "On the ground of justice and fairness, it would seem that the proper view would be to hold the community property responsible for the wife's torts. A contract creditor of the wife may protect himself by obtaining security for its payment. A tort creditor, however, has no such opportunity to protect himself. Notwithstanding that the wife's separate property is responsible for her torts, she does not ordinarily own or possess such separate estate, and it would seem that it is only right that the community property should be chargeable rather than to permit the innocent victim of her wrong to be without redress." Id. at 220.
90 In other jurisdictions, some make the community liable only if it was benefited by the tort; REMINGTON'S WASH. REV. STATS. § 6904 (1932); McFadden v. Watson, 51 Ariz. 110, 74 P.2d 1181 (1938).
where the wife sues for injury to her property, but often only a pretense of recovery where the husband is plaintiff.

**Torts Against Person or Character**

The broad residual definition of "community property" contained in the California Civil Code\(^9\) has led the California courts\(^9\) to adopt the view that damages recovered by either spouse for injuries to his person or character are community property.\(^9\) The most important exceptions to this rule are where the spouses have agreed that such damages should be separate estate,\(^9\) or where the spouses were living separate and apart when the tort was committed so that by statute the damages are separate property.\(^9\) As the spouses are frequently estranged\(^9\) when a tort is committed by one against the other, the latter exception is especially important in tort suits between spouses. However, ordinarily the *nature of recovery* will remain community in contrast to the separate property award for torts against separate estate.

Again, as in suits for torts against separate property, regardless of whether the community is made primarily or secondarily liable as the *source of recovery*,\(^9\) inevitably a case will arise where the defendant has no separate property and the community will be called on to pay the judgment. Yet in inter-spouse suits for torts against person (and against community property) the unique problem then arises that to the extent the community is made liable, this entity will be on both the paying and receiving ends, signing a check one moment and cashing it the next. The only effect of this would be a useless and undesirable reduction in the value of community commensurate with costs of litigation.

This futility of allowing a suit, where the sole effect would be tapping one pocket of the community to fill the other, is reminiscent of the practical problem which faced common law courts where any recovery in inter-spouse suits would necessarily have been paid by, and payable to, the husband. Since the better reasoned decisions permitted suit once this dilemma

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\(^9\) CAL. CIV. CODE § 164. “All other property acquired after marriage by either husband or wife, or both, . . . is community property . . . .”


\(^9\) This is not the universal rule in community property jurisdictions. For example, in Louisiana damages for injuries to the wife become her separate property; La. CIV. CODE, art. 2402 (1945).


\(^9\) “The earnings and accumulations of the wife, . . . while she is living separate from her husband, are the separate property of the wife.” CAL. CIV. CODE § 169. Although this section speaks only of “earnings and accumulations,” this will probably be construed to include damages from personal injuries also, as was done in the case of Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949) based on an analogous statute. See Christiana v. Rose, 100 Cal. App.2d 46, 55, 222 P.2d 891, 897 (1950).

\(^9\) Under CAL. CIV. CODE § 169, the wife’s recovery becomes separate property only if she is permanently “living separate from her husband.” Under § 169.1, the husband’s recovery will be separate property only if there is a “judgment or decree for separate maintenance.”

\(^9\) Again, it is suggested that the defendant’s separate estate be made primarily liable, as in cases where he negligently or intentionally injured his spouse’s separate, or community, property.
was removed, similarly inter-spouse suits for personal torts should be permitted here if some way can be found to avoid having the community play the dual role of payee and payor. One possibility would be for the court to order a partition of the community so as to make the defendant's share separate property and attachable for the damages.\textsuperscript{98} Or a record might be kept so that when the community is finally dissolved by orthodox means an accounting and adjustment could be made at that time.\textsuperscript{99} Perhaps the most obvious solution would be to classify damages recovered as separate rather than community, in contrast to the general rule that damages paid by third persons for torts against a spouse become community property. A departure from the general rule in this limited area does not seem too drastic a suggestion when it is remembered that only by some such departure can the innocent spouse be given redress for the wrongs of his mate.

Even if the courts or legislature are reluctant to make the necessary adjustments which would permit the ordinary suit between spouses for personal torts, it does not follow that when this community property complication is lacking the courts should continue to deny recovery.\textsuperscript{100} Rather, relief should be granted where either the nature of recovery would be separate property (due to dissolution of the marriage, etc.),\textsuperscript{101} or where the source of recovery would be separate (when defendant's separate estate proves adequate to bear the charge). Authority for such a distinction in treatment is found in Flores v. Brown\textsuperscript{102} which emphasized the propriety and, in fact, necessity of applying different rules of law depending upon the nature of the recovery involved. The present dissimilarity of treatment in these analogous areas is confusing and unjustified. Both the Flores and Watson\textsuperscript{103} cases involved the problem of the effect of domestic relations on tort recovery; in both the complication which ordinarily would have arisen from a community property award could be disregarded on the ground that the marriage had been dissolved; yet in the two cases the court reached entirely incongruous results. In Flores recovery was permitted while in Watson it was not.

It is to be hoped that in the future the Flores criterion for affording or

\textsuperscript{98} However, the courts have refused to make a forced division of community in other situations, and might refuse here. Smedberg v. Bevilockway, 7 Cal.App.2d 578, 46 P.2d 820 (1935); Note, 24 Calif. L. Rev. 218 (1936).


\textsuperscript{100} True, there still will remain the problem of inequity unless the courts permit the wife as well as the husband to use the community to satisfy her tort liability. This, however, is no reason for denying inter-spouse personal tort suits if suits for property injury, involving this same problem, are permitted.

\textsuperscript{101} Carver v. Ferguson, 254 P.2d 44 (Cal.App.1953), hearing granted March 26, 1953, dismissed June 4, 1953. Although the granting of a hearing by the California Supreme Court renders this case valueless as a precedent, it is worthwhile to note that the court there allowed the wife to recover against her husband for injuries occurring before marriage, on the ground that since the cause of action was separate property the recovery likewise would be separate property.

\textsuperscript{102} 39 Cal.2d 622, 248 P.2d 922 (1952).

\textsuperscript{103} Watson v. Watson, 39 Cal.2d 305, 246 P.2d 19 (1952).
denying plaintiff a remedy, depending upon the impact of our community property law, will be the one exclusively adopted. By substituting this approach in inter-spouse suits for the outdated identity and policy arguments, the courts would be injecting a drastically needed reform into one of the most retarded areas of tort law.

Babette B. Barton*

* LL.B., June 1954, University of California School of Law, Berkeley.