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Personal Injuries Under the California Community Property Law

William Q. de Funiak*

The prevalence of personal injury actions with an accompanying, and to some an alarming, increase in the amount of recoveries, not only in California but throughout the country, may well warrant some review of the legal rules governing where spouses are involved. In this respect, we may consider the matter from three standpoints. First, where the personal injury is inflicted by a spouse or by both spouses on a third person; second, where the personal injury is inflicted upon a spouse by some third person; and third, where one spouse inflicts the injury upon the other spouse or is at least in some measure responsible therefor.

Where the injury is inflicted upon a third person by a spouse or by both spouses, the important concern relates to the personal responsibility of the spouses and what property or properties, separate and community, are liable at the suit of the third person. Little difficulty presents itself where both spouses join in the commission of the tort so that they are in the position of joint tortfeasors. The separate property of both as well as all the community property, regardless of by which spouse acquired, becomes liable.1 And certainly the same result would ensue where the husband directs or ratifies such a tort committed by the wife. While the courts would probably not be inclined to consider from a legal standpoint that a wife could "direct" the commission of a personal injury by the husband so as to render her personally liable, and would require strong evidence of any so-called "ratification" by her of his tort, nevertheless conceiv-

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1. Although an action of waste, an illustration is Bonneau v. Galeazi, 215 Cal. 27, 8 P.2d 133 (1932), where the action for damages was against husband and wife. Judgment against both was sustained on appeal and particularly as to the wife on the ground the evidence showed that she participated in the tort.

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ably either situation might arise so as to impose liability upon the wife.2

The more common case is that in which the personal injury is inflicted upon some third person by one spouse alone. In California, recapitulation of the Civil Code and the recent cases show that the husband is not liable for civil injuries committed by the wife and that damages are recoverable from her alone3 (in the absence, of course, of "direction" or "ratification" by the husband). Thus, neither the separate property of the husband nor community property acquired by the husband can be subjected to liability for torts of the wife.4 However, the separate property of the wife and her earnings are liable for her tort.5 It is immaterial whether these earnings of the wife are community property, which ordinarily they legally are,6 or whether they are her separate property pursuant to antenuptial or post-nuptial agreement between the spouses; either agreement is legally permissible in California.7 Some areas of doubt exist as to the liability of these earnings where their form changes or they are commingled with other property, such as with community property acquired by the husband. So long as they are still traceable in other forms, they should still be liable, but it would seem that if so commingled with exempt properties as to be unidentifiable or untraceable they would no longer be reachable.

Where the physical injury of a third person is inflicted by the husband alone, his separate property is subject to liability and the community property in its entirety,8 except that so much of the community property as is represented by earnings of the wife is not liable.9 But if these earnings of the wife are commingled with community property acquired by the husband beyond identification, the whole commingled fund or property

2. Common law influences on the courts of most community property states must be considered here. See 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 182 (1943).
5. CAL. CIV. CODE §§ 167, 171a (Deering, 1949).
6. CAL. CIV. CODE § 171c (Deering, 1953), enacted in 1951, in providing for management by the wife of her earnings expressly states that the section shall not be construed as making such money the separate property of the wife nor as changing the respective interests of the spouses therein.
7. CAL. CIV. CODE §§ 159, 177 et seq. (Deering, 1949).
may be subjected to such liability. The separate property of the wife is not liable for the husband's tort.

While the foregoing rules apply to most situations, an exception must be recognized by reason of the application of the California Vehicle Code. While the extent of this liability of an owner of a motor vehicle is limited by Section 403 of this Code, it is important to notice that Section 402 imputes to an owner liability for the negligence of the operator if such operation is by permission, express or implied, of the owner. This section has been applied to one co-owner where another co-owner is operating the vehicle and is negligent. Thus, the question has arisen as to whether a wife, as co-owner of a family automobile, is subject to liability when the husband injures someone while operating the vehicle. Bearing in mind that in California spouses may own property in community or as joint tenants or tenants in common, it may be noticed that the California Supreme Court has pointed out that where the vehicle is owned as community property, the entire management and control of it is by law completely in the husband and so the wife has no consent to give which could add anything to his control. Accordingly, no liability would be imposed on her or subject her separate property or her earnings to liability for the husband's tort. On the other hand, if the spouses own the vehicle as joint tenants or tenants in common, the court points out that her voice in its use is equal to that of the husband and it becomes a question of fact whether he used it with her consent, express or implied, so as to subject her to liability under Section 402. Under whatever form of ownership the vehicle is held, within the limits set by Section 403, the husband may become liable for a tort committed by the wife while driving the vehicle, if he has expressly or impliedly consented to her driving it.

With respect to the foregoing situation, it may be pointed out that a plaintiff who wishes to hold an owner or co-owner liable must establish ownership at the time of the injury and

11. CAL. CIV. CODE § 171 (Deering, 1949).
12. Generally, see Miller, Community Function and Automobile Owners' Responsibilities, 6 LOYOLA L. REV. 43 (1951).
15. Formerly, under the California Vehicle Code, this was not true, as in Hill v. Jacquemart, 55 Cal. App. 498, 203 Pac. 1021 (1921); but as indicated the situation is now otherwise.
the permission, express or implied, of such owner or co-owner to the operation. Such plaintiff, wishing to establish liability on the part of a wife as co-owner of an automobile driven by the husband, has the additional burden of proving that her ownership is of a separate property nature as a tenant and not that of a community property nature.\(^{16}\) Of course, it might be considered that the title evidence, such as a bill of sale or the registration certificate, might show the form of ownership, and, if showing a tenancy, that the burden is then on the wife to prove that despite such form the automobile is nevertheless community property.\(^{17}\) As anyone owning an automobile in California knows, there is scarcely room on a registration certificate for two names, let alone any statement as to the form of ownership.\(^{18}\) There is authority that there is nothing in the provisions of the Vehicle Code requiring anything beyond the listing of the owner or owners and the mere fact that the names of husband and wife (e.g., "John Doe and Jane Doe") are listed does not indicate the character of ownership.\(^{19}\) Actually, such a listing should raise a presumption of community property, but it may be noticed that the California Supreme Court has pointed out that a registration of "John Doe and/or Jane Doe" rebuts any presumption of community property and indicates a joint tenancy.\(^{20}\) Of course, as already indicated above, a form of title showing joint tenancy is rebuttable to show that the property is actually community property.

With respect to the situation in which a third person inflicts personal injury upon a spouse, we enter the realm in which there is a split among the community property states as to whether the cause of action and the recovery thereon is the separate property of the injured spouse or is community property. The more reasonable view, it seems to me, is that followed

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\(^{17}\) While an instrument of title stating a tenancy raises a presumption that such is the ownership, this is rebuttable to show that actually the property is held by the spouses in community. This is usually accomplished by showing that the property was purchased with community funds and that it was not intended to be other than community property. A leading case is Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905 (1944).


in Louisiana,\textsuperscript{21} and evidently also in Nevada\textsuperscript{22} and New Mexico,\textsuperscript{23} that there are or may be two causes of action, one in the injured spouse for pain, suffering and disfigurement which is the separate property of that spouse, and one in the community for loss to the community in expenses, loss of services and earnings, and the like. Certainly, the foregoing states recognize such a rule where the wife is the spouse injured.

While the other community property states, including California, follow the view that the cause of action to an injured spouse and the recovery therefor are community property,\textsuperscript{24} California has a somewhat peculiar view developed as to this, where the wife is injured, which up to a point follows the view in the first group of states. While there is apparently only one cause of action, two actions would seem to be required, although these may be consolidated. One action must be brought by the wife to recover for her pain and suffering, although the recovery will represent community funds.\textsuperscript{25} The other action, for what are called the “consequential damages,” for loss to the community, must be brought by the husband, although it appears that he may delegate this authority to the wife.\textsuperscript{26} It will be seen, accordingly, that there is some recognition that two different matters are involved, although the conclusion is that everything is community property. Naturally, the contributory negligence of the husband will defeat his recovery for the consequential damages and likewise will defeat the wife’s action for damages for her pain and suffering.\textsuperscript{27} If she sues later, the judgment against the husband in his prior action is res judicata as to his contributory negligence and accordingly defeats the wife’s action.\textsuperscript{28} The effect of the contributory negligence rule to defeat the wife’s recovery seems somewhat unpopular at present

\textsuperscript{22} Fredrickson & Watson Const. Co. v. Boyd, 60 Nev. 117, 102 P.2d 627 (1940), followed in King v. Yancey, 147 P.2d 379 (9th Cir. 1945); Underhill v. Anclaux, 68 Nev. 69, 226 P.2d 794 (1951).
\textsuperscript{24} 1 De Funiak, Principles of Community Property § 82 et seq. (1943).
\textsuperscript{25} Sanderson v. Niemann, 17 Cal.2d 563, 110 P.2d 1025 (1941), describing the wife as an indispensable party plaintiff, although husband may join with her. Right of wife to sue was conferred by Cal. Code Civ. Proc. Ann. § 370 (Deering, 1949), which is held, however, not to change rule that damages recovered are community property. See Gioretti v. Wollaston, 83 Cal. App. 358, 257 Pac. 109 (1927).
\textsuperscript{28} Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949).
and there is agitation to enact legislation abolishing contributory negligence in favor of the comparative negligence doctrine. It may also be noted that in a recent case the California Supreme Court has held that where the wife sues after the death of the husband, his contributory negligence should not defeat her recovery, since he can no longer profit from his own contributory negligence.\(^{29}\)

Another facet of this situation is that in California the spouses may contract between them that what either acquires, although it would otherwise be community property, shall be the separate property of the spouse acquiring it.\(^{30}\) Dictum of the California Supreme Court indicates that the spouses may contract that a cause of action for personal injury shall be the separate property of the injured spouse.\(^{31}\) However, recently, in an action by the wife to recover damages for personal injuries to her, wherein the defendant answered alleging contributory negligence of the husband, and the spouses then entered into a contract whereby the husband relinquished any interest in the cause of action, this was not recognized by the court as effective to remove the husband's contributory negligence as a defensive factor and to enable the wife to recover.\(^{32}\)

One other matter may be commented upon in connection with a personal injury to a spouse during marriage. In the so-called Franklin case,\(^{33}\) a district court of appeal held that although personal injury to a husband during the marriage gave rise to a cause of action which was community property, nevertheless if the injured husband did not effect a recovery until after termination of the marriage by divorce, the recovery was his separate property. Fairly recently, although the same question was not involved in the case before it, the California Supreme Court took occasion to overrule expressly the view expressed in the Franklin case and to declare that both the cause of action and the proceeds of the recovery thereon, no matter when recovered, are community property.\(^{34}\)

By virtue of California Civil Code Section 169, earnings and accumulations of the wife, while living separate and apart from the husband, are her separate property. Living separate and


\(^{30}\) Right to contract, see CAL. CIV. CODE §§ 158-160 (Deering, 1949).


\(^{34}\) Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949).
apart, in this respect, does not mean that the spouses must have been divorced or separated by a decree of court, but merely that the wife is living apart with no intention of resuming cohabitation. A cause of action for personal injury to the wife, inflicted during this period of separation, is considered an "accumulation" within this code section and is the separate property of the wife. It would be otherwise, of course, if the recovery was made by the wife during this separation, but for an injury inflicted while she was living with her husband. This seems clear in view of the language of the Supreme Court in overruling the *Franklin* case. Likewise, in view of that language and other authorities, a recovery by a spouse during marriage for injury inflicted prior to marriage would be the separate property of the injured spouse. The fact that at the time of the injury, the man who is now her husband was contributorily negligent will not defeat her recovery, since he has no interest in it.

The situation of one spouse inflicting personal injury on the other spouse during the marriage presents no unusual difficulties of solution in its ordinary aspects. In California, as in other states, whether community or non-community property states, one spouse may not sue another for personal injury inflicted during the marriage. Foregoing any discussion of this, we may merely recognize that it represents a presently established matter of public policy. However, a handful of cases have presented an interesting offshoot of this matter. Many years ago, in Texas, a wife separated from her husband. While so separated and prior to any decree of divorce or separation, the husband with the aid of a friend seized and forcibly detained the wife.

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36. See Christlana v. Rose, 100 Cal. App.2d 46, 222 P.2d 891 (1950), reviewing authorities to this effect from other states.
41. See 1 DE FUNK, PRINCIPLES OF COMMUNITY PROPERTY § 153 (1943).
It must be recognized that there may be qualifications of this rule, as in Louisiana where it appears that although the wife may not sue the husband she does have a cause of action which she may prosecute against his insurer. See Burke v. Massachusetts Bonding & Ins. Co., 19 So.2d 647 (La. App. 1944), aff'd, 209 La. 495, 24 So.2d 875 (1946); McHenry v. American Employers Ins. Co., 18 So.2d 840 (La. App. 1944), conforming to answer to certified question in 206 La. 70, 18 So.2d 656 (1944).
while he attempted to persuade her to live with him again. After effecting her escape or release, the wife sued both the husband and his friend for damages for false imprisonment. Upon the trial she obtained a judgment against both, but upon appeal the judgment against the husband was reversed on the ground that the injury was inflicted during coverture and so gave no cause of action. However, the judgment against the other defendant was sustained, it being said that there could be no enforced contribution between the defendants and the judgment was several.\textsuperscript{42} A very similar factual situation arose more recently in Idaho and the Supreme Court of that state adopted a different view as to the right to sue the husband and recover from him, despite the fact that the tort occurred during coverture. Among other things, the court placed this right of action on the ground that the wife had a status of her own and that no difficulty arose as to the recovery, since it would come within the statute relating to accumulations of a married woman while living separate and apart from her husband.\textsuperscript{43} In California, also recently, has arisen the question of whether a wife could sue her husband for a tort inflicted by him while they were separated, specifically during the period between the interlocutory decree of divorce and the final decree of divorce. Upon the ground that the tort was committed prior to the final decree and while the parties were still legally married, the court held that the wife, although suing after final divorce, could not maintain the action.\textsuperscript{44}

Another case of recent origin involved a man who, knowing that he did not have a valid decree of divorce from a former marriage, entered into an attempted marriage with a woman who believed in good faith that they were married. Subsequently, he sued her for a tort, attempting to allege that since they were not legally married, there was no bar to his suing her in tort. However, as might be anticipated, the court held that he was estopped to deny the validity of the marriage and was thus, in effect, in the same position as a legal spouse attempting to sue the other spouse for a tort inflicted during marriage.\textsuperscript{45}

While not involving a tort inflicted during marriage by one spouse against the other, brief notice may be given to the mat-

\textsuperscript{42} Nickerson and Matson v. Nickerson, 65 Tex. 281 (1886).
\textsuperscript{44} Paulus v. Bauder, 106 Cal. App.2d 559, 238 P.2d 422 (1951).
\textsuperscript{45} Watson v. Watson, 39 Cal.2d 305, 246 P.2d 19 (1952).
ter of one spouse suing the other during marriage to recover for personal injury allegedly inflicted by the defendant upon the plaintiff prior to marriage. Admittedly, an unusual situation, it has arisen, obviously in the effort to effect a payment by an insurer of the defendant. In California, we have had the case of an engaged couple riding in a car driven by the man and colliding with another car. After the engaged couple were married, the wife sued the husband on the ground that his negligence contributed to her injury. It was held that she had a separate property cause of action which she could enforce by action against him during the marriage and the fact that he carried insurance did not deprive her of this right.46

In conclusion, it may be said the foregoing discussion of the three situations is not intended to constitute a complete coverage of all aspects or possibilities concerning these situations, but rather to consider the present state of the California law, in the light of the more recent cases.