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COMMENTS

CIVIL CODE SECTION 163.5: SOLUTION OR ENIGMA?

By Donald W. Curran* and Kenneth W. Rosenthal*

Nowhere are the important California legislative changes of 1957 more striking than in the field of community property. The legislature brought about a basic change in community property law by enactment of section 163.5 of the Civil Code:

"All damages, special and general, awarded a married person in a civil action for personal injuries, are the separate property of such married person."1

It is the purpose of this comment to present a brief discussion of the statute's probable effect, first on the law of negligence and second, on the law of damages.

Effect of Section 163.5 on Negligence as Between Spouses

Prior to the enactment of Civil Code Section 163.5, California courts had held recovery for personal injuries of either spouse to be community property.2 If contributory negligence by one of the spouses was established, such negligence would be imputed to the injured spouse and bar recovery as against a negligent defendant.3 The rationale for the rule was that if community recovery were allowed, it would have permitted the contributorily negligent spouse to share in the community proceeds and thereby be unjustly enriched by a wrong he himself had helped to bring about.4

With the enactment of section 163.5, the recovery for personal injuries by the injured spouse is now made his or her separate property. Hence the reason for imputing the contributorily negligent spouse to share in the community proceeds and thereby be unjustly enriched by a wrong he himself had helped to bring about.5

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6 Louisiana Civil Code art. 2402 is similar to California Civil Code § 163.5 as to the wife, in that the Louisiana statute makes her recovery for personal injuries separate property. Hence if husband is contributorily negligent, his negligence is not imputed to his wife, Elba v. Thomas, (La. App.) 59 So.2d 732 (1952). If the wife is contributorily negligent, however, the negligence must be imputed to the husband, see Levy v. New Orleans & N.E.R. Co., (La. App.) 20 So.2d 559 (1945), rehearing denied, 21 So.2d 155 (1945).
The imputation doctrine as between spouses has, in effect, been rendered inapplicable by section 163.5. But the section does raise a number of questions; the answers must await judicial interpretation. It is felt that some of the problems which may arise can be anticipated and might be analyzed at this time. This comment will be confined to problems seemingly introduced by the enactment of section 163.5, and will not discuss possible legislative changes that might be made to supplement the existing statute.  

Automobile collisions.—Most personal injury cases arise out of automobile collisions. Let us assume that a collision occurs in which one spouse is contributorily negligent while driving, and that the other spouse brings suit for injuries as against a third party defendant. The law on this question was settled prior to enactment of section 163.5; negligence of the errant spouse was imputed to the injured spouse and thereby barred the latter’s recovery as against the defendant.  

It has been pointed out that the imputation doctrine as between spouses has apparently been rendered inapplicable by section 163.5. This does not mean, however, that the door has been closed to imputing the negligence of one spouse to the other outside community property law.  

Foremost among the possibilities of imputing negligence as between the spouses  that presented by section 402 of the Vehicle Code:

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

It will be noted that this section fixes liability upon a vehicle owner for the operator’s negligence to a third person which, as between the owner and the injured person, is direct and unconditional within the limits set. Unlike the imputation rule formulated by the courts and applied as between spouses (which rests primarily on the community recovery), the

6 “Straightforward amending of the contributory negligence doctrine to allow recovery in proportion to responsibility for the accident would seem called for.” 2 ARMSTRONG, CALIFORNIA FAMILY LAW 1513 (1953). It appears that the type of legislative action suggested by Professor Armstrong is particularly desirable since a fairer distribution of future earnings recovered in a personal injury suit is possible. Rather than award the entire recovery to the injured spouse without allowing the contributorily negligent spouse to share in the proceeds, a just apportionment can be established in what would have been community but for Civil Code § 163.5.

7 It should be noted that the doctrine of imputed negligence as between spouses was not extended to a putative spouse, Caldwell v. Odisio, 142 Cal. App. 2d 732, 299 P.2d 14 (1956). There is therefore no reason to believe that California courts will read putative spouse relief into the terms of § 163.5. Indeed, this is hardly necessary as the separate recovery of the putative spouse in personal injury cases would not be enlarged in any way by the section under consideration.  

8 CAL. VEH. CODE § 66 reads as follows: “Owner is a person having all the incidents of ownership, including the legal title of a vehicle whether or not such person lends, rents, or pledges such vehicle . . . .”


negligence of the operator under section 402 is imputed to the owner by statute.

On the other hand, section 163.5 is a recovery statute applicable only as to spouses' actions in personal injury cases. Civil Code section 163.5 apparently was not intended to supersede or displace Vehicle Code section 402 in reference to spouses. Had the legislature so intended, it is presumed that it would have said so by proper amendment of the vehicle code. Therefore, if the defendant is now precluded from imputing the negligence of the errant spouse to the injured spouse because of Civil Code section 163.5, he still has a second string to his bow and may impute the negligence of the driver-spouse to the injured owner-spouse under Vehicle Code section 402. The possibility, it must be noted, is narrow and can be applied only in a few situations.

Determination of when Vehicle Code section 402 may be applied to the collision cases involving the spouses as passengers or drivers would seem to rest on three factors. First, the separate or community character of the automobile; second, in whose name or names the vehicle is registered; and finally, who is guilty of contributory negligence. Should either or both of the last two factors be such that, absent other facts, it would bring them within the scope of the vehicle code section, applicability of that section, in the last analysis, rests on the first factor—the community character of the automobile.

If the automobile is *community property*, registered in the names of both of the spouses, and the husband is driving, the wife, as a co-owner, may not be charged with her husband's contributory negligence in the operation of the community automobile under Vehicle Code section 402. He has the management and control of the community vehicle under Civil Code section 172, and therefore no consent of the wife, express or implied, to the husband's use of such automobile can add anything to his right in that regard. Since she cannot give such consent, section 402 has no application as to her rights. Under section 163.5, then, the wife can fully recover for her injuries.

The converse situation (the husband suing as the injured passenger and the wife contributorily negligent in driving the community vehicle) presents a more difficult question. It is true that the consent of the one co-owner of an automobile is not generally required for its use by the other co-owner. Although the wife would appear to be a co-owner of the com-

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9 Note that Civil Code § 171(c) was amended together with the enactment of Civil Code § 163.5.
10 Even where recovery is allowed under Vehicle Code § 402, such recovery is limited by terms of Section (b) of the statute to $5,000 for death of or injury to one person in any one accident, and $10,000 for death of or injury to more than one person in any one accident. The limit for damage to property is $1,000.
munity automobile,\(^\text{13}\) can it be argued that the husband, as manager of the community,\(^\text{14}\) impliedly consents to his wife's driving the community vehicle, and therefore brings her within the meaning of "... any person ... operating ... with the permission ... of such owner ..." as enacted in section 402 of the vehicle code? If so, her negligence could be imputed to him. In order to definitely negate this idea, to the express language of the statute ("... any person...") must be added, by implication, the words "other than a co-owner."

Requirements for registration of motor vehicles\(^\text{15}\) were enacted in the interest of the public welfare, and to afford identification of vehicles and persons responsible in cases of accident and injury. But the certificate of registration has also been regarded an indicia of title.\(^\text{16}\) Therefore, if the vehicle is registered in the husband's name alone, a stronger case for applying Vehicle Code section 402 would be made out than where it was registered in both spouses' names; certainly, a stronger evidentiary case for "ownership" in the husband would exist.\(^\text{17}\)

It would seem doubtful that the legislature intended to include a co-owner wife as a negligent driver within the terms of Vehicle Code section 402. No case authority has been found directly in point for the obvious reason that heretofore there has been no need to look to the provisions of the vehicle code in order to impute the negligence of the errant spouse to the injured spouse: imputation was accomplished as a result of the community nature of the recovery and not by reason of Vehicle Code section 402. Despite the argument advanced above as to the "consent" of the husband, it would appear that he should be permitted to recover under section 163.5 where the wife has been negligent in her operation of the community automobile. It must be admitted, however, that there is room for doubt, particularly if the vehicle is registered solely in the husband's name.

If the automobile is separate property and registered in the name of husband-owner\(^\text{18}\) or of the wife-owner,\(^\text{19}\) and the non-owner is the negligent driver, the operator's negligence will be imputed by statute to the owner under Vehicle Code section 402 and will prevent recovery. But if the


\(^{14}\) Id. at 452, 175 P.2d at 261 indicates that husband has the entire management and control of the community automobile notwithstanding Civil Code § 161(a) which gives the wife a "vested right" in the community property.

The proposition cited would not be valid in the rare instance where the wife has bought the automobile with her earnings during marriage. Civil Code § 171(c) would be applicable which gives the wife the management and control over community property earned by her and not commingled with other community property.

\(^{15}\) CAL. VEH. CODE § 140.


\(^{17}\) Cf. Dorsey v. Barba, 38 Cal. 2d 350, 240 P.2d 604 (1952), which held Vehicle Code § 402 applicable as between the spouses where the vehicle was registered in the wife's name even though the automobile was apparently community property.


vehicle is the separate property of either spouse and the owner-spouse is
also the negligent driver, the injured passenger-spouse may recover (as
against a third party\textsuperscript{20}) for personal injuries suffered in an accident, even
where the owner-driver spouse was contributorily negligent; the negligence
is not imputed to the non-owner.

In the somewhat uncommon factual situation in which the wife can be
found to be the husband's agent while driving the community automobile,
her negligence may be imputed to him by general agency law.\textsuperscript{21}

If the vehicle is jointly owned and it can be established that a joint
enterprise exists as between husband and wife, it may be argued that negli-
gence should be imputed from one spouse to the other, and thus section
163.5 would have no application in this type of case.\textsuperscript{22} The difficulty in
accepting this view is that such is not the expressed intent of the legisla-
ture.\textsuperscript{23} The terms of section 163.5 would seem to apply whether the basic
principle is to prevent unjust enrichment resulting from the status of the
proceeds as community property, or arising by reason of the existence of a
joint enterprise.

\textit{Conflict of laws.}—The recovery awarded to the injured spouse for per-
sonal injuries is declared to be his or her separate property by section 163.5
of the Civil Code. There is a question, however, as to the rights of a spouse
who is injured in California but who is domiciled in another community
property state that continues to apply the imputation of negligence
rule.\textsuperscript{24} This brings into focus the existing conflict of authority on the problem.

\textsuperscript{20} Vehicle Code § 403 (The California Guest Statute) applies only as to an action between
the driver and the passenger-guest, and not in an action against a third party defendant. The
Guest Statute can only come into play under the situations discussed if one spouse sues the
other. Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909) established the rule of law that one
spouse may not sue the other in a civil action. This has been modified by Langley v. Schumaker,
46 Cal. 2d 601, 297 P.2d 977 (1956), which held the rule to apply only to tort actions on the
person and not to those involving property interests. Even though personal injury recovery is
no longer community property, the injury is a personal one and thus § 163.5 does not seem to
have changed the basic rule as to interspouse suits as established by the Peters case. Hence the
Guest Statute would not appear to be applicable.

\textsuperscript{21} Cf. De Armand v. Turner, 141 Cal. App. 2d 574, 297 P.2d 57 (1956). No agency would
seem to exist in the case of a husband for his wife since he has the management and control of
the community vehicle under Civil Code § 172, and he cannot be an "agent" of what he already
has control over.

\textsuperscript{22} The result was quite different prior to Civil Code §163.5 as recovery was community
property. Civil Code § 172 puts the management and control of community property in the
husband, and therefore no joint enterprise could exist so long as the recovery was community,
as joint control is lacking. Comment, 42 CALIF. L. REV. 838 (1954).

\textsuperscript{23} For an excellent discussion of the whole joint enterprise problem, see Weintraub, The
Joint Enterprise Doctrine in Automobile Law, 16 CORNELL L. Q. 320 (1931).

\textsuperscript{24} Senator James A. Cobey, drafter of Civil Code §163.5, stated the purpose of the sec-
tion this way: "I might say that my intention was to outlaw the imputation of the contribu-
torily negligence of one spouse to the other . . . ", in a letter from the senator to Mr. Ralph
N. Kleps, Legislative Council, Sacramento, copy to the writers of this comment.

\textsuperscript{25} See, e.g., Tinker v. Hobbs, 80 Ariz. 166, 294 P.2d 659 (1956) (Arizona); Ostheller v.
Most courts have adopted the rule that the right of the injured spouse is to be determined by the law of the place where the accident occurred; hence, as his right of action in California is his separate property, the fact that the community property law of the domicile follows the doctrine of imputed negligence would not prevent recovery. Some courts, including those in California, have adopted the rule that property rights thus acquired would be determined by the law of the domicile, on the ground that the cause of action is personal property. Therefore, the community property law of the domicile might prevent any recovery if one spouse were injured by the contributory negligence of the other.

Where an injury occurs in California, it is hoped that an application of section 163.5 will govern future decisions, whether the action be brought in this state or in a foreign court, so as to allow recovery by the injured party.

If the action is brought outside of California, two arguments might be advanced against the application of California law: first, the public policy of the forum prevents application of the law of the locus delicti—section 163.5; second, the provisions of the statute are remedial, rather than substantive, and therefore forum law should apply under the general rule that the forum applies its own procedural law.

It would appear that these arguments would not be enough to prevent a foreign court from applying section 163.5. The fact that the wife's recovery will be her separate property, and that she will not be barred by her husband's negligence, would not seem to offend the "public policy of the forum"; this is adding to, rather than subtracting from, her rights. Further, the recovery seems to involve substantive, rather than remedial rights. That is, section 163.5 defines recovery rights rather than the means of enforcing such rights. Substantive rights are generally determined by the lex loci delicti.

Collateral estoppel.—The court in Zaragosa v. Craven considered (among other problems) the following question: is a wife barred from bringing an action for personal injuries because her husband, in a former suit on the same facts, had been adjudged contributorily negligent in the

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27 CAL. CIV. CODE § 953 defines a thing in action as "a right to recover money or other personal property by a judicial proceeding." A cause of action in tort has been held to be within the meaning of this section as property. Carver v. Ferguson, 115 A.C.A. 641, 254 P.2d 44, 45 (1953), hearing in Supreme Court granted, dismissed on stipulation (June 4, 1953).
29 Id. at 226-228.
30 Lykes Bros. SS. Co. v. Esteves, 89 F.2d 528, 530 (5th Cir. 1937).
31 Matney v. Blue Ribbon, 12 So.2d 249, 253 (La. App. 1943).
same accident? In that case, decided in 1949, it was held that the community property nature of the recovery placed the wife in privity with her husband and therefore precluded her relief. The question of liability of the husband was res judicata as to the wife in her subsequent suit. The reason given for the decision on this point was that a party, or one in privity with him, is usually entitled to only one opportunity to litigate the same facts with the same adversary and will be estopped from arguing them a second time.\textsuperscript{33}

With the enactment of section 163.5, it would seem that the collateral estoppel argument introduced by the \textit{Zaragosa} case must fall, since the theory establishing privity between the spouses was based on the same reasoning as that which imputed the negligence of one spouse to the other: the unjust enrichment to the errant spouse because of his share in the community recovery. Existence of the marital relationship \textit{per se} does not require imputation of the negligence of one spouse to the other; it seems that the question of contributory negligence could be relitigated by the wife under similar circumstances as those found in the \textit{Zaragosa} case, as the privity between herself and her husband is now lacking.

\textit{Parent's suit for the community on child's injury or death}.—Will section 163.5 have any effect where there is an attempted recovery for the community by the parents in an action for the injury\textsuperscript{35} or death\textsuperscript{36} of their minor child? Since the parents' recovery for injury or death of the child is on behalf of the community,\textsuperscript{37} California courts have held that the negligence of one parent is a bar to the other parent's recovery. Rationale for such a holding is that the community would be enriched and the errant spouse thereby would profit by his own wrong.\textsuperscript{38}

The case of \textit{Flores v. Brown},\textsuperscript{39} decided in 1952, raised doubts as to whether this was still the law. The case held that no imputation should be imposed on the mother in her damage suit for her dead child where the contributorily negligent father had been killed in the same accident. The court reasoned that the negligent spouse, being dead, obviously could not share in any community proceeds, and hence recovery should be allowed for the child's death. Therefore if the \textit{Flores} case is confined to its facts,

\begin{itemize}
\item \textsuperscript{33} Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942); Restatement, Judgments § 45(c) (1942). See 1 Stan. L. Rev. 765 (1949).
\item \textsuperscript{35} Cal. Code Civ. Proc. § 376.
\item \textsuperscript{36} Cal. Code Civ. Proc. § 377.
\item \textsuperscript{37} Fuentes v. Tucker, 31 Cal. 2d 1, 10, 187 P.2d 752, 758 (1947).
\item \textsuperscript{39} 39 Cal. 2d 622, 248 P.2d 922 (1952).
\end{itemize}
imputation will be removed only in the case where the negligent parent cannot share in the community recovery.

With enactment of section 163.5, it may be argued that the injury to the child was to be included within the section in the event the parent brought suit for the community. As the section does not specifically state upon whom the personal injury must have been inflicted in order for a married person to recover damages, such an argument may have some merit. However, this would seem to be a strained construction of the statute, since such interpretation forces the conclusion that damages for personal injuries caused to any person (ordinarily community property) must be transformed into separate property as long as they are awarded "to a married person."

It would seem better to read the award clause in the statute together with the personal injury clause, and hold that it will have to be an injury to the spouse in order to be included within section 163.5. In that case, section 163.5 would have no application and existing rules will still apply.\(^4\)

**Effect of Section 163.5 on Damage Recovery of the Spouses**

What is the effect of that portion of section 163.5 that provides "All damages, special and general . . . are the separate property of such married person?" It will be necessary to preface this discussion by defining the terms "general damages" and "special damages," as those terms are not found in the Civil Code provisions defining compensatory relief.\(^4\)

General damages are an aggregate sum of money designed to compensate the injured party for the usual harms resulting from the unlawful act or omission of another.\(^4\) Usual harms are first, the impairment of earning capacity and second, pain and mental anguish.\(^4\) Compensation for impairment of earning capacity is assessed by the trier of fact considering the age, sex, physical condition before and after the injury, and the activities pursued by the plaintiff.\(^4\) Therefore, it is not necessary that the injured party be gainfully employed in order to justify a recovery for the loss or impairment of earning capacity.\(^4\) Compensation for pain and mental an-

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\(^4\) Roedder v. Lindsley, 28 Cal. 2d 820, 172 P.2d 353 (1946); Kline v. Santa Barbara Ry., 150 Cal. 741, 90 Pac. 72 (1907); Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72 (1901).

\(^4\) It is sufficient in order to justify recovery of general damages, to allege in the complaint that the plaintiff has suffered pain and mental anguish and that he has lost time from his vocation, profession, or activity as a result of the described injury. Roedder v. Lindsley, 28 Cal. 2d 820, 172 P.2d 353 (1946); Osterode v. Almquist, 89 Cal. App. 2d 15, 200 P.2d 672 (1948).

\(^4\) Kline v. Santa Barbara Ry., 150 Cal. 741, 90 Pac. 72 (1901); Hume v. Lacey, 112 Cal. App. 2d 147, 245 P.2d 647 (1948).
guish is assessed by the trier of fact in its discretion, considering the severity of the injury, the temperament of the injured party, and the facts surrounding the incident out of which the cause of action arose.\textsuperscript{46}

Special damages compensate the injured party for the unusual harms resulting from the unlawful act or omission of another.\textsuperscript{47} Considered as unusual harms are past and future medical expenses as well as awards resulting from loss or damage to property.\textsuperscript{48} These losses, therefore, must be alleged in the pleadings and proved with reasonable certainty.\textsuperscript{49}

\textit{Injury to a Married Woman Living with Her Husband}

\textit{Special Damages}.—It was formerly well settled that the husband, as manager of the community, had the primary right to maintain an action to recover for damage to, or loss of community property.\textsuperscript{50} The wife was neither a necessary nor proper party to such an action.\textsuperscript{51} Since section 370 of the Code of Civil Procedure permits a married woman to sue in all actions involving injury to her person, an exception was made in personal injury cases.\textsuperscript{52} A married woman could recover community expenses arising from her injury as well as compensation for injury to her person.\textsuperscript{53}

Section 163.5 of the Civil Code encompasses all damages for personal injuries. It may be argued that this is a clear mandate by the legislature that all damages which can be recovered in a personal injury action will be the separate property of the injured spouse. Such an interpretation would require two assumptions. First, we must assume that the clause “special” and “general” is to be read as emphasizing the word “all.” Second, such an interpretation presupposes that the injured party is the necessary and proper party to maintain the cause of action for special as well as general damages. Strict construction requires that the wife's medical expenses be recovered in an action by her alone; community funds utilized for these purposes become her separate property. In order to justify such an interpretation, it must be argued that the wife can recover as her separate property an amount equal to all community property utilized for the expenses of her injury; otherwise, the husband's contributory negligence would bar recovery of these expenses. Requiring the husband to forfeit his interest in what would otherwise have been community funds may have

\textsuperscript{47}McCorMick, DAMAGES 299–301 (1935); 14 CAL. JUR. 2d, DAMAGES § 26 (1956).
\textsuperscript{50}Sanderson v. Nieman, 17 Cal. 2d 563, 110 P.2d 1025 (1941); Walling v. Kimball, 17 Cal. 2d 364, 110 P.2d 58 (1941).
\textsuperscript{51}Ibid.
\textsuperscript{53}Ibid.
some justification when his negligence has contributed to the wife's injury; however, there would appear to be no reason for such a result when the husband has not so contributed.

Classifying statutes either as mandatory or directory is useful in determining the effect to be given to statutory provisions. Mandatory statutes are those which by their terms create new rights and also set forth the mode by which such rights are to be enjoyed or acquired. They are strictly construed, to avoid interference with the vested rights of others. It may therefore be questioned whether section 163.5 should be considered a mandate. It would appear that it should not, for the following reasons. First, in order to interpret the section as mandatory, the right of the injured party to maintain the cause of action for special damages must be implied. Second, if the statute is strictly construed, the vested rights of the husband in community property will be forfeited.

Section 163.5 states only that all damages, special and general, are the separate property of the injured spouse. The statute may therefore be considered directory and be liberally construed in the light of other statutes.

It is submitted that California statutes, when interpreted in the light of section 163.5, should not permit a married woman to maintain an action for the recovery of the expenses arising from her injury if such expenses have been paid from community funds. Section 370 of the Code of Civil Procedure authorizes a married woman to sue without joining her husband in all actions arising out of injury to her person. This section has not been interpreted as creating substantive legal rights in the wife. Since section 163.5 provides that the special damages awarded will be the separate property of the injured spouse, cases interpreting section 370 as permitting a married woman to recover the expenses of her injury should no longer be in point since they proceed on the presumption that any recovery by a married woman will be community property.

The husband's action for recovery of expenses arising from injury to his wife is called an action for consequential damages. Section 427(9) of the Code of Civil Procedure permits the husband's cause of action for consequential damages to be joined with the wife's cause of action for personal injuries. This section has not been amended. It can, therefore, be con-

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54 3 SUTHERLAND, STATUTORY CONSTRUCTION § 5801 (3d ed. 1943).
55 Id. at § 5815.
56 Ibid.
57 CAL. CODE CIV. PROC. § 370: "A married woman . . . may sue without her husband being joined as a party in all actions . . . for injury to her person . . . ."
59 Supra note 52.
60 Sanderson v. Nieman, 17 Cal. 2d 563, 110 P.2d 1025 (1941); Sheldon v. Steamship Uncle Sam, 18 Cal. 526 (1861).
61 CAL. CODE CIV. PROC. § 427: "... [A]ll damages suffered or sustained by husband alone including loss of services by his wife, moneys expended or indebtedness incurred by such injury to his wife, may be alleged and recovered without separately stating such cause of action."
cluded that if the legislature had intended the husband to forfeit his interest in community property, section 427(9) of the Code of Civil Procedure would have been amended so as to deny the existence of the husband's right to maintain the action for losses arising from his wife's injury.

Section 171c of the Civil Code has been amended, deleting the provision relating to personal injury awards recovered by the wife. It seems clear that the wife should no longer be able to recover community property expenses arising from her injury because community recovery by the wife in personal injury cases is no longer possible. Section 172 of the Civil Code has not been amended so as to limit the husband's right to control and manage community property. This would seem to imply that the husband is still the proper party to maintain the action for loss or damage to the community.

If section 163.5 of the Civil Code is to be interpreted so that the husband will forfeit his interest in community funds recovered by the wife, the effect will be a partial division of community property. Such a construction would be inconsistent with the existing statutory scheme relating to division of community property. Apportionment of community property is authorized only on dissolution of the marriage by death or divorce, or by agreement of the parties. It would seem that the general rule still applies: the husband, as manager of the community property, is the proper party to maintain an action for loss of, or damage to, community property. The wife, neither a necessary nor proper party to that action, may not maintain an action for the recovery of expenses arising from her injury unless her separate property has been utilized or obligated for their payment.

Further, under the construction suggested, the clause "special and general" is not without meaning. If the wife utilizes her own property for the expenses of her injuries, her recovery should be, and is by the terms of section 163.5, her separate property. When community funds are utilized for the wife's expenses, the husband's award would continue to be community property and recovery would be barred should his negligence contribute to his wife's injuries.

General Damages.—Before the enactment of section 163.5 of the Civil Code, either husband or wife could maintain an action for impairment of

62 Supra note 9.
63 Cal. Civ. Code § 172: "The husband has the management and control of the community personality with like power of disposition . . . as he has of his separate estate . . ."; Compare: Louisiana Civil Code art. 2402 (supra note 5) (both the cause of action and the recovery for the wife's personal injuries are her separate property).
68 Cf. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) (where the general recovery was not community property, an action by plaintiff's mother to recover medical expenses barred by husband's contributory negligence).
the wife’s earning capacity. Early cases permitted the husband, as manager of the community property, to recover for loss of his wife’s services as an impairment of the community’s capacity to accumulate property. More modern cases allow the wife to recover community property money damages for impairment of her earning capacity. The ratio decidendi of the later cases is that the impairment of one’s earning capacity is violative of a personal right for which the injured party is entitled to compensation. Since the husband’s recovery for loss of services and the wife’s recovery for impairment of her earning capacity are one and the same, the husband may not recover for loss of his wife’s services if the wife has recovered for impairment of her earning capacity. Though there are no cases in point, most authorities agree that the wife would have been given the award for loss of her earning capacity in preference to the husband’s claim for loss of her services.

General damages include the award for loss or impairment of earning capacity as well as pain and mental anguish. If the wife, under existing law, is the proper party to bring the cause of action for impairment of her earning capacity, then compensation for such a loss, by operation of section 163.5 of the Civil Code, will be her separate property. The recovery for pain and mental anguish would also be her separate property by terms of the section. Unless there is an agreement between the spouses that the wife’s accumulations will be community property, the husband could not maintain an action for impairment of his wife’s earning capacity.

It would seem that the intent of the legislature was to create a separate property interest in the recovery for direct physical harm to a married person. In an action for personal injury to the wife, the husband may also

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69 Martin v. Southern Pac. Co., 130 Cal. 285, 286, 62 Pac. 515 (1900) (while the husband has no right to his wife’s services, he may, as manager of the community property, maintain an action for any wrongful act which deprives either himself or his wife of the capacity to accumulate community property).


71 Ibid.


73 Armstrong, California Family Law 1501 (1953); De Funiak, Personal Injuries under the California Community Property Law, 15 L.A. L. Rev. 526, 530 (1955); see Cal. Civ. Code § 171C.

74 Supra note 46. Exemplary damages may be awarded in addition to actual damages: Cal. Civ. Code § 3294. It would seem that where exemplary damages are awarded, they would be the separate property of the injured spouse.

75 Cal. Civ. Code § 158: “Either husband or wife may enter into any agreement or transaction with the other . . . respecting property which either might if unmarried . . . .” If there is an agreement to the effect that all accumulations will be community property as per § 158, then it seems that the obvious import of § 163.5 is nullified and the rules governing community property would govern. Cf. Perkins v. Sunset Tel. and Tel. Co., 155 Cal. 712, 103 Pac. 190 (1909) (a contract between husband and wife that all community property to be acquired by either should become the sole and separate property of the wife held valid as against third parties).

76 Supra note 23.
recover community property money damages for loss of his wife's consortium.\(^{77}\) The physical and sentimental society of a wife has been recognized as a legally protected right in California.\(^{78}\) As there is no physical harm, but only an impairment of a personal right, section 163.5 of the Civil Code would not appear to be applicable. Thus, the recovery for loss of consortium would continue to be community property.

**Injury to a Married Man Living with His Wife**

Special Damages.—When the husband is injured, he is the necessary and proper party to maintain the cause of action for recovery of community funds utilized for expenses arising from his injury.\(^{79}\) His wife is neither a necessary nor proper party to that action.\(^{80}\) Section 163.5 would have the effect of transforming an award which would otherwise be community property\(^{81}\) into the separate property of the husband. Unless a lien\(^{82}\) or constructive trust were imposed on that part of the recovery which includes the award of community property, the wife, having no direct recourse against the wrongdoer, would be without means to protect her interest in these community funds.

There would appear to be no reason why section 163.5 could not be interpreted in the same manner suggested in the instance where the community property has been utilized for the wife's injury; that is, by limiting the effect of the statute to an award which is compensation for the husband's separate property loss. Where the husband has utilized his separate property for the expenses arising out of his injury, his recovery should be, and is under section 163.5, his separate property.

It may be argued that a distinction can be made between the husband's right to recover community property expenses and his right to recover com-

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\(^{78}\) Ibid. A wife has a cause of action for loss of consortium resulting from negligent injury to her husband. Deshotel v. A.T.&S.F. Ry., 156 A.C.A. 325, 319 P.2d 357 (1957), (hearing in Supreme Court granted). It would seem that her recovery would also be community property unless it could be argued that the invasion of her personal right to her husband's consortium is a personal injury to her within the meaning of § 163.5.


\(^{80}\) Ibid.

\(^{81}\) CAL. CIV. CODE § 161a: "The respective interests of husband and wife in community property during the continuance of the marriage relation are present, existing, and equal..."

\(^{82}\) A lien has been allowed on the husband's separate property where he has, without his wife's knowledge and consent, utilized community funds for the removal of encumbrances or improvement of his separate property. It may be argued that the use of community property for creating a cause of action for special damages is analogous to the use of community funds for improving the husband's separate property. Even though a cause of action is considered property, the analogy seems to be erroneous since the funds would probably be used with the wife's knowledge and consent; further they are not paid to a third party to enhance the separate property of the husband. See Annotation, 53 A.L.R.2d 729; De Funiak, Improving Separate Property or Retiring Liens or Paying Taxes on Separate Property with Community Funds, 9 Hastings L.J. 36 (1957).
pensation for his personal injuries. In the former instance, it may be said that his right to recover is based on his statutory control and management of community property. In the latter instance, the husband’s recovery rests on his right of compensation for injury to his person. Thus, the husband, in his capacity as manager of the community property, is not within the terms of the statute under consideration. Thus, should the husband recover community property as compensation for expenses arising from his injuries, the award would not be his separate property.

**General Damages.**—The husband’s earnings are community property. They are primarily used to support the family. Section 163.5 of the Civil Code creates a separate property interest in the husband’s award for impairment of his earning capacity. There would appear to be no way in which his wife can claim an interest in the recovery. To allow the husband to recover the award for impairment of his earning capacity as his separate property is tantamount to denying to the community earnings which it might otherwise have received. However, such a result appears inevitable until the legislature makes possible a more just result by apportioning future earnings to the community.

**Injury where the Spouses are Living Apart.**—The earnings and accumulations of a married woman living apart from her husband are her separate property. Section 163.5 makes no change in this regard. Until the enactment of the section under consideration, the earnings of a married man unjustly abandoned by his wife were his separate property; but, since an award of damages is not considered earnings, an award to a married man living apart from his spouse through her fault would have been community property. Section 163.5 modifies this by making damages awarded to a married man his separate property without regard to whether or not he is living with his spouse.

**Settlements of a Cause of Action for Personal Injury.**—The earnings and accumulations of husband and wife after marriage (except those by gift, devise or bequest) are community property. A cause of action for personal injuries has been held to be community property. Recoveries by way of settlement likewise have been held to be community property. A settlement is not made by a legal tribunal. It is an agreement made

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83 Supra note 63.
85 CAL. CIV. CODE § 164.
87 Supra note 79.
88 Supra note 6.
89 CAL. CIV. CODE § 167.
90 CAL. CIV. CODE § 175.
91 Supra note 85.
by the parties privately involved in the action.\textsuperscript{95} It may be argued that, as section 163.5 of the Civil Code, by its express terms applies only to damages awarded by a court of law, it has no application to a settlement brought about by the parties. Thus, a settlement would retain its community character.

The fallacy in the argument would appear to be that it presumes the cause of action under section 163.5 of the Civil Code to be community property. This concept would have to be urged, despite the fact that the section under consideration makes the damages the separate property of the injured spouse. It may be argued that there being no reference to the cause of action in section 163.5, such cause of action must continue to be community property. However, should the cause of action result in an award of damages, such damages would be separate property. This conclusion would be a return to the now discredited argument that the property character of the cause of action and the recovery can be split.\textsuperscript{96} Since the award in a court of law for personal injuries is separate property, it would seem that the cause of action as well must be separate property. Thus, a settlement arising from the cause of action would also be separate property. The practical result of characterizing a settlement as community property might be to continue litigation for no purpose other than to insure that the recovery will be separate property.

Although section 163.5 has gone far in clearing up a previously confusing area of California community property law, it is hoped that the section has not raised more problems than it has solved.

\textsuperscript{95} Ibid.

\textsuperscript{96} Zaragosa v. Craven, 33 Cal. 2d 315, 202 P.2d 73 (1949), overruling Franklin v. Franklin, 67 Cal. App. 2d 717, 155 P.2d 637 (1955) which held: while the property character of the cause of action could be community the recovery might be separate property. The court at page 320 stated: "... [I]t must be considered that the cause of action for personal injuries suffered by either spouse during marriage ... as well as the recovery therefore constitute community property ... and any contrary implications of the Franklin case are disapproved."