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Open Topic

The Effect of the Adoption of Comparative Negligence on California Community Property Law: Has Imputed Negligence Been Revived?

By WILLIAM A. REPPY, JR.*

Introduction

Some two decades ago, the doctrine of “imputed negligence” between husband and wife was one of the most scathingly criticized doctrines of California tort law and community property law.¹ Under this doctrine, the negligence of one spouse was imputed to the other, so that a third-party tortfeasor had a complete defense against the personal injury action of the spouse if the negligence of the other spouse contributed to the injury. That is to say, the third-party had such a defense to the extent that recovery in the suit would be community property, and

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California law made almost all parts of a personal injury recovery community property—whether it was for pain and suffering, lost wages, or medical expenses.²

In 1957, the state legislature sought to abrogate this defense by making personal injury damages awarded to a married person his separate property.³ Because of numerous problems generated by this solution,⁴ a different approach to avoiding the so-called imputed negligence defense was enacted in 1968. The 1968 amendment, which is now Civil Code section 5112, reads as follows:

If a married person is injured by the negligent or wrongful act or omission of a person other than his spouse, the fact that the negligent or wrongful act or omission of the spouse of the injured person was a concurring cause of the injury is not a defense in any action brought by the injured person to recover damages for such injury except in cases where such concurring negligent or wrongful act or omission would be a defense if the marriage did not exist.⁵

The statute was enacted in the context of a system in which the negligence of the nonplaintiff spouse could be pleaded by the third-party tortfeasor as a complete defense to a personal injury action by the injured spouse. Now the California Supreme Court in Li v. Yellow Cab⁶ has abrogated the contributory negligence defense and has adopted a system of comparative negligence. Language in the Li opinion suggests that contributory negligence no longer has any function as a defense and that for the first time the plaintiff's contributory negligence is relevant in determining the amount of damages recoverable:

The contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be

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2. See text accompanying notes 11-71 infra. About the only exception to the all-community recovery rule was damages for harm to property. If the wife owned the car involved in an accident as her separate property, an award giving her compensation for repairing it would be separate property on a tracing theory and the husband's contributory negligence would be irrelevant in such a case.


4. See text accompanying notes 50-67 infra.


6. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). Li adopted the "pure" form of contributory negligence, under which a plaintiff is entitled to some recovery even though more than 50% of the negligence is attributed to him. See generally V. Schwartz, Comparative Negligence (Supp. 1975); Flemming, Comparative Negligence at Last—By Judicial Choice, 64 Calif. L. Rev. 239 (1976); Schwartz, Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence, 7 Pac. L. J. 747 (1976) [hereinafter cited as Schwartz Survey]; Comment, Comparative Negligence in California Multiple Party Litigation, 7 Pac. L. J. 770 (1976) [hereinafter cited as Comparative Negligence].
diminished in proportion to the amount of negligence attributed to the person recovering.\textsuperscript{7}

This article will examine the effect of the Li decision on Civil Code section 5112 and the doctrine by which the negligence of one spouse was a tort defense in a suit brought by the other. Initially, it is to be noted that section 5112 is couched in terms of a defense available to third-party tortfeasors. It is possible, then, to take what I will refer to in this article as the "narrow interpretation": since section 5112 literally eliminates only a defense, it does not bar the reduction of damages recoverable by the community to the extent of the percentage of fault allocable to the nonplaintiff spouse.

Alternatively, section 5112 is susceptible of what I will call the "broad interpretation": in personal injury litigation, the legislature intends that in a personal injury action brought by a married person the negligence of this plaintiff's spouse is irrelevant with respect to the issue of the damages recoverable. Under the broad interpretation, Li v. Yellow Cab will have no effect on litigation against married persons. Such a broad interpretation relieves a marital partnership from a reduction of damages due to one partner's negligence that business partners and joint venturers must suffer.

My conclusion is that the narrow interpretation of section 5112 is appropriate if the California courts will employ along with it a correct classification of which types of damages are community property and which ones are the separate property of the injured spouse. This would require overruling some old, untenable authority which classified damages awarded for disfigurement, pain, and suffering as community property. On the other hand, if the California Supreme Court insists on adhering to the old precedent which classified such damages as community property, the broader interpretation of section 5112 is to be preferred. Although the broad interpretation involves a less than logical reading of the statute, such an interpretation would be necessary to counteract the unfairness to the victim spouse that would otherwise flow from the erroneous characterization of damages for disfigurement, pain, and suffering as community property.

Looming on the horizon, and threatening to make the thesis of this article instantly obsolete, is the case of American Motorcycle Association v. Superior Court,\textsuperscript{8} in which the court of appeal, on the basis of Li

\textsuperscript{7} 13 Cal. 3d at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.
\textsuperscript{8} 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977), hearing granted on court's motion, No. L.A. 30737 (Sup. Ct., Feb. 11, 1977). Because the court has granted
v. Yellow Cab, took the extraordinary step of abrogating the common law doctrine of joint and several liability, replacing it with a measure of damages based on the tortfeasor’s proportional share of fault. This decision is contrary to Safeway Stores, Inc. v. Nest-Kart,9 in which a different panel in the court of appeal found continued vitality in joint and several liability. The California Supreme Court has granted a hearing on these two cases. If the supreme court follows American Motorcycles and abrogates the doctrine of joint and several liability, the reader need not proceed any further, since the third party tortfeasor will have no need of the imputed negligence doctrine.10 Under the American Motorcycles theory of limited several liability, the defendant will be only liable according to the proportion of fault attributable to him. The plaintiff spouse’s award would be reduced by the nonplaintiff’s negligence (or any other tortfeasor) without resort to the imputed negligence doctrine. It will be assumed for the purposes of this article (without proffering an editorial judgment on the matter) that the California Supreme Court will opt for the Nest-Kart result in favor of joint and several liability.

Development in California of the All-Community Characterization Rule and of the So-Called Imputed Negligence Doctrine in Personal Injury Cases Involving a Married Plaintiff

In order to understand the policy questions involved in deciding what interpretation to give to section 5112, it is essential to examine the development of California law with respect to both the classification of personal injury damage awards as separate or community property and the so-called imputing of the contributory negligence of a plaintiff’s spouse to the plaintiff. The history of these two doctrines is so intertwined that a discussion of one necessarily entails a discussion of the other.

This history begins in 1891 with McFadden v. Santa Ana, Orange & Tustin Street Railway11 Mr. and Mrs. McFadden were driving down

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10. If the court chooses to abrogate the rule, the problem of classification of damages as community or separate, will still require resolution. See text accompanying notes 77-82 infra.
the street when their vehicle fell into an excavation dug by the defendant. Mrs. McFadden was injured. She and her husband sued the defendant railway as coplaintiffs. At issue was whether the contributory negligence of the husband, who was apparently driving the wagon, barred recovery by his wife. The trial court had instructed the jury that the husband's negligence "cannot be imputed to Flora McFadden, and must not be regarded as her negligence."

The California Supreme Court held that this instruction was erroneous when the McFadden case went up on appeal. The court began its analysis with the classification of the entire recovery of damages for Mrs. McFadden's injuries as community property:

The right to recover damages for a personal injury as well as the money recovered as damages, is property, and may be regarded as a chose in action . . . and if this right to damages is acquired by the wife during marriage, it, like the damages when recovered in money, is, in this state, community property of the husband and wife . . . of which the husband has the management, control, and the absolute power of disposition other than testamentary.

No express discussion of the imputing of negligence was felt to be necessary by the court; the characterization of damages as community property made it self-evident that the husband's contributory negligence was a defense and that the judgment had to be reversed. When we recall that in 1891 the wife did not even have an ownership interest in what was called "community" property, it is hard to quibble with the recognition of the contributory negligence of the husband as a defense against an action by the wife once the initial classification of all damages as community property has been made.

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12. At this time, a suit for damages for a wife's personal injuries had to be brought in the names of both husband and wife. Tell v. Gibson, 66 Cal. 247, 5 P. 223 (1884). This rule was abrogated by the state legislature in 1913. Cal. Stat. 1913, ch. 130, § 1, at 217; see Moody v. Southern Pac. Co., 167 Cal. 786, 791, 141 P. 388, 391 (1914).
13. 87 Cal. at 467, 25 P. at 682.
14. Id. at 467-68, 25 P. at 682 (citations omitted).
15. By 1891, several cases had already decided that the wife had no proprietary interest in what at that time was therefore erroneously called "community" property; her only interest was that of expectancy of an heir. See, e.g., Van Maren v. Johnson, 15 Cal. 308, 311 (1860). See also Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 S. CAL. L. REV. 977, 1055-59 (1975). The fact that the husband was the sole owner of any recovery in the eyes of the court should be kept in mind when assessing whether these old decisions are even relevant to the question of "imputing" negligence now that section 5105 of the California Civil Code makes the husband and wife equal owners of community property. CAL. CIV. CODE § 5105 (West Supp. 1977).
In subsequent cases, however, some of which were decided even before the wife was given an equal ownership share in the community property, the supreme court did not attribute the defense to the fact that the negligent husband was the sole owner of the damages awarded. In Basler v. Sacramento Gas & Electric Co., decided before the wife was given equal ownership, the McFadden defense was explained as follows:

Regardless of the question as to whether or not the wife was so in the husband's care [as to make him her agent in fact], if his negligence contributed proximately to her injury (since under the laws of this state the recovery for her injuries is community property, in which the husband shares and over which he has control), the law will not permit him to benefit by his own wrong, and therefore a recovery will not be permitted.

Given the recognition that husband and wife share ownership of community damages recovered as a marital partnership, it seems misleading to speak of McFadden rule, as so many cases and commentators do, as "imput[ing] the negligence of the husband to the wife." It is simply inaccurate to describe the McFadden defense as holding "that a wife was barred from recovery for personal injuries in an action against a third party where her husband was guilty of contributory negli-

16. The husband and wife were made equal co-owners of all community property by statute in 1927. Cal. Stat. 1927, ch. 265, § 1, at 484, as amended Cal. Civ. Code § 5105 (West Supp. 1977). The statute was held to apply only to property acquired after July 29, 1927, the date it became law, and not to any pre-1927 community property. Stewart v. Stewart, 204 Cal. 546, 269 P. 439 (1928). Thus, a wife had an ownership interest only in damages arising out of injuries inflicted after July 29, 1927.

17. 158 Cal. 514, 111 P. 530 (1910).

18. Id. at 518, 111 P. at 331-32 (emphasis added). See also Moody v. Southern Pac. Co., 167 Cal. 786, 790, 141 P. 388, 390-91 (1914) (explaining the McFadden defense on the ground that since recovery for the wife's injuries would be community property, contributory negligence would defeat the action). Moody also indirectly recognized that the husband was still the sole owner of community property at this time, but the court did not rely expressly on this factor as explaining why the husband's negligence was a defense.


gence.”21 It was the classification of the damages as community property, not the contributory negligence doctrine, that barred the wife as such in the McFadden case. Given such classification of the recovery, the husband’s negligence is attributed or imputed to the marital partnership, not to the wife.22

The first major assault on the doctrine came in 1949 in the case of Zaragosa v. Craven.23 Mr. and Mrs. Zaragosa had been injured in the same accident. Mr. Zaragosa sued the tortfeasor and lost after the defendant raised a contributory negligence defense. Mrs. Zaragosa then sued the same defendant, who raised the defense of res judicata. Conceding arguendo that her husband’s negligence would bar recovery of community damages and that such negligence had already been litigated in the previous action,24 Mrs. Zaragosa contended that a 1913 amendment to the Code of Civil Procedure25 had altered the McFadden court’s classification of a wife’s personal injury damages and had made them separate property. The court held that whatever claims Mrs. Zaragosa might have had based on the 1913 legislation had been undercut by a 1921 amendment to the same statute.26 The court reaffirmed an old rule:


24. The wife’s contention that the prior adjudication was not binding on her because she was not in privity with her husband was rejected on the ground that he had represented her in the first suit. Id. at 318, 202 P.2d at 75.

25. Cal. Stat. 1913, ch. 130, § 1, at 217. The section was amended to read, in pertinent part: “When a married woman is a party [to an action], her husband must be joined with her except: 1. When the action concerns her separate property, including action for injury to her person, libel, slander, false imprisonment, or malicious prosecution, or her right or claim to the homestead property, she may sue alone. . . .” (Emphasis added.)

26. Cal. Stat. 1921, ch. 110, § 1, at 102. The amendment eliminated all reference to separate property, and simply authorized the wife to sue alone on various causes of action, including personal injuries to her, libel, and slander, and specifically authoriz-
Money recovered for damages to the wife in this state has always been held to be community property, because it was not owned by the wife before marriage, nor acquired afterward by gift, devise, bequest or descent.\textsuperscript{27}

Justice Jesse W. Carter, however, in his dissenting opinion in the Zaragosa case, attacked the basic assumption of the McFadden rule that all damages for a spouse's personal injuries were properly classified as community property. In Justice Carter's view, the prior law's classification of a married person's damages for disfigurement, pain, and suffering as community property was erroneous.\textsuperscript{28} Since the victim owns his body before marriage, it is separate property; money paid for damages to the body, by a process of tracing, is therefore also separate.\textsuperscript{29}

That the majority actually recognized the logic of Justice Carter's position is perhaps the only reasonable explanation of the next judicial development with respect to the McFadden defense. In the 1952 case of Flores v. Brown,\textsuperscript{30} the California Supreme Court held that dissolution of the community before the injured spouse recovered damages permitted classification of personal injury damages as separate property. In a single accident involving a car driven by Mr. Flores, he and his son were killed and Mrs. Flores was injured.\textsuperscript{31} The jury was instructed that the contributory negligence of Mr. Flores would bar any recovery for injuries his wife otherwise would have had against the third-party tortfeasor.\textsuperscript{32} Even though the jury apparently found Mr. Flores contributorily

\textsuperscript{27} 33 Cal. 2d at 319, 202 P.2d at 76.
\textsuperscript{28} Id. at 323, 202 P.2d at 78. Justice Carter conceded, of course, that damages for lost earnings by a spouse were properly characterized as community property. Id. at 323-24, 202 P.2d at 78.
\textsuperscript{29} Various cases discuss the rule that any property traceable back to a separate source is also separate, even if received during marriage. See, e.g., In re Marriage of Mix, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975); Beam v. Bank of America, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971); Huber v. Huber, 27 Cal. 2d 784, 167 P.2d 708 (1946); Boyd v. Oser, 23 Cal. 2d 613, 620-23 (1944); In re Marriage of Jafeman, 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1972). See also W. Brockelbank, The Community Property Law of Idaho, 134-38 (1962).
\textsuperscript{30} 39 Cal. 2d 622, 248 P.2d 922 (1952).
\textsuperscript{31} Mr. and Mrs. Flores' daughter, Anita, was injured in the same accident, and a friend of hers was killed. In total, five separate actions were filed against the defendants, who included the driver of the truck with which they collided, and the owner of the trailer he was hauling. Id. at 625-26, 248 P.2d at 923.
\textsuperscript{32} This instruction, however, was not given with respect to Mrs. Flores' cause of action for the wrongful death of her son Felipe, which certainly would have been a community cause of action had Mr. Flores been alive. See Comment, The Impact of the Community Property System on Tort Suits, 42 Calif. L. Rev. 486, 490 (1954).
negligent, they still awarded Mrs. Flores damages for her pain and suffering, as well as wrongful death damages for the killing of her son. After the lower court ordered a new trial in all of the actions, in part because of the inconsistent verdicts, various parties appealed. In discussing the propriety of imputing the negligence of the deceased husband to the injured wife, the court said:

Mr. Flores's negligence may be imputed to his wife, if at all, only because the cause of action for the wrongful death of [their child] was community property.

In the absence of an agreement to the contrary, it is settled that a cause of action for injuries to either the husband or the wife arising during the marriage and while they are living together is community property . . . and the same rule is applicable to a cause of action for the wrongful death of a minor child . . . . Accordingly, in all of these situations it is ordinarily necessary to impute the negligence of one spouse to the other to prevent the negligent spouse from profiting by his own wrong . . . . 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.

Mr. Flores died in the same accident in which his wife was injured. To allow her to recover for her personal injuries will in no way enrich Mr. Flores or those who might take through him. Similarly, there will be no unjust enrichment if Mrs. Flores is allowed to recover for the wrongful death of her son. Damages for wrongful death are the sum of those suffered by each heir or parent . . . and accordingly, when the heirs are not husband and wife, the negligence of one is not imputed to the others because the recovery may be limited to the nonnegligent heirs . . . . Similarly, in this case the damages will be limited to those suffered by Mrs. Flores and the recovery will be hers alone.

. . . When the husband is dead, not only is the reason for the rule imputing his negligence to his 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 benefit from his own wrong, surely the former evil may not be balanced by the latter when the latter is no longer present.33

33. 39 Cal. 2d at 630-32, 248 P.2d at 926-27. With respect to Mrs. Flores' recovery for pain and suffering, the points made are dicta, as she had not appealed the
Exactly what Mrs. Flores is permitted to recover for her personal injuries is here left unclear, although she could certainly recover for pain and suffering and for wages that she would have earned after dissolution of the community had she not been injured. The Flores opinion leaves other questions unanswered as well, such as whether reimbursement for Mr. Flores' half interest in community funds that may have been spent to pay her medical bills are Mrs. Flores' separate property damages and whether this part of the cause of action survives to her. If Mr. Flores had not died at once, but had lingered for several months, what of his half interest in wages that Mrs. Flores might have earned prior to his death if she had not been injured, and for which wage loss she is now compensated in damages? Since such earnings would have been community property, Mr. Flores could have bequeathed that interest to his legatees to the extent such earnings were unspent at his death. Is that half of the award for lost earnings part of his surviving wife's damages? If so, why would it be a “windfall” to the defendant to relieve him of liability for such sums, any more than it is a windfall to a defendant when an employer is denied recovery because his employee, in the scope of employment, has been contributorily negligent? Surely on any logical analysis, the evils to which the court refers at the end of the above quotation can be said to result either from the contributory negligence defense itself (the evil of allowing the defendant to escape liability) or from the erroneous classification of the wife's disfigurement, pain, and suffering damages as community property, with the result that the injured wife recovers only half of the damages for wrongs done solely to her while her husband is the beneficiary of a recovery although he has not been wronged.

Flores was followed by Washington v. Washington, in which the

grant of a new trial in her suit. The point of departure for the language quoted was defendants' appeal in the wrongful death action.

34. See generally Comment, The Impact of the Community Property System on Tort Suits, 42 CALIF. L. REV. 486, 496 (1954).

35. CAL. PROB. CODE § 201 (West 1956).

36. Another open question concerns the operation of the statute of limitations: When would the Flores majority have determined that Mrs. Flores' cause of action arose? At the time she was injured, McFadden barred a recovery. The last act giving her a right to collect damages was her husband's death, which dissolved the community, leading to the possibility that her cause of action might not be deemed to have arisen until the death of her husband, which could be years later.

37. 47 Cal. 2d 249, 302 P.2d 569 (1956).
supreme court held that a divorce decree entered after a husband was injured but before he recovered damages converted the cause of action for personal injuries into his separate property. Before considering the consequences of the divorce, the court attempted to explain why the all-community-recovery rule was applied when the spouses were married and cohabiting at the time of the accident and judgment:

A rule permitting apportionment of the damages as suggested, however, has never been adopted in this state, and in the absence thereof, treating the entire cause of action as community property protects the community interest in the elements that clearly should belong to it. . . . Although such a rule may be justified when it appears that the marriage will continue, it loses its force when the marriage is dissolved after the cause of action accrues. In such a case not only may the personal elements of damages such as past pain and suffering be reasonably treated as belonging to the injured party, but the damages for future pain and suffering, future expenses, and future loss of earnings are clearly attributable to him as a single person following the divorce. Moreover, as in any other case involving future earnings or other after acquired property, the wife's right, if any, to future support may be protected by an award of alimony. Since we have no rule permitting the apportionment of the elements of a cause of action for personal injuries between the spouses' separate and community interests and since such a cause of action is not assignable, it must vest in the injured party on the dissolution of the marriage.

Justice Carter concurred, stating that the quoted passage made it clear that the majority implicitly recognized that the all-community recovery rule was outmoded, and that the majority would ultimately concede that damages for disfigurement, pain, and suffering are properly classified as the separate property of the victim-spouse.

Justice Carter's suggestion as to the impact of the quoted passage in Washington, however, did not convince the district court of appeal. Just thirty days after the decision in Washington was rendered, Nemeth v. Hair was decided. In that case, Mr. and Mrs. Nemeth and their son were involved in an auto accident. The husband's insurer paid him pursuant to a policy for most of the damage to the vehicle. The insurer brought suit in subrogation against the driver of the other car and the driver's employer, but the employer won a summary judgment on the ground that the employee was really an independent contractor. Later, when the wife brought a personal injury action against the driver's

38. Id. at 253-54, 302 P.2d at 571. This reasoning was reaffirmed in In re Marriage of Jones, 13 Cal. 3d 457, 462-64, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).
39. 47 Cal. 2d at 254-57, 302 P.2d at 572-73.
employer, res judicata was pleaded. Relying somewhat reluctantly on precedents compelling classification of the entire recovery in a personal injury case as community property, the court of appeal followed Zaragosa and ruled that the judgment against the husband was res judicata as against the wife. Without citing Washington, the court in Nemeth held that the wife's personal injury damages were community property.

The primary contention of the plaintiff wife in Nemeth was that the basis for Zaragosa had been undermined by the enactment in 1951 of a statute giving the wife management and control of community property earned by her and "community property money damages received by her for personal injuries suffered by her." This argument was made in spite of the language of the statute, which provided that it should "not be construed as making such money the separate property of the wife." Had the husband in this case lost his suit for damages to the community car at the time of the accident, the argu-

41. Id. at 408-09, 304 P.2d at 131.
42. Cal. Stat. 1951, ch. 1102, § 1, at 2860 (repealed 1973). The statute provided: "Notwithstanding the provisions of Section 161a and 172 of this code, and subject to the provisions of Section 164 and 169 of this code, the wife has the management, control and disposition, other than testamentary except as otherwise permitted by law, of community property money earned by her, or community property money damages received by her for personal injuries suffered by her, until it is commingled with other community property, except that the husband shall have management, control, and disposition of such money damages to the extent necessary to pay for expenses incurred by reason of the wife's personal injuries.

"During such time as the wife may have the management, control and disposition of such money, as herein provided, she may not make a gift thereof, or dispose of the same without a valuable consideration, without the written consent of the husband.

"This section shall not be construed as making such money the separate property of the wife, nor as changing the respective interests of the husband and wife in such money, as defined in Section 161a of this code."

It should be stressed that nothing in this 1951 statute, which was ultimately repealed with the adoption of equal management and control in 1975, compelled the classification of all of the damages awarded in a suit arising out of a wife's personal injuries as community property. The statute only provided that if any damages were so classified, such as the wife's lost earnings during the existence of the community, these were to be in her control.

Why, if not to undercut the imputed negligence rule in the area in which it was operating unfairly, only damages for personal injuries were placed in the wife's control, and not damages for invasion of privacy, slander, false imprisonment, or breach of contract, is unclear.

43. Judgment was given to the defendants in the suit on a motion for summary judgment based on lack of ownership of the vehicle, and the independent contractor status of the driver. 146 Cal. App. 2d at 406, 304 P.2d at 130.
ment might not have been completely frivolous, because some of the early decisions establishing the contributory negligence defense where the husband had driven the car in which his wife was injured had stressed his control over community property damages that might be awarded. The court of appeal, however, held in Nemeth that it was the husband’s coequal ownership of the community property personal injuries damages, and not exclusive control, that was the foundation for the Zaragosa defense. Thus, whatever the reason for giving the wife control of “community property money damages” when she had been injured, the all-community classification rule was held to be alive and well as long as the community itself had not been dissolved.

The principle of Flores v. Brown that a dissolution of the community eliminated the McFadden defense spawned yet another scheme to create an exception to the rule. In Kesler v. Pabst, after a wife was injured in an accident in which her husband was contributorily negligent, the spouses entered into a transmutation agreement in which the husband renounced all interest in any recovery that his wife might obtain from the third-party tortfeasor. The effect of this agreement on its face was to transmute the cause of action from community property to the wife’s separate property. After a verdict and judgment for the defendant, plaintiffs appealed, maintaining that the trial court erred in instructing that any contributory negligence of the husband would bar the wife’s recovery. The court of appeal had accepted the contention that imputing the husband’s negligence was not appropriate where the husband would, because of such contract, own no share of his wife’s recovery and thus would not profit by his wrong. But the supreme court disagreed. Giving such effect to the postaccident contract between the spouses did indeed, it held, allow the husband to profit by the device of voluntarily conferring on his wife as his donee a valuable property right (to recover damages) that previously did not exist because of the McFadden defense.

44. See text accompanying note 14 supra.
45. 146 Cal. App. 2d at 408-09, 304 P.2d at 131.
47. For a discussion of the broad freedom of California spouses to transmute all kinds of property from community to separate and vice versa, see Reppy & deFuniau, Community Property in the United States 409-15, 421-25 (1975).
49. 43 Cal. 2d at 258, 273 P.2d at 259. The majority in Kesler did recognize, however, that the cause of action for the wife’s pain and suffering and lost wages after
In 1957 the state legislature finally decided to do something about the McFadden defense of imputed negligence. One bill was submitted that simply prohibited recognition of the contributory negligence of the nonplaintiff spouse as a defense even where recovery would be community property. This proposal was not enacted; rather the legislature approved a section which provided:

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

Although this section says nothing about imputed negligence, it is unanimously agreed that the only reason for its enactment was dissatisfaction with the operation of the imputed negligence defense.

The Kesler opinion was subsequently followed in Ferguson v. Rogers, 168 Cal. App. 2d 486, 336 P.2d 234 (1959). However, a sound argument could have been made that Washington had impliedly overruled it. The Washington rule surely allowed a contributorily negligent spouse, for example, the husband, to deliberately confer a benefit on his wife by taking advantage of existing grounds for divorce and suing her to terminate the community, thereby fashioning for her a cause of action in tort free of a McFadden defense. Would not Washington have also given the wife a cause of action free of the "imputed" negligence defense had she, pursuant to an implied agreement with her husband, committed adultery after the accident to give the husband the then-required "fault" grounds to divorce her? If so, then at least some sort of postaccident planned activity by the spouses could succeed in eliminating the McFadden defense. And, of course, under Flores, so would the husband's suicide, committed for the very purpose of allowing his wife to recover.

Prior legislation which had been contended by litigants to affect the issue is discussed in notes 25, 26 & 42 supra.


In re Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975); Cooke v. Tsipouroglou, 59 Cal. 2d 660, 381 P.2d 940, 31 Cal. Rptr. 60 (1963); Charles, Ending the Separate Property Presumption in Auto Accident Cases, 40 CAL.
It soon became obvious that the 1957 statute was ill-advised. While it eliminated the McFadden defense, it operated quite unfairly in other areas due to the improper classification as separate property of such items of damage as lost earnings during marriage. For example, at the victim's death, he could will all of such funds away from his surviving spouse, including half of any damages paid to reimburse the community for medical expense paid from community savings. Moreover, such funds were treated for estate and gift tax purposes as belonging solely to the husband in case of bequest, intestate succession, inter vivos gift, or commingling with community funds. As a result of the operation of the 1957 statute, the half interest that had been owned under McFadden by the nonvictim spouse was the separate property of the victim, and taxed accordingly.54

After discussing these many faults of the 1957 legislation,55 and recognizing that the only purpose of the 1957 act was to abrogate the defense of "imputed contributory negligence,"56 a 1967 report of the California Law Revision Commission recommended

enactment of legislation that would again make personal injury damages awarded to a married person against a third party community property. The problem of imputed contributory negligence should be dealt with in a way less drastic than converting all such damages into separate property.57

The latter was to be achieved by enactment of a new statute (now Civil Code section 511258) that simply abolished the defense.59 However,
the commission did not propose any statute to compel classification of the damages in most cases as community property; apparently this was left to the court. It is clear, however, that the commission members expected the courts to return to their pre-1957 classification under the all-community recovery rule, for the report goes on to recommend a statute classifying damages as separate property if recovered after divorce or (in some circumstances) after separation. In addition, with respect to damages received during marriage but still on hand at a subsequent divorce, the commission recommended what was in effect a reclassification of such funds from community property to separate property of the victim spouse.

The explanation given in support of these changes is significant. First, the commission expressed its approval of the declaration in Washington that funds received as compensation for lost earnings that would have accrued after dissolution of the community ought logically to be treated as separate property. The commission then criticized the all-separate recovery rule of the 1957 legislation in cases in which a substantial portion of the damages was accorded to compensate the victim for lost earnings that would have been received during the period of the marriage prior to a divorce or separate maintenance action. Finally, it again criticized the all-community recovery classification insofar as it had authorized shared ownership at dissolution of the

60. One proposal, which was acted on by the legislature, sought to amend the 1957 legislation, specifically former Civil Code section 163.5, to compel classification of recovery by one spouse in a suit against the other as separate property of the victim. The supreme court had already relied on this classification under the 1957 act as a basis for overruling the doctrine of spousal immunity. Self v. Self, 58 Cal. 2d 683, 367 P.2d 65, 26 Cal. Rptr. 97 (1962). The commission obviously did not wish to undercut the basis for the Self holding.

Additionally, the commission pointed out that "[i]f damages recovered by one spouse from the other were regarded as community property, the tortfeasor spouse or his insurer would, in effect, be compensating the wrongdoer to the extent of his interest in the community property." DAMAGES REPORT, supra note 55, at 1391. This reasoning seems odd, for the same apology could be made for the so-called imputed contributory negligence defense sought to be abolished.

61. DAMAGES REPORT, supra note 55, at 1391-93.

62. Id. at 1392-93, 1395. The Commission proposed the awarding of all such damages (although still labeled community property) at divorce to the victim spouse, just as separate property of each spouse is confirmed to him or her at divorce, unless such division would work an injustice. This is essentially the law today. CAL. CIV. CODE § 4800(c) (West Supp. 1977). See also In re Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

63. DAMAGES REPORT, supra note 55, at 1391-92 n.8.

64. Id. at 1392.
marriage of damages for lost earnings yet to accrue.65

A close reading of the commission report thus discloses that it simply cannot be taken seriously when it states at one point that "personal injury damages awarded to a married person against a third party should be community property."66 In fact, the brief report noted three situations in which commissioners believed that at least some elements of these damages should not be treated as community property.67 Undoubtedly other situations could have been noted, and this may explain why the commission did not recommend substituting a legislatively compelled all-community classification rule for the 1957 all-separate recovery mandate.

The recommendations of the commission were enacted into law in 1968,68 and, with minor amendments and recodification, constitute the statutes the courts must deal with today in handling the imputed contributory negligence problem. These statutes are Civil Code section 5112,69 which provides that the negligence of a spouse is no defense in an action brought by an injured spouse; section 5109, which provides that all damages paid by one spouse to another in settlement of a claim for personal injuries are separate property of the injured spouse; section 4800(c) which allows personal injury damages to be awarded to the injured spouse70 upon divorce; and section 5126, which provides that personal injury damages shall be separate property of the injured spouse if received after separation or divorce, subject to certain reimbursement provisions.71

It is to a discussion of these statutes, and their interpretations by the California courts, that we now turn.

65. Id.
66. Id. at 1391.
67. The three situations alluded to are recovery of damages after dissolution of the community, awarding of predissolution recoveries at divorce, and recovery by one spouse against the other. DAMAGES REPORT, supra note 55, at 1392-94.
69. CAL. CIV. CODE § 5112 (West 1970).
70. Id. § 4800(c).
71. Section 5126 does not expressly ban dividing a cause of action at divorce as community property, but it has been held that since monies received upon reducing the cause of action to judgment would be separate property under the statute, it necessarily has the effect of reclassifying at divorce the cause of action itself from community property to the separate property of the victim spouse. In re Marriage of Pinto, 28 Cal. App. 3d 86, 104 Cal. Rptr. 371 (1972). To the extent, if any, that Pinto suggests that a cause of action for damages for predivorce and preseparation lost earnings would be converted into separate property, the result is unacceptable.

Another problem raised by reclassifying the cause of action on divorce was pointed out in In re Marriage of Pinto, 28 Cal. App. 3d 86, 104 Cal. Rptr. 371 (1972). When,
Arguments for a Narrow Interpretation of Civil Code Section 5112

Literally, section 5112 states that imputed contributory negligence is "not a defense." This statute is not directed at a comparative negligence system in which the fault of a member of the community would not be a "defense" in a suit seeking community property damages but would merely pertain to the appropriate measure of damages. Thus, if section 5112 is taken to mean what it plainly seems to mean, the statute has no application under the system of comparative negligence adopted in California, and something similar to the McFadden imputed negligence rule is once more the law in this state.

Before this narrow interpretation is rejected as a step backwards, however, this result should be examined in the light of California’s comparative negligence doctrine to determine if there may now exist policy reasons for retaining the McFadden rule which did not exist under the old contributory negligence doctrine. It is possible that the injustice resulting from the application of the McFadden rule that section 5112 sought to correct no longer exists.

In order to examine the operation of the McFadden rule under the doctrine of comparative negligence, it is helpful to consider an example. Imagine a situation in which a wife is injured while a passenger in a community-owned car which her husband is operating. Further imagine that the husband and a third party are each responsible for 50 percent of the causative negligence. What is the result under comparative negligence, supplemented by the McFadden rule, if the community is held responsible for the negligence of the husband? If the wife sues the third party for damages to the community car; the award will be reduced by one-half. That such an application of "imputed" negligence at dissolution of the marriage, a cause of action in tort is converted from community property into the victim spouse’s separate property (as occurred in Pinto), or where funds on hand, traceable to a tort recovery, are converted from community to separate property or divided unequally under section 4800(c), there is probably a taxable event in which the victim spouse must recognize gain. See Rev. Rul. 76-83, 1976 INT. REV. BULL. No. 10, at 13.

The taxation considerations would be even more confusing if, in the case of funds on hand at dissolution that were converted or unequally divided, the jury trying the tort case had been instructed to reduce damages on account of income taxes that would have been paid on recovery had it been received as income. That is the rule where recovery for lost earnings is had against the United States as a defendant, and the jury would consider, it seems clear, the combined tax bracket of both the victim and his spouse insofar as recovery would be community property. See Felder v. United States, 543 F.2d 657 (9th Cir. 1976).

72. CAL. CIV. CODE § 5112 (West 1970).
is necessary to prevent injustice is obvious once we realize that if the husband had been denominated the plaintiff, only half the damage to the car would have been recoverable.\footnote{Note that section 5112 seems not to apply, if taken literally, for another reason. Although "a married person [has been] injured" in the accident, we are not concerned here with "damages for such injury."} Unless we are to allow a procedural device to double the recovery against the third party tortfeasor, the recovery for damages to the community-owned car ought to be the same, no matter which spouse is formally the plaintiff.

Surely there is nothing unfair about this result concerning the car, if we accept marriage as a true partnership. All would agree that the value of the community property can be reached by the postmarital creditors of one spouse, whether the other spouse approves or not, but this will be offset by the earnings of that spouse, which are co-owned. A spouse's contributory negligence in tort situations will also sometimes lessen the recovery otherwise going to the community, but this will be offset in other situations where activities involving risk of tortious conduct (e.g., driving to work) generate gains in which the other spouse shares.

Likewise, if the loss to the community is not a wrecked car but loss of the salary or other earnings of a spouse for a period during which the spouses were married and living together, so that such sums if accrued as anticipated from labor would have been community property, it is just as fair to apply the \textit{McFadden} rule and reduce the recovery to the community by the total amount of negligence of both spouses even though only one has been injured.

By way of example, suppose that both spouses worked and that the wife has been injured so that she will be unable to earn $10,000 per year for five years. If her husband has been 50 percent negligent in causing the injury, the operation of the marital partnership system, together with comparative negligence, causes recovery of only half the damages to be awarded. This is not unjust, since, at the same time, the wife is obtaining corresponding benefits due to the marital partnership system by owning as a matter of law half of her husband's continuing paycheck.

But what of recovery for the wife's pain and suffering and for her disfigurement? Should it be reduced because of her husband's negligence? Unless the proponents of the narrow interpretation of section 5112 are going to take the bizarre position that the injured wife must "'suffer' for the community,"\footnote{See W. Brockelbank, \textit{The Community Property Law of Idaho} 182-84} they will concede that such a reduction...
is unjust and improper. This injustice results from the California Supreme Court's classification of this element of recovery as community property. The proper solution is not to torture the language of section 5112 to bar consideration of the nonplaintiff spouse's share of causative negligence in determining the appropriate measure of damages under Li—a solution that would cause a patently improper recovery insofar as it eliminated a reduction of damages for the plaintiff spouse's lost earnings during marriage and while the spouses were living together. Rather, the solution is to classify correctly damages for pain and suffering as separate property, a result no statute prohibits.

Moreover, the adoption of comparative negligence is a boon to the community for which inability to claim special benefits under section 5112 is a small and fair price to pay. Surely the great bulk of cases involving contributory negligence by a married person are those in which that negligent spouse was also the tort victim. Before Li, there could be no community recovery at all, even when the third-party tortfeasor was 90 percent to blame for the accident. Given the benefit of partial recovery under Li, there is no unfairness in using the imputed negligence principle to reduce damages in the more unusual case where one spouse is contributorily negligent and the other is injured, especially if a logical classification of the damages as community or separate is made.

Arguments for the Broad Interpretation of Section 5112

Proponents of a broader reading of section 5112 in a comparative negligence context will stress that the special relief provided for married personal injury plaintiffs in the 1957 and 1968 legislation was prompted by more than dislike for contributory negligence. If so, the elimination of that doctrine alone does not call for the end of special consideration for married plaintiffs in personal injury suits.

Prior to both the 1957 and 1968 enactments, it was well settled in California that if the plaintiff's business partner or joint venturer, in the course of the business venture, had contributed to the injuries by his negligence, imputed contributory negligence was a complete defense.75

(1962); Note, Personal Injury Damages and Inheritance and Gift Taxes: Revenue and Taxation Code § 13560, 24 HASTINGS L.J. 329, 343 (1973). These commentators stand alone in contending that the California classification of true personal injury damages as community property is logical.

75. E.g., Buckley v. Chadwick, 45 Cal. 2d 183, 190, 288 P.2d 12, 15-16 (1955);
If the legislature had a general distaste for such a defense, the reform legislation would probably not have been confined to husband-wife imputed negligence but would also have addressed the unfair operation of the defense in the area of joint commercial venture. Also, why would the legislature have limited relief to suits involving injuries to the person? Why wasn't it thought just as unfair to impute negligence to bar recovery when damage was to tangible property of the community or to a spouse's business?

The answer may be that, outside of the "business and property" context, the legislature felt marriage of a person should never be used to reduce the recovery that a single person would be able to obtain for wrongs done to him. That is, for property damage suits, married persons would be lumped with joint venturers in the commercial area, properly subject to sharing the risks as well as benefits of partnership. When it comes, however, to damages for pain, suffering, disfigurement, medical bills, lost earnings, and the like in personal injury suits, the sometimes harsh "win a few, lose a few" theory of business partnership is inappropriate. When dealing with the marital community, some aspects of strict partnership—for example, the imputing of negligence—are disregarded; others—for example, shared ownership by the spouses of community property damages—do not act harshly in this setting and are retained. This purpose can only be obtained under a comparative negligence system by interpreting section 5112 to prohibit, when an injured person sues as plaintiff to recover personal injury damages, the attributing or imputing to him of any of the non-plaintiff spouse's negligence.

Thus, if the wife is 30 percent negligent, the husband 20 percent negligent, and a third-party tortfeasor 50 percent negligent in the wife's suit against the third party for community property personal injury damages, her recovery is 70 percent of the damages, not just 50 percent—as would be the result if her spouse's negligence were imputed to her.76


76. Against charges that it is unfair to require the third-party tortfeasor to pay 70% of the damages, it must be remembered that, at least until Li, the third party and the nonplaintiff spouse were jointly and severally liable for all damages not caused by the negligence of the plaintiff spouse.

Another possibility, not entirely illogical, is that the wife's recovery would be 62.5% of damages (%) on the theory that section 5112 requires that the nonplaintiff spouse's negligence be disregarded entirely. In other words, of the eight units of fault allocable between the plaintiff spouse and the third-party tortfeasor, five units belong...
It is thus clear that factors other than mere dislike for the defense of contributory negligence must have been in the minds of the California legislators who enacted section 5112, since nothing was done to eliminate that defense in contexts other than personal injury suits brought by a married plaintiff.

**Resolving the Dilemma by Reopening the Classification Question**

My own view is that while the 1957 and 1968 California legislatures may have had some distaste for the contributory negligence defense generally, that was not the primary reason for the anti-*McFadden* legislation which they enacted. If contributory negligence had been viewed as the primary evil, rejecting it in favor of comparative negligence certainly would have been discussed as an alternative to what was done instead. On the other hand, there is nothing in the legislative history or case law background of section 5112 to suggest that it was intended to confer special immunities from ordinary tort law defenses to some plaintiffs simply because they were married.

Rather, I think the legislature perceived that contributory negligence when applied to deny recovery for damages for a married plaintiff's pain, suffering, and disfigurement produced unacceptable results—not because of the imputing of the nonplaintiff spouse's negligence to the community but because the classification of such damages as community was erroneous. That is, with respect to the integrity of a person's own body, there is no element of joint venture, commercial or

to the third party and therefore he should be liable for $5/8$ of the damages. According to Professor Schwartz, however, in the few decisions so far on the question arising in comparative negligence jurisdictions where multiple tortfeasors are jointly and severally liable for all damages, the negligence of a tortfeasor not joined as a defendant is generally treated as part of the negligence of the defendant. Thus, 70%, and not 62.5%, would be the appropriate recovery for the wife in our hypothetical. V. SCHWARTZ, COMPARATIVE NEGLIGENCE, 254-55 (1974) (citing Wisconsin cases). Schwartz also notes that in Arkansas a plaintiff who is 20% negligent can sue a defendant only 10% negligent but can recover 80% of his own (plaintiff's) damages. *Id.*, at 258-59. On the other hand, in discussing the *Li* case, Schwartz suggests that in California, if the plaintiff chooses not to sue certain potential defendants, “he should not be permitted to allocate fault to them.” This would make the case easier for the jury, for “it permits the jury to make judgments about parties whom they can see and hear without straining to apportion fault in the abstract.” *Id.*, 1975 Supp. at 7. For a similar suggestion that the *Li* court may not intend to follow the Wisconsin authorities, see Schwartz Survey, supra note 6, at 762-63. *Contra*, Comparative Negligence, supra note 6, at 774 n.30. Schwartz, however, does not cite any portion of *Li* suggesting that the California court plans to repudiate the Wisconsin-Arkansas solution to the problem.
marital, and no reason to attribute to the plaintiff the negligence of his spouse. Yet when the damages are related to the commercial joint venture sharing of the spouses, recognition of the partnership results in no unfairness.

In sum, section 5112 seems to be the strange offspring of disenchantment not with that portion of *McFadden* attributing to the community partnership the negligence of either spouse, but with the all-community recovery rule itself. I say “strange” offspring, for if I am correct in my analysis of what was troubling the legislature, the logical response would have been to enact a bill requiring California courts to apply a more sensible rule for classifying the various elements of damages in a personal injury suit, rather than abolishing contributory negligence as a defense in such litigation.

Nevertheless, looking beyond section 5112, there is ample evidence that the legislature was quite troubled by the all-community recovery rule and was primarily concerned with statutory devices to ameliorate its unfortunate effects. One such effect was the absurdity of an imputed contributory negligence defense when part of a married person’s body had been lost in an accident. Section 5112 took care of that problem. Another was the possibility of treating as community property sums on hand at divorce that were awarded for future suffering and for lost earnings yet to accrue following the divorce. Section 4800(c) took care of that.

Additionally, there was the possibility that the courts might retreat from the illogical decisions of *Flores v. Brown* and *Washington v. Washington*, which allowed treating as separate property damages for future suffering and for future lost earnings yet to accrue after dissolution of the marriage by death or divorce. Section 5126 took care of that.

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77. See note 29 and accompanying text.
78. See 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Community Property § 68 (7th ed. 1960). Community property was subject to mandatory 50/50 division in some situations. If the grounds for divorce were adultery or extreme cruelty, an “innocent” spouse could be awarded more than half the community property under the law in effect before 1970. If the “guilty” spouse were the tort victim, the result in such a case could be especially inequitable.
79. CAL. CIV. CODE § 4800(c) (West Supp. 1977).
81. 47 Cal. 2d 249, 302 P.2d 569 (1956).
82. CAL. CIV. CODE § 5126 (West 1970), as amended CAL. CIV. CODE § 5126 (West Supp. 1977). The fact that the only thing the 1957 legislation actually did was
If the primary reason for the 1968 legislation was dislike of the all-community recovery rule, it must be conceded that the narrow interpretation of section 5112, coupled with continued application of the all-community recovery rule, will cause a result the legislature did not intend. If a wife loses a leg and her spouse is 50 percent negligent, the legislature would not want the wife's damages diminished at all. It would follow, then, that if for any reason the courts are incapable of making the initial classification desired by the legislature—that damages for pain, suffering, and disfigurement are separate property—the broad interpretation of section 5112 is tolerable. If there is no bar to a proper classification of elements of damages, then the narrow interpretation—the literal reading of the statute—is appropriate. It will assure no reduction of a person's recoverable damages for pain, suffering, and disfigurement due to a spouse's contributory negligence, while quite logically and properly lumping together the negligence of both spouses to reduce damages which are correctly treated as part of the wealth of the marital partnership.

Are California Courts Free to Overrule the All-Community Recovery Decisions and Adopt the Nevada Rule?

The approach of the Nevada courts demonstrates that a correct classification of the rights violated will serve the interests sought to be protected by section 5112. In the leading case of Frederickson & Watson Construction Co. v. Boyd, the Nevada supreme court, when faced with the question whether and to what extent Mrs. Boyd would be barred from recovery from third-party tortfeasors for personal injuries because of her husband's contributory negligence, held that the character of the judgment obtained by Mrs. Boyd as separate or community property depended on the right violated. The court found that a cause of action for personal injury is based on the violation of a separate right, the right to personal bodily integrity. Recovery for violation of this right would therefore be Mrs. Boyd's separate property. The court distinguished the case of damages arising from the loss of the wife's services to the community and for medical expenses; these would be community property.

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83. 60 Nev. 117, 122, 102 P.2d 627, 629 (1940).
84. Id.
85. Id.
From 1957 to 1968, the California courts were compelled by statute to classify personal injury damages in a particular manner and thus were not free to adopt the better reasoned Nevada approach. The 1968 legislation, however, changed the situation. Only one statute even refers to personal injury damages as community property, and does so in a most tangential way. Hence, even if the Law Revision Commission did think the all-community recovery rule was sound, the statutes it recommended and which the legislature enacted in 1968 simply do not tie the courts' hands on the classification issue.

The California courts have at times suggested that what is now Civil Code section 5110 compels the all-community recovery rule. Under it, "all personal property wherever situated acquired during the marriage . . . is community property . . . [e]xcept as provided in sections 5107, 5108, and 5109. . . ." But sections 5107 and 5108 provide that "all property owned by [one spouse] before marriage" is his separate property. These statutes could be seen as compelling classification as separate property of those damages received by a spouse to compensate him for loss of a leg (his property before marriage) to the same extent that section 5110 compels classifying a recovery for lost earnings during marriage as community property.

Actually, sections 5107, 5108, and 5110 are merely legislative efforts to codify basic principles of community property law applicable when specific classification provisions addressed to particular types of property are not themselves dispositive. Resort must be had to the statutes could be seen as compelling classification as separate property of those damages received by a spouse to compensate him for loss of a leg (his property before marriage) to the same extent that section 5110 compels classifying a recovery for lost earnings during marriage as community property.

...
doctrine of tracing, which is not codified, but which is a basic tenet of community property law. If damages can be traced back to a foot or arm of the spouse or to a legal right not to be tortiously subjected to pain and suffering, then the combination of the tracing rule and sections 5107 and 5108 dictates classifying damages for disfigurement or for pain and suffering as the victim spouse's separate property. No reason was given in McFadden for the refusal there to trace back beyond the accrual of the cause of action itself which (since that happened during marriage) led to the all-community recovery rule in California. The error in McFadden's refusal to trace was at once observed by the Supreme Court of Nevada when it was for the first time called upon to classify such damages in Fredrickson & Watson Construction Co. v. Boyd. Where the wife had been injured, the Nevada court divided the recovery into separate property of the wife for damages for her pain and suffering traceable to her separately owned right of personal security and into community property damages for lost earnings, lost services, and medical expenses. The Nevada rule was adopted in New Mexico, again on the basis of tracing portions of the damages back to the victim spouse's separate rights, the New Mexico court stating: "A person has no more property in a right to recover for a lost arm or leg, than he had in the arm or leg itself." In 1972, the Texas Supreme Court repudiated many years of adherence to an all-community recovery rule similar to California's by adopting the Nevada rule on the ground that it was in accordance with basic principles of Spanish law. Finally, in a case in which it also

is often essential in making an appropriate classification. See, e.g., Bradley v. Bradley, 540 S.W.2d 504, 512 (Tex. Civ. App. 1976); In re Salvini's Estate, 65 Wash. 2d 442, 445-47, 397 P.2d 811, 812-13 (1964); Andrews v. Andrews, 116 Wash. 513, 519-22, 199 P. 981, 984 (1921). With respect to the problem of classifying personal injury damages for pain and suffering and disfigurement, however, de Funiak and Vaughn aptly state that the Spanish concepts of onerous and lucrative title provide no solution. W. de Funiak & M. Vaughn, Principles of Community Property § 82 (2d ed. 1971). The significant inquiry is into the classification of the rights from which the cause of action and damages stem—the "property" which the money awarded takes the place of.

94. Id. § 77. See note 29 supra.
96. Graham v. Franco, 488 S.W.2d 390 (Tex. 1972). The decision upheld a Texas statute abrogating the all-community recovery rule, Tex. Fam. Code § 5.01(a)(3) (1970), which had been established by case law on the very theory used in McFadden. Exell v. Dodson, 60 Tex. 331 (1883). Graham construed the Texas Constitution as adopting basic classification principles of Spanish-Mexican community property law. 488 S.W.2d at 395. The historical context in which this case arose deserves note. In 1915 the Texas legislature had passed a statute somewhat like California's 1957 act, making all of the wife's personal injury recovery separate property. The statute was
abolished spousal immunity, the Idaho Supreme Court in 1975 repudiated numerous all-community recovery decisions in favor of the Nevada rule.97

[W]e believe the correct concept is first to consider the nature of the right or interest invaded or harmed by the negligence of a defendant, and based on a determinization [sic] of the nature of this right, then to characterize the damages recovered in relation to the right violated. Thus, the character of any judgment in this type of case as separate or community would take its character from the nature of the right violated.

held to violate the Texas Constitution in Northern Texas Traction Co. v. Hill, 297 S.W. 778 (Tex. Civ. App. 1927). According to Graham this decision was correct, not for the stated reason (the all-community recovery rule) but because the statute wrongly classified as separate property damages recovered for the wife's lost earnings. 488 S.W.2d at 396. See generally Note, The Texas Community Property Defense: An Obituary, 10 HOUST. L. REV. 958 (1973). Louisiana has also abrogated by statute the all-community recovery rule with respect to damages recovered by the wife. LA. CIV. CODE ANN. art. 2334, 2402 (West 1971). The Louisiana statute is construed, however, to make separate only damages for pain and suffering, and disfigurement, not those for the wife's lost earnings or for expenses of her medical treatment.

97. Rogers v. Yellowstone Park Co., 97 Idaho 14, 539 P.2d 566 (1975). Rogers was a case in which one spouse sued the other for damages. The Idaho court did not, after speaking approvingly of it, apply the Nevada rule, but adopted rather the Washington interspousal suit precedent of Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972). That case allowed the victim spouse to recover only half of his lost earnings, the amount recovered becoming the plaintiff's separate property.

I do not view Rogers as abandoning the all-community recovery rule only in interspousal suits. Guy v. Guy, -- Idaho --, 560 P.2d 876, 879 (1977). The great bulk of the opinion constitutes dicta attacking the all-community-recovery rule and lauding the Nevada approach. It approvingly cites Nevada, Texas, and New Mexico cases outside the interspousal immunity area where the Nevada classification approach was utilized and California's rejected. The Rogers court appears to have been inviting trial judges in Idaho to henceforth use the Nevada rule in cases where the defendant is not the plaintiff's spouse. Cf. Comment, Limitations on Personal Injury Tort Litigation by Married Persons in Community Property States: Inter-Spousal Immunity and the Community Property Classification of Personal Injury Recovery, 11 IDAHO L. REV. 225 (1975). But see Note, The Husband's Recovery of Personal Injury Damages after Judicial Separation, 36 LA. L. REV. 1029, 1039 n.50 (1976).

If my interpretation is correct, the California rule is now a minority position, with Idaho, Texas, Nevada, New Mexico, and Louisiana (as to wives) rejecting it. The all-community recovery rule does seem to be alive and well in several states. See, e.g., Tinker v. Hobbs, 80 Ariz. 166, 294 P.2d 659 (1956); Fox Tuscon Theatres Corp. v. Lindsay, 47 Ariz. 388, 56 P.2d 183 (1936); Ostheller v. Spokane & I.E.R. Co., 107 Wash. 678, 182 P. 3 (1919); Schneider v. Biberger, 76 Wash. 505, 136 P. 701 (1913); Perez v. Perez, 11 Wash. App. 429, 523 P.2d 455 (1974). In Louisiana the rule applies when the husband is injured. McHenry v. American Employers' Insurance Co., 206 La. 70, 18 So. 2d 656 (1944). But cf. LA. CIV. CODE art. 2334 (West 1971) (husband's recovery separate if at time of injury he was living separate and apart from his wife due to her fault).
When a couple marry they bring to the marriage not only their property, but also themselves as individuals. While they enter into common bonds, still they are entitled to maintain certain individual rights. One of those rights is that of personal security and freedom from harm to one's person from the spouse. Any physical injury to a spouse and the pain and suffering therefrom is an injury to the spouse as an individual.98

Similar logic has repeatedly been pressed on the California court by Justice Carter in separate opinions.99 To me it seems irrefutable in the typical case of injury to the very body one spouse brought to the marriage that damages for pain, suffering, and disfigurement should be classified as separate property.

The Policy Against Splitting a Cause of Action as a Ground for Refusal To Adopt the Nevada Approach

In the Washington case, the California Supreme Court seems to concede that the all-community recovery rule is unsound in many of its applications. It is noteworthy that the rule is no longer defended on the theory that the cause of action arises during marriage and that tracing back to some antecedent source is impossible. Rather, it is said that the all-community recovery rule "protects the community interest in the elements that clearly should belong to it," and it is apparently for this reason that "[a] rule permitting apportionment of the damages . . . has never been adopted."100 But the Nevada rule protects the separate estate

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98. 97 Idaho at 18, 539 P.2d at 570 (citations omitted).
100. Washington v. Washington, 47 Cal.2d 249, 253-54, 302 P.2d 569, 571 (1975). Note, too, as the California Supreme Court had pointed out earlier, that once the community is dissolved by death "it becomes possible to segregate the elements of damages that would, except for the community property system, be considered personal to each spouse." Flores v. Brown, 39 Cal. 2d 622, 631, 248 P.2d 922, 926 (1952).

It is ironic that, while shunning any apportionment of personal injury recoveries into community and separate components, California has been the leader among the community property jurisdictions in requiring apportionment in other areas. For example, California is one state willing to treat a debt at dissolution of the community as part community, part separate. See Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967) (although one could quarrel with the factual conclusion here that a portion of the debt was community). See also Babcock v. Tam, 156 F.2d 116 (9th Cir. 1946) (Arizona law), which takes an all or nothing approach to the characterization problem on facts strongly suggesting the tortious activity was related to both community and separate endeavors. California was also the leader in requiring an apportionment where a separately owned business has grown in value because of a combination of separate capital and community skill. See cases reviewed in Beam v. Bank of America, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971). Interestingly, Nevada, which originated the theory that apportionment was impossible
of a victim with respect to what he or she should own, as well as protecting what is legislatively classified as community property. The McFadden approach is necessary to supply protection only if it is legally impossible to make a Nevada-style apportionment, so that the only alternative to an all-community rule is an all-separate rule.

One possible reason for refusal to segregate community from separate damages could be a mystical notion of "one accident, one cause of action," at least when the possible separate claimants are the united flesh of husband and wife (to use the English common law fiction, a notion completely inappropriate in a community property jurisdiction). But "one accident, one cause of action" never has been the law of California. In the first California case to consider the rights arising when a married woman was injured, Tell v. Gibson, decided in 1884, the court said:

[T]he wrongful act which caused the injury to her may involve two distinct wrongs, for which the law gives two distinct causes of action: one to the wife, to recover damages for the injury to her; another to the husband, to recover damages for the consequential injury to him caused by the loss of services of his wife, and the expenses incurred by her injuries. ¹⁰¹

Although this precise holding was rejected in McFadden, it was not on the theory that one accident could not create multiple legal rights, for soon after McFadden, the court in Moody v. Southern Pacific Co.¹⁰² declared that where the wife is injured, joinder with her husband as plaintiff was required in a suit to recover community owned damages for her personal injuries (i.e., pain, suffering, and disfigurement damages), but that the husband may also have

a separate action which he is entitled to maintain in his own name for damages which are caused to him by reason of his wife's injuries, such as the loss of her service and medical and other expenses incurred . . . . ¹⁰³

And, of course, where property is harmed in the same accident in which the spouses are injured, a separate cause of action can arise. Thus, in Scoville v. Keglar,¹⁰⁴ Mr. and Mrs. Scoville were both injured while

in such a circumstance, Lake v. Lake, 18 Nev. 361, 4 P. 711 (1884), has now conceded that California was correct and follows the California apportionment rule, Johnson v. Johnson, 89 Nev. 244, 510 P.2d 625 (1973), while California still rejects Nevada's apportionment approach in personal injury cases.

¹⁰¹. 66 Cal. 247, 248, 5 P. 223, 224 (1884).
¹⁰². 167 Cal. 786, 141 P. 388 (1914).
¹⁰³. Id. at 789, 141 P. at 390.
¹⁰⁴. 27 Cal. App. 2d 17, 80 P.2d 162 (1938). One issue before the court was whether the husband or his estate was a necessary party, since on the husband's death before final judgment, the attempt to substitute his estate for him as a plaintiff was found not to be timely.
driving in a car separately owned by Mrs. Scoville. The car was also damaged. The court said that all recoverable damages would be community property except for $600 found by the trial court to be the appropriate recovery for damages to the car. This could be awarded even if Mrs. Scoville alone brought the suit (at this time she had no management power over community property), for this was her separate property.

It is true that in a few cases the Nevada rule, by recognizing some separate property recovery, may technically create two causes of action where previously there was one under McFadden. If it is felt this may cause needless hardship to the tortfeasor by subjecting him to multiple suits, the remedy is not to reject the Nevada rule but to impose a requirement of joinder of the two causes of action. This seems to have been done by the court in Rodriguez v. Bethlehem Steel Corp., where overruling what was thought to have been settled law, the court fashioned a cause of action for loss of consortium. Where, for example, the husband has been seriously injured in a fashion giving rise both to a cause of action for his injuries and to a cause of action for his wife's loss of consortium, the defendant can insist on the husband and wife joining their actions against him. Rodriguez is also pertinent to the present inquiry for the observation by the court that the jury can be trusted to segregate the wife's loss from her husband's in such a case. If the jury can be trusted to give a monetary value to such elements as "love, companionship, affection, society, sexual relations, [and] solace" in determining the amount of damages to be awarded for loss of consortium, then surely a jury in an ordinary personal injury case

105. As to the California definition of a cause of action, see Comparative Negligence, supra note 6, at 795.
107. 12 Cal. 3d at 408, 525 P.2d at 686, 115 Cal. Rptr. at 782. Rodriguez does not answer the interesting question whether the recovery for loss of consortium is community or separate. See Reppy & De Funia, Community Property in the United States 206 (1975). Presumably it is community, as the right infringed on did not exist prior to marriage.
108. 12 Cal. 3d at 406, 525 P.2d at 685, 115 Cal. Rptr. at 781.
should be able to segregate one spouse's damages for pain, suffering, and disfigurement (as to which the noninjured spouse's contributory negligence is irrelevant) from the community's damages for lost earnings and medical expenses.

In sum, the Nevada rule need not involve any splitting of a single cause of action, and the fear that juries will be unable properly to segregate the damages is no basis for rejecting the Nevada approach.

Other Objections to the Nevada Rule

The simplest argument to make (but also perhaps the simplest to reject) for retaining the all-community recovery rule of classification is that it makes litigation easier. Under the all-community recovery rule, one set of instructions to the jury would cover all of the damages. Although contributory negligence is a much easier system on the courts than comparative negligence, this was no barrier to the Li decision. If the California courts conclude that the Nevada rule is appropriate and McFadden is in error, the ease of applying McFadden will not prevent its demise.

Second, the law's general preference for community ownership could be cited in support of the present California rule, particularly now that the state has provided for nondiscriminatory equal management by husband and wife of most community property. It is certainly true that marital property management is facilitated if all assets are of the same class, especially if both spouses have management power over them. But that policy would lead to adoption of the general community found in some European countries, whereas California's constitution and statutes recognize the existence of separate property. Since

110. Of course, this would not be so if additional causes of action as for loss of consortium or damage to personal property separately owned were joined.
112. CAL. CIV. CODE § 5125(a) (West Supp. 1977). "Equal" management means each spouse alone can act, as opposed to "dual" or "joint" management whereby both husband and wife must act together in order to make a valid transaction. See Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 S. CAL. L. REV. 977, 980-81 (1975). In California, equal management ends when either spouse diverts community funds to a business from which the other spouse is excluded, or deposits them in a bank account in the spouse's own name alone. CAL. CIV. CODE § 5125(d) (West Supp. 1977); CAL. FIN. CODE §§ 851, 7601, 11200 (West Supp. 1977).
113. See Vaught, The Policy of Community Property and Inter-Spousal Transactions, 19 BAYLOR L. REV. 20 (1967). In its extreme form, a general community excludes separate ownership of property.
114. CAL. CONST. art. 21 (West Supp. 1977); CAL. CIV. CODE §§ 5107-09 (West 1970).
separate property does exist, the courts have a duty to recognize it as such in a given case.

It must also be remembered that while assuring equal management of all of the damages awarded to the victim spouse by following McFadden may seem desirable, the misclassified property becomes available to a large additional class of creditors. That is, so long as a spouse's personal injury damages for pain, suffering, and disfigurement are classified as his separate property, only the spouse's own creditors can seize the funds. But if the funds are community property, creditors of the nonvictim spouse can seize them. And if the debt were the nonvictim's spouse's community obligation, his spouse would not even have a claim for reimbursement at dissolution of the marriage on the ground she was taken advantage of when her damages for pain and suffering were used in that manner, for there is nothing innately unjust about paying community debts with community property.

Moreover, if after a separate property award is made to the wife or husband under the Nevada rule, and the victim spouse would like to have the benefits of equal management applied to such funds, the recipient can make his spouse his agent, with power along with him, to control such funds. Or he could transmute the funds from separate to community property.

115. CAL. CIV. CODE § 5121 (West Supp. 1977). This section and section 5132 contain an exception for debts contracted by the other spouse to supply necessaries of life or support. CAL. CIV. CODE § 5132 (West Supp. 1977).

116. CAL. CIV. CODE § 5116 (West Supp. 1977). An exception in section 5120 for debts of a spouse "contracted" before marriage (and separate for this reason) would not apply, for that exception insulates only the nondebtor spouse's "earnings", which do not include personal injury damages. CAL. CIV. CODE § 5120 (West Supp. 1977). Aside from section 5120, the Washington-Arizona concept of classifying debts as separate and community is not utilized in California to determine what property a creditor can reach. (Section 5122 creates a "pecking order" of liability based on the community versus separate debt theory, but it does not exempt property as Washington-Arizona law does. CAL. CIV. CODE § 5122 (West Supp. 1977)). The community versus separate debt system is applied, however, to determine what reimbursement rights may be asserted at dissolution of the community. Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967); Marriage of Walker, 57 Cal. App. 3d 802, 129 Cal. Rptr. 351 (1976); Williams v. Williams, 14 Cal. App. 3d 560, 92 Cal. Rptr. 385 (1971).

117. See cases cited note 116 supra.

118. Professor Horowitz, places his objection to the all-community recovery rule on grounds that it is unfair to have damages recovered for a married person's pain and suffering be used to pay community obligations. Horowitz, Conflict of Law Problems in Community Property, 11 WASH. L. REV. 212, 229 (1936).

119. W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 144 (2d ed. 1971). A substantial transmutation might incur a gift tax. See Estate of Rogers, 24 Cal. App. 3d 69, 100 Cal. Rptr. 735 (1972); Comment, Personal Injury Dam-
A quite different basis for objecting to the Nevada rule might be that the tracing test is sometimes unworkable. For example, suppose the tort is defamation of the wife. Is the jury to consider whether the particular elements of her reputation at issue were acquired before or after marriage? Of course, it is not easy to apply the tracing theory in such instances, but that difficulty can be answered by invoking the presumption in favor of community ownership, so that there is no need to brand the Nevada rule as a whole unsound. That is, unless the court is convinced that the wife has satisfactorily traced the cause of action to some property or pre-marital right—such as part of her body or a legally created protection of bodily integrity—the cause of action or damages must be community-owned as property acquired by a spouse during marriage.120

Departing from the all-community recovery rule (especially together with adoption of the narrow interpretation of section 5112) can also be criticized as encouraging the manipulating of the nature of recoverable damages to assure separate ownership or to avoid imputed contributory negligence which would decrease the amount of recoverable damages. Although several Nevada rule decisions state that damages to compensate for the victim's medical expenses are community property,121 these decisions seem to be based on an assumption that since community funds would be liable for medical expenses incurred during marriage, they were in fact so used. The Texas Supreme Court has more carefully considered the problem and has said: "To the extent that the marital partnership has incurred medical or other expenses . . . both spouses have been damaged . . . . The recovery, therefore, is community in character."122 But what if, prior to the assessment of damages, separate property of the victim spouse has been used to pay hospital bills and medical expenses, and suppose, too, that the recommended narrow interpretation of section 5112 is adopted, and the husband has been concurrently negligent along with the third-party defendant? Can reduction of damages be avoided by the device of not using community property to pay the bills?

Kesler v. Pabst123 held that a postaccident, prejudgment contract between a husband and wife whereby the husband relinquished all

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interest in all recoverable damages, was ineffective to eliminate the operation of the *McFadden* rule.\textsuperscript{124} Subsequently, however, the supreme court permitted what was plainly a bona fide divorce, not entered into to improve tort litigation posture, to create a cause of action previously barred by *McFadden*.\textsuperscript{125} These California cases suggest that if the medical bills were paid from separate funds for bona fide reasons—for example, if the wife had married the husband shortly before the accident and carried medical insurance, which had paid her hospital and doctor bills and which she had purchased entirely with premarriage separate earnings—any recovery to reimburse for such expenses would also be separate.

Addressing a similar problem, one Texas commentator suggests that a rule allowing any separate payment of such expenses prior to judgment to defeat a contributory negligence claim is unfair to families where the injured spouse has no separate property.\textsuperscript{126} He concludes that the more equitable criterion for the classification of medical expenses is the "intrinsic nature of the debt,"\textsuperscript{127} namely, that the burden of paying for the necessary medical services furnished to the injured spouse should fall to the community. Under this line of reasoning, "the source of payment should be immaterial to classification because of the fixed community nature of the liability."\textsuperscript{128} But even this writer recognizes that if separate property were used to pay the bills and the spouses were separated at the time, a separate property classification would be appropriate, a result that is statutorily compelled in California by Civil Code section 5126,\textsuperscript{129} at least where the spouses do not reconcile before the recovery is received.

Under section 5126, a bona fide divorce or separation can improve the injured spouse's financial position by converting some community recovery into separate property (e.g., for lost earnings). This is so

\begin{enumerate}
\item[124.] See text accompanying notes 46-49 *supra*.
\item[125.] See text accompanying notes 37-38 *supra*.
\item[127.] Id.
\item[128.] Id. The writer suggests that the remedy for the separate estate where in fact separate funds have been used to discharge the medical debts is a claim for reimbursement at dissolution of the community. *Id.* at 373-74. See also Brunn, *California Personal Injury Damage Awards to Married Persons*, 13 U.C.L.A. L. REV. 587, 591 (1966). Brunn indicates that reimbursement to the community was the remedy when community property had prior to judgment been used to pay medical bills but the 1957 statute had compelled the recovery based on those expenses to be classified as separate property of the victim spouse.
\item[129.] CAL. CIV. CODE § 5126 (West Supp. 1977).
\end{enumerate}
whether the Nevada rule or all-community recovery rule is used in the ordinary case where the married plaintiff is not separated. In addition, if the narrow interpretation of section 5112 is adopted, the bona fide divorce or separation can eliminate the reduction of otherwise community damages due to the percentage of negligence of the nonplaintiff spouse. Thus, it should not be startling if a bona fide payment of medical bills with separate property should also increase recoverable damages.

It would be unfortunate, of course, to create another litigable issue in the bona fides of the use of separate property to pay such debts before the tort suit judgment. If the courts consider this to be a serious problem, it is not necessary to resolve it by rejecting the Nevada rule in favor of continued adherence to the all-community recovery doctrine. The Texas commentator has an adequate solution in defining this element of damages as intrinsically community without regard to the actual source of payment.

The 1968 Legislation and the Harmful Effects of the All-Community Recovery Rule

Finally, it can be argued that no reason for abandoning McFadden in favor of the Nevada rule exists, on the ground that the 1968 legislative package cured all the undesirable effects of the all-community recovery doctrine in California. Unfortunately, the latter premise is also demonstrably false. It has already been noted that under the all-community recovery rule, damages paid on account of pain, suffering, and disfigurement of the wife can be reached by community creditors (without her having any claim for reimbursement) and by the husband's separate creditors (with his wife being able to claim reimbursement at dissolution of the community for half the amount taken.)¹³⁰ The 1968 reforms offer no solution to this problem. Although section 4800(c) attempts to ameliorate the unfairness of the McFadden rule on divorce,¹³¹ no statute authorizes any corrective measures when the com-

¹³⁰. See notes 115-16 & accompanying text supra.
¹³¹. See note 70 supra. Application of the statute raises a problem of interpretation. What is the scope of "community property personal injury damages" which are in the ordinary case to be awarded entirely to the victim spouse notwithstanding the mandate of section 4800(a) for an equal division of community property? The phrase logically must include damages for pain, suffering, and disfigurement, as well as damages for the victim spouse's future lost earnings and future medical expenses. But what of sums still on hand compensating for the victim's lost earnings prior to separation of the spouses? There is no reason at all not to make an equal division of these. The courts can be expected routinely to invoke the "interests of justice" escape clause
munity is dissolved by death. If the nonvictim spouses dies first, he can bequeath half of the money on hand that was awarded to the survivor not only to compensate her for pain and suffering during marriage (which is logically separate in character) but for postdissolution pain and suffering and lost earnings of the survivor—which are not even arguably community in nature—and for continuing disfigurement.\textsuperscript{132} The logic of \textit{Flores v. Brown} and \textit{Washington v. Washington} compels the conclusion that this is unfair.

Adoption of the Nevada rule is a partial answer. At least half of the sums on hand traceable to the award for pain, suffering, and disfigurement could not be bequeathed away from the victim by the surviving spouse under the Nevada approach. Where damages are received, during marriage and while the spouses are still living together, for future lost earnings and future medical expenses, they must be classified under any rule as community property at the time. There is no statute reclassifying from community property to the separate property of the victim spouse any part of these funds as may still be on hand at dissolution of the community by death. Perhaps the same logic that led the court itself to reclassify the cause of action existing at dissolution by death from community to separate property of the surviving spouse in \textit{Flores v. Brown}\textsuperscript{133} can produce a reclassification in this case as well as in section 4800(c) in order to divide this type of “community property personal injury damages” equally. Indeed, it would probably be reversible error in most cases not to do so. Preferably, section 4800(c) should be amended to make clear that the legislature never considered the classification at divorce of this element of damages as community property to be improper.

Another problem meriting attention is the situation which arises if section 4800(c) community property personal injury damages are mixed in one bank account with other community property, such as a spouse's earnings, and withdrawals are made for living expenses, investments, payment of separate debts, and the like. Is it assumed that the section 4800(c) property is withdrawn first? Last? Pro rata with the other property? Does the manner in which the withdrawal is spent affect the decision? See generally W. Reppy & W. de Funiaq, \textit{Community Property in the United States} 146-62 (1975).

132. Since the Law Revision Commission was critical of the effect of the 1957 statute that the victim spouse could give away or bequeath all of the award intended to compensate for lost earnings during marriage, it is astonishing that it recommended legislation apparently sanctioning the mirror image problem, whereby the rights of the victim spouse in future lost earnings can be defeated at the other's death. See \textit{DAM-AGES REPORT}, supra note 55, at 1389-90.

133. 39 Cal. 2d 622, 248 P.2d 922 (1952). See text accompanying notes 32-34 supra. See also West v. Ortego, 325 So. 2d 242 (La. 1975). In \textit{West} the husband received a workmen's compensation settlement after dissolution which included damages for wage loss before and after separation. The court apportioned the recovery into sums intended to compensate for pre- and post-dissolution damages, holding that the benefits were the husband's separate property to the extent that they compensated for
to assure that none of the damages for future lost earnings and future medical expenses can be bequeathed away from the surviving victim spouse.\(^\text{134}\)

Where the damages are received after the dissolution of the community, Civil Code section 5126\(^\text{135}\) does in part relieve the courts of the necessity of using the Nevada rule to obtain the appropriate result. However, the statute has been awkwardly and overbroadly drafted and requires some courageous judicial interpretation if what is surely the intent of the legislature is to be achieved.\(^\text{136}\)

post-dissolution loss of earnings. The opinion provides a more careful analysis of the problem than either Flores or Washington. See also Note, Community Property—Effect of Dissolution on Damages for Husband’s Personal Injury—The Loss Suffered Test, 46 Tulane L. Rev. 836 (1972).

134. A statute similar to section 4800(c) which would reclassify the damages at dissolution of the community by death of the non-victim spouse is recommended. See Cal. Civ. Code § 4800(c) (West Supp. 1972). Alternatively, Probate Code section 201 could be amended to remove the decedent’s power of testamentary disposition over his community half interest in sums awarded to compensate the surviving victim-spouse for future lost earning and medical expenses, leaving the survivor to inherit this share by intestate succession. Cf. Cal. Prob. Code § 201 (West 1956). I am not troubled by the existing bar to the victim spouse’s bequeathing away more than half such damages when she is the first to die.

Absent corrective legislation, there are limits on the extent the courts can create judge-made rules of reclassification to cure flaws perceived in the community property system. Consider the case in which the victim’s spouse dies and the victim remarries, possessing at the time of remarriage considerable monies awarded for future (i.e., post-remarriage) lost earnings and medical expenses. It could be contended with some logic that these ought to be treated as community property of the second marriage. However, Civil Code sections 5107 and 5108 literally make the property separate property of the victim. Cal. Civ. Code §§ 5107-08 (West 1970); see Broussard v. Broussard, 340 So. 2d 1309, 1311-12 (La. 1976). Moreover, the victim’s new spouse knowingly entered into a relationship in which no community earnings would be generated by the previously injured spouse. An antenuptial contract could have been entered into to take account of this fact (transmuting some of the tort damages to community property of the second marriage or equalizing the new spouse’s status by designating the earnings of the victim’s new spouse as also separate). See, e.g., Marriage of Dawley, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976). See also Cal. Civ. Code §§ 5133-36 (West 1970). The case in which the new husband or wife deliberately and knowingly enters into a “separate property marriage” can be distinguished from that in which reclassification from community property to separate is necessary because of the unanticipated death of the nonvictim spouse whose will does not leave any community interest in lost earnings and medical expense damages to the surviving spouse. See generally Bodenheimer, The Community Without Community Property: The Need for Legislative Attention to Separate—Property Marriages Under Community Property Laws, 8 Cal. West. L. Rev. 381 (1972).


136. The problem is that if “damages for personal injuries” which are converted to separate property when received after separation of the spouses (and I must assume the courts will find such separation to have occurred when a spouse has died) include
In sum, the 1968 statutory package has by no means rectified all of the ill effects of McFadden and that legislation neither bars adopting nor provides any reason for refusing to adopt the Nevada rule of classification.

**The Effect of a Broad or Narrow Interpretation of Section 5112 on Contribution Problems**

If a married person (for example, the husband) and a third party, by their concurrent negligence, injure the wife and if she compels the third-party defendant to pay more than his fair share in damages, the basis for asserting a claim of contribution among joint tortfeasors arises. Since whether section 5112 is given a broad or narrow interpretation—and the subsidiary issue whether to adopt the Nevada rule of classification—may have an effect on the way contribution principles operate in such a case, it is appropriate to examine such effects with the thought that if either the broad or the narrow interpretation of section 5112 significantly complicates the contribution process, there is at least some basis for rejecting it.

Of course, to the extent that the plaintiff spouse obtains any community recovery in such a situation, interpretation of section 5112 a recovery for lost earnings that would have accrued prior to dissolution of the community or separation, section 5126 operates in an absurd manner. Under any logic, such damages must be community property. The solution may be to construe “damages for personal injuries” as meaning only those for pain, suffering, and disfigurement. Basic nonstatutory principles could be relied on to reclassify from community to separate sums awarded for post dissolution lost earnings and medical expenses. See note 133 & accompanying text supra.

The preferable solution is a legislative amendment to section 5126 expressly excluding from it damages for lost earnings that would have accrued before separation and for medical expenses paid with community property.

While the legislature is at it, it can amend section 5126(b), which at present allows reimbursement to the community for recovery of medical expenses reclassified by section 5126(a) into separate property if paid by “the spouse of the injured person” with community funds. Such reimbursement is appropriate whether the victim spouse or the other spouse uses community funds to make the payment. Fortunately, the language of 5126(b) at present does not bar the courts from creating as a matter of judge-made law such a right of reimbursement when the victim spouse is the payor. See notes 116 & 128 supra.

137. See V. Schwartz, Comparative Negligence § 16.7 (1974); Fleming, Comparative Negligence at Last—By Judicial Choice, 64 CALIF. L. REV. 231, 251-56 (1976) (contribution and comparative negligence). See also Comment, Reclassification of Tort Recoveries by Spouses—Possible Effects of Graham v. Franco, 4 TEXAS TECH. L. REV. 359, 375-77 (1973) (contribution and imputed negligence in a community property context); Comparative Negligence, supra note 6, at 777-78, 781-89, 804-05.

138. See notes 8-9 & accompanying text supra.
does affect the total amount involved in any contribution dispute; i.e., recovery is larger under the broad interpretation, since it is not reduced despite the noninjured spouse's concurrent negligence. However, Civil Code section 5109 probably makes it impossible that any of the injured spouse's recovery from the negligent spouse or his insurer is community property.  

Damages for pain, suffering, and disfigurement are quite certainly separate property, as they are under the Nevada rule, but section 5109 probably also makes separate even those damages representing lost earnings during marriage, which ought to be classified as community property under any possible theory absent section 5109. Yet under *McFadden*, which presently governs the classification of recoveries from third-party defendants, all parts of the recovery—damages for pain and suffering as well as damages for lost wages—are community property.

Under a strict reading of section 875(a) of the Code of Civil Procedure, it may be that the negligent spouse and the third-party tortfeasor can claim contribution only in situations where the damages which each has to pay are classified in the same way. That section permits contribution against a cotortfeasor only when "a money judgment has been rendered jointly against two or more defendants in a tort action . . ."  

Thus, the initial questions presented in considering the interrelation of section 5112 and the law of contribution are the exact extent to which section 5109 makes recovery separate property and the meaning of "judgment . . . rendered jointly" against a spouse and a third-party tortfeasor.

The question of interpreting section 5109 pits its literal language and general common sense against legislative history. Literally, damages for "personal injuries" are those for disfigurement, pain, and suffering. Damages for medical expenses and lost earnings stem from a broader and more complex source. And if the spouses are still living together as man and wife, by all logic the sums recovered for lost earnings and medical expenses should be community property.  

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139. Section 5109 makes separate property of the plaintiff spouse "[a]ll money or other property paid by or on behalf of a married person to his spouse in satisfaction of a judgment for damages for personal injuries to the spouse. . . ." *Cal. Civ. Code* § 5109 (West 1970).


141. Fairness to creditors also suggests classifying the damages for lost earnings as community. Otherwise, with the exception of necessaries, the creditor in a credit purchase made by the nonvictim spouse may go unpaid, even though money awarded in lieu of community lost earnings is on hand.
the Law Revision Commission, in recommending that section 5109 be amended to its present form, stated:

Although personal injury damages awarded to a married person against a third party should be community property, the Commission recommends retention of the rule that such damages are separate property when they are recovered by one spouse from the other spouse. If damages recovered by one spouse from the other were regarded as community property, the tortfeasor spouse or his insurer would, in effect, be compensating the wrongdoer to the extent of his interest in the community property. This reasoning is unsound. Initially, when one spouse brings suit against the other spouse, one of two situations almost certainly exists: either their marriage has broken down and they have separated so that section 5126 will make the appropriate portion of recovery separate anyway, or the suit is brought in order to reach liability insurance proceeds covering the negligent spouse's torts. Particularly where the insurance has been paid for with community funds, the tortfeasor spouse is not "profiting" from his own wrong—rather, the community is being assured the protection against loss which it has purchased. It is difficult to see how merely making the community whole for community sums used for medical expenses is unfairly com-

142. DAMAGES REPORT, supra note 55, at 1389, 1391. Neither section 5109 nor any discussion of it in the Law Revision Commission report bars assertion of a claim for reimbursement in a case of inequitable classification due to the all-separate recovery rule of that section. Suppose, for example, that the wife's damages for lost earnings, owed by her husband, are paid by insurance proceeds from a policy purchased and maintained with community property. Certainly the cost of the last premium can be asserted in a reimbursement claim by the community against the wife's separate estate at dissolution of the marriage. Cf. Comment, Community and Separate Property Interests in Life Insurance Proceeds: A Fresh Look, 51 WASH. L. REV. 351 (1976). However, in two analogous recent cases where community funds have been used to qualify a husband for workmen's compensation coverage, but an award had been declared to be separate under Civil Code section 5126(a) and Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975), reimbursement was disallowed. In re Marriage of Robinson, 54 Cal. App. 3d 682, 126 Cal. Rptr. 779 (1976); In re Marriage of McDonald, 52 Cal. App. 3d 509, 125 Cal. Rptr. 160 (1975). If these cases correctly indicate that reimbursement is unavailable on the facts there, it may also be unavailable when section 5109 converts into separate property what ought to be community and is paid in part from community property. Probably Robinson and McDonald will be disapproved in the future insofar as they deny reimbursement. They are inconsistent with the logic in In re Marriage of Cavner, 62 Cal. App. 3d 660, 133 Cal. Rptr. 267 (1976).

143. In the extremely unlikely event that one spouse sues the other while they are married and living together for the purpose of levying on his property after obtaining judgment, rather than reaching insurance proceeds, the tortfeasor spouse would still be substantially "punished" for his negligence under a classification rule treating the award for the injured spouse's lost earnings as community because of the operation of Civil Code section 5113. This section provides that where one spouse injures another, community property cannot be used to satisfy the judgment until the separate property of the tortfeasor spouse is exhausted.
pensating the negligent spouse even when there was no insurance. Much the same can be said of the recovery for lost earnings.

Nevertheless, the Law Revision Commission stated that the 1968 amendment to what is now section 5109 was to continue the all-separate classification of the 1957 legislation in cases where one spouse recovered damages from the other. Although I have found no actual holding that the 1957 act made not just pain, suffering, and disfigurement damages separate but also lost earnings, the Law Revision Commission assumed this to be the case.

Assuming, then, the courts give section 5109 the overbroad scope intended for it by the Law Revision Commission, the combination of that rule and the McFadden rule means that when one spouse, injured by the concurrent negligence of the other and a third party, obtains a judgment against both, his judgment against the negligent spouse is separate property of the injured spouse, whereas the judgment against the third party is community property. If we add to this the broad interpretation of section 5112, both the negligent spouse and the third party probably will be declared jointly and severally liable, and thus either of them seeking to claim contribution from the other can pass the first hurdle of the contribution statute—that there be a "money judgment . . . rendered jointly" against the two. Presumably the fact that sums paid by the defendant spouse will be separately owned while sums paid by the third party will be community would not bar the entry

144. See Rogers v. Yellowstone Park Co., 97 Idaho 14, 539 P.2d 566 (1976); McHenry v. American Employers Ins. Co., 206 La. 70, 18 So. 2d 656 (1944). See also Novo v. Hotel Del Rio, 141 Cal. App. 2d 304, 295 P.2d 576 (1956), allowing the community in a suit brought by the wife to recover as damages community funds her husband had paid to defendants on his gambling debts. The gambler husband had been a wrongdoer both in incurring the debts and in paying them, but, the court held: "In the instant case, the husband, although benefitting by the wife's recovery, would not thereby be unjustly enriched. There would be but a return to the community of that which was unlawfully taken from it . . . . [The judgment] merely places the parties in the positions which they occupied prior to the transaction. No one is penalized nor is anyone unduly enriched." Id. at 308, 295 P.2d at 579.

145. The 1957 act made separate property damages for lost earnings which would have accrued during marriage while the spouses were living together. Cal. CIV. CODE § 5109 (West 1970); DAMAGES REPORT, supra note 55 at 1389-90; cf. Estate of Rogers, 24 Cal. App. 3d 69, 100 Cal. Rptr. 735 (1972) (not attempting to segregate any damages received under the 1957 legislation as community property).

146. If the Nevada rule of classification were applied, the judgment against the husband would be all separate property (under Section 5109) but that against the third-party tortfeasor would be partly separate (to the extent that damages for pain, suffering, and disfigurement were awarded) and partly community.

of a joint judgment against the two defendants for the common amount of damages for which each is liable.

On the other hand, using the narrow interpretation of section 5112, the judgment will not declare the negligent spouse and the third party jointly and severally liable for one sum of damages. Insofar as the injured spouse's recovery is community property, the damages which the third party is ordered to pay will be smaller than those for which the negligent spouse will be adjudged liable. For example, if the negligent spouse is 30 percent negligent, and the third party 70 percent negligent, and if the non-negligent victim spouse suffers $100,000 worth of community damages, the judgment would make the third party liable to the injured spouse for $70,000 and the negligent spouse for $100,000.\(^{148}\) If the injured spouse collects $70,000 from the third party, can he obtain contribution from the negligent spouse? One would logically assume that application of the comparative negligence system under the narrow interpretation of section 5112 whereby the tortfeasor spouse's 30 percent negligence was considered at trial to reduce the liability of the third party to the injured spouse should preclude any contribution. But that is not the present California law, for Code of Civil Procedure section 875(c) provides that the

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\text{right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof. It shall be limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment.}^{149}\]

Code of Civil Procedure section 876(a) provides that "[t]he pro rata share of each tortfeasor shall be determined by dividing the entire judgment equally among all of them."\(^{150}\) This definition of "pro rata" precludes (notwithstanding section 875(b)'s direction to administer contribution "in accordance with principles of equity") a holding that one can obtain contribution only upon a showing that he has paid a greater percentage of the joint judgment than his percentage of negligence.\(^{151}\)

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148. Applying the Nevada rule of classification and the narrow interpretation of section 5112, assume that pain and suffering damages are $50,000 and lost earnings damages $100,000, and that the spouses are living together. Three forms of judgment are possible: (1) the husband owes $150,000 and the third party tortfeasor owes $120,000; (2) the husband and the third party are jointly liable for $50,000, and in addition the husband owes $100,000 and the third party $70,000; and (3) the husband and the third party are jointly liable for $120,000 and in addition the husband owes $30,000.


150. \textit{Id.} § 876(a) (West Supp. 1977).

151. See note 8 & accompanying text supra.
Accordingly, the third party, by having paid $70,000 is not unable to seek contribution so long as a joint judgment exists. The third party's claim for contribution would seek a restructuring of the injured spouse's judgment so as to treat it as providing, for purposes of the third party's contribution claim, that the negligent spouse and the third party are jointly liable to the injured spouse for $70,000, and the negligent spouse additionally owes the injured spouse $30,000. The tortfeasor spouse's pro rata share of the $70,000 joint judgment is one half (there being two joint tortfeasors as judgment debtors), so that the negligent spouse owes the third party $35,000.152 If the injured spouse proceeds against the negligent spouse or his insurer for the additional $30,000 he owed, the negligent spouse or his insurer will be out of pocket $65,000 and the third party will be out of pocket $35,000, somewhat of a strange result on the facts.

If the broader interpretation of section 5112 is adopted, the tortfeasor spouse's negligence will not reduce the injured spouse's recovery against a third party; a joint judgment of $100,000 will be rendered; and if contribution claims are asserted, the negligent spouse and the third party will ultimately pay $50,000 each, a bit more palatable result given that the tortfeasor spouse was only 30 percent negligent.

The unfairness in the 65-35 allocation when section 5112 is given the narrow interpretation results primarily from the senseless separate-only classification mandated by section 5109 when one spouse seeks recovery from another and by the pro rata sharing rule of Code of Civil Procedure section 875(c), itself a strange approach in a system where the jury can determine the relative fault of the defendant and the plaintiff.

In the 1975-76 California legislature, a bill to alter the latter approach to contribution law was submitted and passed the Senate before dying in the Assembly by a re-referral to committee. This proposal, Senate Bill 2119, would have amended Code of Civil Procedure section 875(c) to provide:

Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more

152. If the husband or his insurer pays the wife $100,000 on the judgment, then the husband has discharged the third party's $70,000 obligation in full, for it is clear that merely classifying the wife's rights against the third party as community, and her rights against her husband as separate property, cannot permit her a double recovery. Thus, again hypothetically restructuring the judgment to make $70,000 a joint liability of the husband and the third party, the husband can recover the third party's pro rata half share of the joint judgment. Once again the third party or his insurer is out of pocket $35,000 and the husband or his insurer $65,000.
than his proportionate share thereof, as determined by the trier of
fact in fixing the percentage of negligence attributable to him. It
shall be limited to the excess so paid over the proportionate share
of the person so paying and in no event shall any tortfeasor be com-
pelled to make contribution beyond his own proportionate share of
the entire judgment.\textsuperscript{153}

If this were enacted, adoption of the narrow interpretation of section
5112 would result in less inequitable results. Thus, where, as in our
example, the spouse is 30 percent negligent, the third party is 70 percent
negligent, and the injured spouse’s community damages (without con-
sidering the reclassification of them under section 5109) are $100,000,
the joint judgment against the tortfeasor spouse and the third party
would be $70,000, with the negligent spouse additionally liable for
$30,000. Contribution now would be figured by dividing the $70,000
damages awarded under the joint judgment to the plaintiff\textsuperscript{154} into 70
percent and 30 percent portions. The third party would pay $49,000;
the negligent spouse would pay $21,000 and an additional $30,000 if
the injured spouse proceeds against the negligent spouse for the “bonus”
provided by section 5109. But this 49 percent/51 percent ultimate
allocation of liability seems fairer than the 35 percent/65 percent result
obtained by applying the existing statutory law.\textsuperscript{155}

The broad interpretation of section 5112, when coupled with S.B.
2119, leads to a result that is subject to no criticism insofar as contribu-
tion is concerned. The joint judgment is $100,000 (as the tortfeasor
spouse’s negligence does not reduce even the community recovery), and

\textsuperscript{153} S.B. 2119 § 2 (1976). Section 3 of the bill would have amended section
876(a) of the Code of Civil Procedure to provide: “The proportionate share of each
tortfeasor judgment debtor shall be determined by multiplying the total damages awarded
to the plaintiff by the percentage of all tortfeasor judgment debtors’ negligence attributa-
table to the tortfeasor.” Section 1 of the bill would have amended section 389 of the
Code of Civil Procedure to ordinarily require joinder of all persons who are alleged
by a party to have negligently contributed to a victim party’s injuries. One remedy
for failure to join would have been dismissal, although the trial court could in the inter-
est of justice permit the action to proceed.

It is unclear just what the author of the bill sought to achieve by the latter provi-
sion. Certainly it was anticipated that the trier of fact was to assess the percentage
of negligence of each joint tortfeasor in the action brought by the plaintiff so that
an additional trial on this issue would not be necessary in a contribution suit. Certainly,
too, it is preferable to compel joinder of all defendants so long as contribution cannot
be obtained against those whom, for reasons best known to him, the plaintiff elects
not to sue. See \textsc{Cal. Code Civ. Proc.} § 875(a) (West Supp. 1977). But the repeal
of the joint judgment requirement is the preferable way to correct inequities in the
present law.

\textsuperscript{154} See note 153 & accompanying text \textit{supra}.
\textsuperscript{155} \textsc{Cal. Code Civ. Proc.} § 875(c) (West Supp. 1977); \textsc{Cal. Civ. Code} §§ 5109, 5112 (West 1970).
the 70 percent negligent third party will, after contribution, pay out $70,000 with the negligent spouse or his insurer paying $30,000. The same goal—equating percentage of out-of-pocket expenses to percentage of negligence—would be achieved by repealing 5109 (or interpreting it restrictively, notwithstanding the intent of the Law Revision Commission) and applying the narrow interpretation of section 5112.

But whatever improvements in the functioning of contribution law, either under the present statutes or a scheme like S.B. 2119, any inconvenience that would flow from the broad interpretation of section 5112 would seem slight compared to the unfairness to the third-party tortfeasor under the broad interpretation of not reducing community (marital partnership) damages due to concurrent negligence of one partner. Any problems existing in the contribution area ought to be addressed by legislative attention to Civil Code section 5109 and Code of Civil Procedure sections 875 and 876, rather than by giving section 5112 an illogical interpretation with respect to “business” damages (i.e., lost earnings) enjoyed by married joint venturers.

The Extent to Which the Narrow Interpretation Encourages Divorce or Separation

An interpretation of section 5112 which permits reduction of community property damages (i.e., lost earnings and medical expenses but not pain, suffering, and disfigurement damages if a proper classification is made) based on the percentage of negligence of both spouses does permit increasing the recovery by separation or divorce of the spouse prior to rendering judgment against the third-party tortfeasor. If a spouse (for example, the husband) is 30 percent negligent, the third party 70 percent negligent, and the nonnegligent wife’s damages are $100,000 for pain and suffering, $100,000 in future lost earnings, and $10,000 for future medical expenses, the separation of the husband and wife, a divorce, or the husband’s death prior to a judgment costs the third-party $33,000. This result is obtained because Civil Code section 5126 acts to convert $110,000 of community recovery into the wife’s separate property, so that the theory that any partner’s negligence reduced partnership recovery is inapplicable and the husband’s negligence is irrelevant on the measure of damages issue.

Arguably, too, under the logic of Flores and Washington, which reclassifies a cause of action on dissolution of the community, the marriage of the tort victim after the accident but before rendition of judgment against the third-party tortfeasor would result in a reduction of damages if the new spouse were a cotortfeasor. Future lost earnings
and medical expenses would now be seen to be community property. This argument should fail, however. As has been noted, the imputing to the community the negligence of a marital partner cannot logically rest on the notion that permitting recovery for lost earnings and medical expenses causes any profit to the wrongdoer; the community is merely placed in the position it would have been in absent the accident. Instead, negligence is imputed on agency principles. In the case where the victim marries after the accident, the new spouse was not at the time of the injury a community agent and hence the subsequent forming of the community may not make that negligence relevant to the measure of damages issue.  

It must be conceded, however, that where the accident is followed not by marriage but by separation or by dissolution of the community by divorce or death of the nonvictim spouse, the narrow interpretation of section 5112 has unfortunate consequences. The third-party tortfeasor above will be outraged that postaccident events such as separation or divorce can have such an effect. Therefore, it will be necessary to permit him to litigate the bona fides of any such separation or even of a divorce.  

Unfortunately, if the post-accident separation is bona fide, the narrow interpretation of section 5122 will at least theoretically discourage reconciliation, since reconciliation would surely cause the recoverable damages to revert back to their lower level existing before the separation.  

These problems are unfortunate, but do not, in my view, warrant rejecting the logical interpretation of section 5112 and the treating of husband and wife like other joint venturers when it comes to recoverable damages under a comparative negligence system for monetary losses.  

156. The same theory will probably also apply when the accident occurs during a separation of the spouses—creating a separate cause of action—and the spouses then reunite before judgment is rendered. Probably the separated husband was not acting as a community agent when his concurrent negligence and the wife's injury occurred. However, it is possible for separated spouses to engage in community endeavors, for although separation means future earnings and acquisitions are separate, former community property remains community until divorce. A tort occurring while the husband was taking care of such community property would be one in which he was acting as community agent even though separated at the time from his wife. Cf. Cross, The Community Property Law of Washington, 49 WASH. L. REV. 729, 828-29 (1974).  

157. For an example of a non-bona-fide divorce that should not be permitted to increase the damages the third-party tortfeasor has to pay. See Omer v. Omer, 11 Wash. App. 386, 523 P.2d 957 (1974). If the divorced spouses are living in a meretricious relationship, this fact alone may preclude the increasing of recoverable damages.  

158. If the spouses were divorced after the accident and remarried before rendition of judgment, the new community might be treated as a revival of the old, thus theoretically "penalizing" the spouses for remarrying. Cf. Draper v. United States, 243 F. Supp. 563, 565 n.1 (W.D. Wash. 1965).
such as earnings. The California Supreme Court in the *Washington* case must have realized that that decision made the bona fides of a divorce a litigable issue if the third party tortfeasor contended it was obtained to create a cause of action where none previously existed. The court considered a proper application of tort and community property law principles more important.

Moreover, even under the broad interpretation of section 5112, the bona fides of the separation or divorce may be litigated. If a spouse is injured, an ordinary creditor of the nonvictim negligent spouse will be unable to reach sums awarded as the injured spouse's separate property under Civil Code section 5126 due to postaccident separation or divorce. Otherwise much of the award would have been community property and liable for the tortfeasor spouse's debts. 159

Most important, common sense tells us that very few married persons will separate or divorce for the greedy motive of increasing damages from a third party tortfeasor. Surely, to the great majority, marriage vows are more sacred than that. Thus, the cases in which the narrow interpretation of section 5112 causes what may seem to some as capricious results owing to separation or divorce following an accident and leading to the litigation of the bona fides of such separation or divorce, ought to be rare.

**Conclusion**

Under a comparative negligence system, no substantial basis exists to stretch the literal language of Civil Code section 5112 to extend to marital partners special protection not enjoyed by joint venturers generally against the imputing of negligence to reduce damages that are appropriately treated as owned by the partners. Damages properly classified as community ought to be reduced under *Li* on account of the concurrent causative negligence of either marital partner, just as damages recovered by a corporation will be reduced on account of the negligence of any corporate agent acting for the entity.

However, section 5112 was probably intended primarily to correct one of the unfortunate effects of California's all-community recovery rule of classification. That is, negligence of one spouse should have no bearing on the other's right to recover from a third-party tortfeasor damages for pain, suffering, and disfigurement. Under a comparative negligence system, concurrent negligence of the uninjured spouse should not reduce such damages. A broad interpretation of section 5112 will

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prevent this, but it will give the community in the same case a windfall, since damages for lost earnings, community medical expenses, and the like will not be reduced.

The solution to the problem caused by the all-community recovery rule is to overrule McFadden and cases following it and to adopt instead the Nevada rule for classifying tort damages as separate or community according to the nature of the right invaded by the tortfeasor. If this is done, no significant public policy will be infringed by taking section 5112 at its word—that contributory negligence of the nonvictim spouse is no "defense", but may instead be relevant to the measure of damages.

160. If the California Supreme Court does adopt the Nevada rule, it is suggested that it recommend to trial courts in negligence cases in which a married person is the plaintiff—even when the absence of any comparative negligence instructions concerning plaintiff's spouse makes it not essential—that special verdicts be returned by the jury designating how much of its award is for disfigurement, pain, and suffering, how much for lost earnings or lost services, and how much for medical expenses. Cf. Nev. Rev. Stat. § 121.123 (1975). The procedure would alleviate the need for subsequent relitigation of the damages issue in an attempt to second-guess the jury, such as where the husband’s creditor levies on the monies paid over and it is contended by the wife that they are not liable for the husband’s debt because they are her separate property under the Nevada rule.

Where there are no special verdicts or findings of fact segregating the award, it is suggested that the spouses themselves immediately upon receipt of the money enter into a written agreement segregating it as best they can (with explanations for the reasons therefore). Such agreement if reasonable and nonfraudulent ought to be binding on creditors.

161. Four other community property states have adopted comparative negligence systems. Three of them follow the Nevada rule of classification. Presumably in these states, since their statutes contain nothing like section 5112 to suggest a prohibition, damages for community lost earnings during marriage and medical expenses will be reduced by the combined percentage of negligence of the spouses. See Knutsen, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240, 247 (1966); Note, Contributory Negligence of Husband as a Bar to Recovery by Wife, 24 Calif. L. Rev. 739, 741 (1936) (nonvictim spouse's negligence might logically mitigate damages); see Comment, Comparative Negligence: Tort Damage Relief for the Marital Community, 9 Idaho L. Rev. 56, 60 (1972). The pertinent comparative negligence statutes are Idaho Code §§ 6-801, 6-803 (Supp. 1976) (the latter relating to contribution problems); Nev. Rev. Stat. § 41.141 (1975); Tex. Rev. Civ. Stat. art. 2212(a) (Supp. 1977) (including treatment of contribution problems).

At the same time that Washington adopted comparative negligence by statute in Wash. Rev. Code Ann. § 4.22.010 (Supp. 1976), its legislature provided that "[t]he negligence of one marital spouse shall not be imputed to the other spouse to the marriage so as to bar recovery in an action by the other spouse to the marriage, or his or her legal representative, to recover damages from a third party caused by negligence resulting in death or injury to the person." Id., § 4.22.020 (emphasis added). In view of the fact that this statute was passed as part of a comparative negligence package, the section makes little sense unless "bar" is intended to mean "reduce." See V. Schwartz, Comparative Negligence § 16.1, at 249 (1974).