

Community Property - Loss of Wife's Earning Capacity

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Notes

COMMUNITY PROPERTY—LOSS OF WIFE'S EARNING CAPACITY—

A married woman who is a professional acrobatic dancer was injured in an automobile collision. Although she recuperated from all her injuries, two brown discolorations remained on her back. The trial court awarded her damages in the amount of four thousand dollars for physical pain and suffering, one thousand dollars for loss of earnings, and five hundred dollars for the permanent discoloration of her back which decreased her earning capacity as a professional dancer. On appeal to the First Circuit Court of Appeal, it was held that the award for loss of earnings was improperly allowed because the wife's earnings fell into the community of acquets and gains and, for any loss thereof, the husband alone, as head and master of the community, could sue. *Simon v. Harrison*, 200 So. 476 (La. App. 1941).

The Louisiana Supreme Court, by its interpretation of Article 2334 of the Civil Code,¹ has made clear the fact that the earnings of the wife when not living separate and apart from her husband are community property.² On the other hand, ever since the amendment of Article 2402 by Act 68 of 1902 "damages resulting from personal injuries to the wife . . . remain the separate property of the wife and are recoverable by herself alone."³

In the principal case the court of appeal could have adopted the view of the dissenting judge that where the personal injuries of the wife result in her loss of earning capacity, the damages allowed for this loss are her separate property. Were that interpretation given Act 68 of 1902,⁴ the following rule would exist in our state: the earnings of the wife are community property, but the damages allowed for loss of her earning capacity are her separate property.⁵

1. Art. 2334, La. Civil Code of 1870, provides:

"The earnings of the wife when living separate and apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses and the property purchased with all funds thus derived, are her separate property."

2. *Houghton v. Hall*, 177 La. 237, 148 So. 37 (1933). For a complete discussion of the "community unbalance," see Daggett, Is Joint Control of Community Property Possible? (1936) 10 Tulane L. Rev. 589.

3. Art. 2402, La. Civil Code of 1870.

4. La. Act 68 of 1902, amending Art. 2402, La. Civil Code of 1870.

5. The wife's recovery of earnings under the Workmen's Compensation

The inconsistency⁶ of such a rule is properly avoided by the present case. However, the court awarded the wife damages for the skin spots because "in her performances as a professional dancer [she] has to wear costumes in which her back is exposed." This reasoning, which regards the resulting decrease in earning capacity as the only basis of the damage, gives the impression that the court is reluctant to apply its own language.

The principal case illustrates again the injustice and procedural inconvenience⁷ occasioned by permitting only the husband, as head and master of the community, to institute suits for the community. Certainly the purposes of constitutional due process would be better served if the wife were permitted to maintain an action for the community when her earnings are at issue.⁸

H.H.P.

EDITOR'S NOTE: *Simon v. Harrison* has given rise to considerable discussion and argument among the Student Editors of the LOUISIANA LAW REVIEW. In order to present both sides of the controversy, the following paragraphs have been added.

By the amendment of Article 2402 by Act 68 of 1902 damages resulting from personal injuries to the wife are her separate property. In the present case the wife sought recovery for impairment of her ability to follow her profession, as a result of personal injuries.

The lower court apparently viewed this as a claim for loss of earnings, for it allowed such a claim. The court of appeal viewed it rather as a claim for loss of earning capacity. Under the analysis

Act is separate property. *Brownfield v. Southern Amusement Co.*, 196 La. 74, 198 So. 656 (1940). But, as pointed out in Note (1941) 3 LOUISIANA LAW REVIEW 641: "If this reasoning is to be carried to its logical conclusion, a recovery by the husband under the Workmen's Compensation Act would likewise be his separate property," so that the rights of the husband and the wife are equalized.

6. An award of damages for loss of future earnings or of earning capacity is justified only because an expectant loss has occurred. Since the anticipated earnings of the wife would have been community property had they been earned, then the reward for the loss of those expected earnings should likewise be community property, especially in view of the fact that the wife has already received full compensation for her own physical and mental pain and suffering.

7. *Vercher v. Roy*, 171 La. 524, 131 So. 658 (1930); *Succession of Howell*, 177 La. 276, 148 So. 48 (1933); *Breland v. Great States Ins. Co.*, 150 So. 313 (La. App. 1933); *Jones v. Vernon Parish School Board*, 161 So. 357 (La. App. 1935).

8. "The wife is completely emancipated as an individual and yet she cannot sue upon her contract because it accrues to the benefit of the community. This situation presents a case of a right without an adequate remedy, which deprivation is essentially a denial of due process of law." *Daggett*, supra note 2, at 598.

presented, it is immaterial in which light the claim is regarded, for in either the results are the same.

The dissenting judge in the court of appeal stated that loss of earning capacity was damage for personal injuries within the wording of the amendment.¹ Certainly loss of earnings or earning capacity is usually considered as an element or measure of damages in such cases.² The majority rejected the claim, but allowed a recovery of five hundred dollars for two small discolorations because plaintiff, a dancer, exposed her back in her performance. Is this not allowing damages for loss of earning capacity?

The reasoning of the majority appears to be that since any earnings produced by the wife's abilities fall into the community, any loss sustained is a loss of the community.³ Under this reasoning an employee whose wages had been garnished would not be entitled to recovery for loss of earnings or loss of earning capacity.

It is suggested that to find a right of action in the community there must either be a right or property falling into the community by operation of law, as is true in the case of the husband, or there must be an invasion of some right of the community. While it is well established that the wife's earnings when not living separate and apart from the husband belong to the community, Article 2334 deals only with the earnings of the wife after they have accrued. It does not therefore follow that the community is of right entitled to the wife's services, or restated, there is no duty imposed upon the wife to render services. Consequently, there is no right of the community damaged by the loss of future earnings of the wife, or impairment of her earning capacity.

In the case of contracts of the wife, while the suit may be to recover future earnings of the wife, the husband must sue, not because the community has a right to future earnings, but because the *right of action* arising from the breach of contract is community property.

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1. Ott, J., in *Simon v. Harrison*, 200 So. 476, 480 (La. App. 1941): "Where these personal injuries result in her loss of earning capacity, that is a damage which she sustains as a result of the injuries, and I think under the wording of the amending act . . ."

2. Cf. *Weddle v. Phelan*, 177 So. 407 (La. App. 1937); *Wilcox v. B. Olinde & Sons Co.*, 182 So. 149 (La. App. 1938); *Warren v. Metropolitan Life Ins. Co.*, 190 So. 855 (La. App. 1939).

3. The court cited the case of *Picheloup v. Gibbons*, 9 La. App. 380, 120 So. 504 (1928). This case dealt only with the recovery of medical expenses incurred by the community because of the wife's injury.