deElche v. Jacobsen: Recovery from Community Property for a Separate Tort Judgment

Washington's judicial rule classifying torts as either separate or community pits the interests of the tort victim against the interests of the innocent spouse of a married tortfeasor. The provident victim of a tort committed for the benefit of the community, a community tort, may subject all community property to judgment levy.[1] When the tort is separate, however, only the tortfeasor's separate property can satisfy the judgment; if there is no separate property, the victim goes uncompensated.[2] Acknowledging the rule's incongruous and inequitable history, the Washington Supreme Court, in *deElche v. Jacobsen*,[3] permitted the separate tort victim to recover against the tortfeasor's interest in community personal property.[4] By allowing recovery, the *deElche* decision not only returns Washington to a rule consistent with community property principles, but also balances the interests of the tort victim and the tortfeasor's innocent spouse.

DeElche itself aptly juxtaposes the conflicting interests. Mrs. deElche, her ex-husband, and Mr. and Mrs. Jacobsen were socializing aboard the Jacobsens' sailboat.[5] When the party began to drink heavily, Mrs. deElche retired to her ex-husband's boat moored nearby. Later that night, Mr. Jacobsen boarded the deElche boat and forcibly raped Mrs. deElche. Although a civil suit resulted in a separate tort judgment against Mr. Jacobsen, he had no separate property because of a community property agreement with Mrs. Jacobsen.[6] Mrs. deElche, therefore, could not collect her judgment. Upon appeal, the supreme court overturned the rule immunizing all community property from separate tort judgment.

This casenote critically analyzes *deElche* against the histori-

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1. Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 730, 834 (1974). *See generally* Pruzan, *Community Property and Tort Liability in Washington*, 23 WASH. L. REV. 259 (1948).

2. *See, e.g.*, Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917).

3. 95 Wash. 2d 237, 622 P.2d 835 (1980) (noted case).

4. *Id.* at 246, 622 P.2d at 840.

5. *Id.* at 238, 622 P.2d at 836.

6. *Id.* at 238-39, 622 P.2d at 836.

cal background of community property statutes and evaluates its effect on previous case law that subverted community property principles, resulting in injustice to either the victim or the tortfeasor's spouse.[7] While *deElche* does not explicitly overrule these cases, it casts doubt on their current vitality. The casenote also responds to the dissent's criticisms, and discusses the scope of the *deElche* decision.

Washington law defines community property as all assets acquired after marriage by either spouse, except those acquired by gift, devise, or descent.[8] The underlying premise of this form of property ownership is equality of the spouses,[9] a concept intrinsically recognizing that the earnings of either spouse are due to the productive labor of both. It assumes that a husband's ability to earn a wage is partly due to the efforts of the wife who elects to maintain a household and care for the children.[10] Thus, both spouses are equal partners in the marriage and share the community benefits equally.[11] Community property principles contrast vividly with the common law where the wife's contributions to the marriage are unrecognized because the husband is sole owner of marital assets.[12]

The Washington territorial legislature adopted the American community property concept, derived from the Spanish civil law.[13] The modern Washington Revised Code[14] closely follows

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7. *Compare* LaFramboise v. Schmidt, 42 Wash. 2d 198, 254 P.2d 485 (1953) (husband's molesting of foster child held community tort, despite spouse's lack of knowledge, because the community received payments for the child's care) *and* Edmonds v. Ashe, 13 Wash. App. 690, 537 P.2d 812 (1975) (accidental injury to hostage taken to reunite the community held not to be for community benefit because the kidnapping was unlikely to achieve its purpose) *with* Day v. Henry, 81 Wash. 61, 142 P. 439 (1914) (public officials were excepted from normal community liability for work-related torts because the community could not be elected to a public office).

8. WASH. REV. CODE §§ 26.16.030, .010, .020 (1981). These sections also provide that rents, issues, and profits of separate assets retain the separate character of the underlying asset.

9. The Washington community property statutes do not include a policy of spousal equality. Commentaries on Spanish law, however, identified this policy. *See* 2 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 66, 194 app. III (1st ed. 1943) (translating the works of Spanish legal scholars Matienzo and Gutierrez). The commentaries in a civil law system are treated as the equivalent of precedential judicial decisions in common law jurisdictions. *Id.* at 32. Today's commentators agree. W. BROCKELBANK, THE COMMUNITY PROPERTY LAW IN IDAHO § 1.5 (1962); W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 11.1 (2d ed. 1971); Cross, *supra* note 1, at 734.

10. *See,* W. BROCKELBANK, *supra* note 9, at § 1.5.

11. Cross, *supra* note 1, at 734.

12. 2 W. BLACKSTONE, COMMENTARIES 442.

13. W. DE FUNIAK & M. VAUGHN, *supra* note 9, at §§ 181, 182. Hill, *Early Washing-*

the Spanish Civil Code and Washington courts recognize the persuasive authority of the Spanish antecedent.[15] Nevertheless, construing community property law as a mere collection of statutes misapprehends its nature. Although based on civil law statutes, community property constitutes a unified system, similar in framework to the English common law.[16] The similarity ends, however, where the community property system reflects value judgments, such as spousal equality, that are different from the common law.[17] Thus, interpretation of individual community property statutes by judges trained in common law concepts is incorrectly supported unless the differing underlying policies are understood. Washington courts, considering the law of community property as a whole, should reject any theory[18] of community property, not required by statute, that does not further the policy of spousal equality.[19]

Review of the underlying policies of the Spanish and the Washington codes indicates that immunization of community property from separate tort judgments was an aberration created by common law courts misconstruing a civil law concept.[20] Considering the civil nature of community property, with its policy of spousal equality, and the common law background and

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ton Marital Property Statutes, 14 WASH. L. REV. 118 (1939).

14. Since 1881, the statutes remained relatively unchanged until the equal management amendments in 1972. *See* Cross, *Equality for Spouses in Washington Community Property Law — 1972 Statutory Changes*, 48 WASH. L. REV. 527 (1973).

15. DeElche v. Jacobsen, 95 Wash. 2d 237, 622 P.2d 835 (1980); *In re* Estate of Salvini, 65 Wash. 2d 442, 397 P.2d 811 (1964). *Salvini* cites the first edition of W. DE FUNIAK & M. VAUGHN, *supra* note 9, for authority that American states have adopted the community property law of Spain. *Salvini*, at 447, 397 P.2d at 814. De Funiak and Vaughn actually go much further to say that Spanish law, unless specifically abrogated, remains the law today in the American community property states. W. DE FUNIAK & M. VAUGHN, *supra* note 9, at § 37. They specifically include Washington, noting that the state constitution provided that all laws in force should remain in force until altered or repealed by the legislature. *Id.* at § 47. Under this view, the Washington courts should have followed Spanish law as binding precedent.

16. *See* W. DE FUNIAK & M. VAUGHN, *supra* note 9, at §§ 4, 181.

17. *See* W. BROCKELBANK, *supra* note 9, at § 1.5.

18. This casenote discusses the "entity theory" and the "item theory" in community property; these theories are not related to each other and should not be confused. See *infra* notes 22-24 for a discussion of the entity theory, and notes 39-47 for a discussion of the item theory.

19. *See* W. DE FUNIAK & M. VAUGHN, *supra* note 9, at §§ 181, 182.

20. *See, e.g.*, Day v. Henry, 81 Wash. 61, 142 P. 439 (1914). *Day* immunized community property from separate tort judgments because the community was a separate legal entity from its members, much as a corporation is immunized for the unrelated torts of its stockholders. G. MCKAY, COMMUNITY PROPERTY § 817 (2d ed. 1925). See *infra* notes 22-24 and accompanying text for a discussion of the community as an entity.

training of most judges, it is not suprising that such a mistake occurred.[21] In settling tort liability, for instance, courts unfamiliar with community property attempted to equate the marital community to a corporation, holding that the community as a separate legal entity could not be liable for the unforeseen torts of its members.[22] But the husband could subject community assets to tort liability under the doctrine of respondeat superior when he acted as the agent for the entity.[23] Only torts committed outside the scope of the agency would not subject the community to liability.[24]

Finding community liability using this entity theory undermines the policy of spousal equality inherent in community property because liability is based on a principal-agent relationship that does not exist. The entity, the fictitious principal, could not arise prior to 1972, because no one, including the wife, had legal control over the husband's management of community assets.[25] While both spouses were required to join in conveyances of real property,[26] the husband's decision controlled if disputes arose in the management of personal property.[27] More-

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21. R. BALLINGER, A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE, UNDER THE COMMUNITY OR GANACIAL SYSTEM § 252 (1895). *See generally id* §§ 252-62.

22. *See, e.g.*, Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917); Day v. Henry, 81 Wash. 61, 142 P. 439 (1914); G. MCKAY, *supra* note 20, at § 817. The development of the entity theory is only one example of judicial error in dealing with community property statutory construction. Other examples include the item theory and the unthinking adoption of the widow's election. See notes 39-48 for the item theory discussion, and note 41 and accompanying text for a discussion of the widow's election.

These theories sometimes lead to absurd results. The entity theory formed the basis for exempting public officials from community tort liability. *See Day*, at 61, 142 P. at 439 (1914). Under the entity theory, courts must find some agency relationship existing between the tortfeasor spouse and the community entity. This is easiest to achieve when a spouse commits a tort during the course of employment. The commission of the tort benefits the community by increased wages, and when there is no monetary gain, the community entity still benefits by its agent's salary for improper job performance. *Day* insulated community assets of public officials from work-related tort liability because an entity could not hold public office, so the tort must be that of the public official acting alone. *Compare* Day v. Henry, 81 Wash. 61, 142 P. 439 (1914) *with* Kies v. Wilkinson, 114 Wash. 89, 194 P. 582 (1921), *and* Kangley v. Rogers, 85 Wash. 250, 147 P. 898 (1915). *Day* was overruled in 1964. Killcup v. McManus, 64 Wash. 2d 771, 394 P.2d 375 (1964).

23. *E.g.*, LaFramboise v. Schmidt, 42 Wash. 2d 198, 254 P.2d 485 (1953); Werker v. Knox, 197 Wash. 453, 85 P.2d 1041 (1938).

24. *E.g.*, Furuheim v. Floe, 188 Wash. 368, 62 P.2d 706 (1937); Coles v. McNamara, 131 Wash. 691, 231 P. 28 (1924); Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917).

25. WASH. REV. CODE § 26.16.030 (1963).

26. WASH. REV. CODE § 26.16.030(3) (1981) (amending WASH. REV. CODE § 26.16.030 (1963)).

27. Hanley v. Most, 9 Wash. 2d 429, 115 P.2d 933 (1941).

over, since 1972, each spouse may manage community assets without the consent of the other spouse.[28] As a result, even under current law, neither spouse has control as a principal over the other solely because of the marital relationship.[29]

Despite the fictitious agency, Washington courts, struggling to provide recovery to victims of separate torts, expanded the scope of the agency to find benefit to the entity derived from even the most "tenuous" community contacts.[30] The *deElche* court noted that recovery was based on distinctions without a difference, which "yielded illogical, inconsistent and unjust results."[31] The consequence was a system of law not only unfair to tort victims, but also insensitive to the plight of the innocent spouses. The court, recognizing the unfairness of previous Washington law,[32] implicitly affirms the principle that spousal equality is the basis for community property by acknowledging that community property only assures equal ownership of assets by the spouses.[33]

The *deElche* dissent nonetheless asserts the discredited[34] entity theory in support of its position.[35] The dissent points out that the individual spouses themselves cannot reach community assets until after the community is dissolved by death or divorce.[36] Each spouse, in the dissent's view, has only a future interest while the community owns the present interest.[37] Most courts, however, reject the entity theory, espousing the view that each marital partner holds a present interest in community

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28. Act of Feb. 23, 1972, ch. 108, § 3, 1972 Wash. Laws 1st Ex. Sess. 246 (amending WASH. REV. CODE § 26.16.030 (1963)).

29. One spouse can be the agent of the other spouse, but the agency must arise from some other transaction, such as employment in a business, or execution of a power of attorney. Under the entity theory of agency, the community could not claim damages from its agent although the commercial principal could. RESTATEMENT (SECOND) OF AGENCY § 401 (1957). Washington courts have rejected the entity theory as a basis for Washington community property law. Bortle v. Osborne, 155 Wash. 585, 285 P. 425 (1930).

30. *See* cases cited *supra* note 7, for specific examples. *See also deElche*, 95 Wash. 2d at 240-42, 622 P.2d at 837-38. *See generally* W. DE FUNIAK & M. VAUGHN, *supra* note 9, at § 182.

31. *DeElche*, 95 Wash. 2d at 242, 622 P.2d at 838.

32. *Id.*

33. *Id.* at 243-44, 622 P.2d at 839. *See, e.g.*, W. DE FUNIAK & M. VAUGHN, *supra* note 9, at § 11.1.

34. *See* Bortle v. Osborne, 155 Wash. 585, 285 P. 425 (1930).

35. *DeElche*, 95 Wash. 2d at 250, 622 P.2d at 842.

36. *Id.*

37. *Id.* at 249, 622 P.2d at 841.

assets, and the community as a separate entity does not exist.[38] Therefore, the existence of a marital community cannot shelter assets otherwise available to satisfy judgments.

Unfortunately, another judicially derived theory applied to community property law needlessly complicates separate tort recovery. When each spouse's present interest in community assets is recognized, the item theory[39] establishes that each owns an undivided half interest in every item of community property.[40] In *deElche*, for example, had the Jacobsens' community-owned sailboat been sold in satisfaction of the tort judgment, Mrs. Jacobsen would appear to have been unconstitutionally deprived of her property interests in the boat, interests as present and vested as Mr. Jacobsen's.[41] A due process argument implicitly underlies the dissent's objections to permitting separate tort recovery from community assets.[42]

The argument is not persuasive, however, even assuming the

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38. Bortle v. Osborne, 155 Wash. 585, 285 P. 425 (1930). *See also* Poe v. Seaborn, 282 U.S. 101 (1930) (the community is not an entity for federal income tax purposes).

39. *See In re* Estate of Patton, 6 Wash. App. 464, 494 P.2d 238 (1972). *Patton* is the only case from any community property jurisdiction which mentions an item theory. The *Patton* court felt constrained to use the item theory, relying on an earlier supreme court case, *In re* estate of Wegley, 65 Wash. 2d 689, 399 P.2d 326 (1965), yet the issue was not before the *Wegley* court. *In re* Estate of Patton, 6 Wash. App. 464, 476, 494 P.2d 238, 245 (1972). As noted by the dissent, the majority decision in *deElche* is inconsistent with an item theory. 95 Wash. 2d at 253, 622 P.2d at 843. If so, the United States Supreme Court, which once expressed confusion as to the invalidity of the item theory in Washington, is probably still confused. *See* Yiatchos v. Yiatchos, 373 U.S. 306 (1964) (decided before both *Wegley* and *Patton*).

40. *See In re* Estate of Patton, 6 Wash. App. 464, 472, 494 P.2d 238, 244 (1972).

41. If the item theory is applicable to Washington law, this due process argument appears to be the strongest argument against the result in *deElche*. Unfortunately, discussion of the policy reason for the item theory is sparse, and no court has raised the due process issue explicitly. Unless the item theory is necessary to support some important policy consideration, such as protection of property rights under the constitution, or spousal equality as a community property principle, it should be rejected in order to avoid confusion. *See Id.*

Patton was a case involving a widow's election. Widow's elections are permitted in Washington. Collins v. Collins, 152 Wash. 499, 278 P. 186 (1929). No explanation has been proposed as to how a remedy developed to ease hardships caused by the common law marital property regime can be applicable to defeat the intent of the testator, as was done in *Collins*. Once the foothold was gained to permit widow's elections, tax advantages developed and the doctrine is likely to continue. *See*, Comment, *The Widow's Election as an Estate Planning Device in Washington*, 43 WASH. L. REV. 455 (1967). Widow's elections require an item theory when the election was unintentional by the testator. If the aggregate theory is used, the testator can devise up to one half of the community net worth without putting the widow to an election. None of the cases dealing with the widow's election state the amount of community assets involved.

42. 95 Wash. 2d at 248, 622 P.2d at 841.

validity of the item theory.[43] Under Washington law, community property must be divided equitably at dissolution, and equitable shares are not necessarily equal shares.[44] Nevertheless, courts find no due process violation when one spouse receives a greater share of community assets. Moreover, the state commonly exercises its police power, interfering with private property rights to achieve legitimate state interests.[45] Permitting tort victims to recover from the tortfeasor in order to prevent the victim from becoming a public charge is a legitimate state interest.[46] The property interest of the innocent spouse does not require constitutional protection at judgment, but is protected when the proceeds of the sale are realized.[47]

The dissent is correct, though, in stating that the majority is inconsistent in allowing separate tort recovery against community assets and then characterizing the remainder as community property.[48] The majority failed to consider the implication of their argument: if there is no entity, and no community to act as principal, then there can be no agency to support the vicarious liability of one spouse for the torts of the other. Without an agency, the tortfeasor can do no more than jeopardize his own share of ownership in community assets. Therefore, the nontortfeasor spouse, still retaining ownership of the other half of the community assets, can claim these assets as separate property. The *deElche* court, failing to see the inherent severance in a separate recovery, held that the remaining property retained its community character,[49] but was encumbered by an

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43. *See supra* notes 39 and 41 for the validity of the item theory.

44. WASH. REV. CODE § 26.09.080 (1981); *In re* Marriage of Hadley, 88 Wash. 2d 649, 565 P.2d 790 (1977).

45. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In *Pennsylvania Coal*, the Supreme Court balanced the extent of public good achieved by the regulation against the diminution in value of the private property. In a case like *deElche*, the diminution in value of the spouse's interest does not occur at judgment sale, if sold at fair market value, and not at all if one half of the proceeds from the sale are confirmed to the innocent spouse, with an equitable lien on community property used to satisfy the judgment. *See infra* notes 68-73 and accompanying text.

46. *See* Addison v. Addison, 62 Cal. 2d 558, 339 P.2d 897, 48 Cal. Rptr. 97 (1965).

47. *See* Warburton v. White, 176 U.S. 484 (1890). The issue before the Supreme Court was whether a Washington statute had taken a husband's property rights without compensation by permitting the wife to manage property. There was no due process violation, according to the Court, because even if the wife sold the property, the community would realize the proceeds of the sale, and the husband's interest would be protected by his claim on the sale proceeds.

48. *DeElche*, 95 Wash. 2d at 248-49, 622 P.2d at 841-42.

49. *Id.* at 246, 622 P.2d at 840.

equitable lien[50] in favor of the nontortfeasor spouse.

Spanish law came to a fundamentally different result, following the principles underlying community property to their logical conclusion. The tort victim could recover against the tortfeasor's half-interest in community property, whereupon the community was severed.[51] The innocent spouse then owned half of the community assets as separate property as a consequence of the severance.[52] The *deElche* majority, in reaching the opposite result, was perhaps responding to the dissent's charge that the majority had reduced community property to a form of mere cotenancy.[53] This fear is unfounded, however, because the statutory origin of community property, unlike common law cotenancies, limits the judicial role.[54] Moreover, the Spanish law, on which Washington law is based, confirmed one-half of the community assets to the innocent spouse as that spouse's separate property.[55]

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50. For a discussion of the equitable lien, see *infra* notes 67-73 and accompanying text.

51. NOVISIMA RECOMPILACION, bk. 10, tit. 4, l. 10, *reprinted in* 2 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 20, app. I (1st ed. 1943) [hereinafter cited as NOVISIMA RECOMPILACION].

52. *Id.*

53. *DeElche*, 95 Wash. 2d at 246, 622 P.2d at 840. The majority asserts that the property retains its community character, "especially with the prevalence of community property agreements." The dissent argues that community property arises from the marital relationship itself, or as a result of an "agreement of both spouses." *Id.* at 250, 622 P.2d at 842. To hold otherwise reduces community ownership to a "mere species of common law cotenancy." *Id.* at 249, 622 P.2d at 842.

54. Cotenancies are common law doctrines which by their nature are judicially created. Community property, on the other hand, is a civil law concept based in statute. The majority responds to the dissent's criticism on this point by comparing the *deElche* decision to Francis v. Francis, 89 Wash. 2d 511, 573 P.2d 369 (1978); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972), and Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952). These cases support the dissent's position more than the majority's position, because none deal primarily with community property. *Freehe* abolished interspousal tort immunity and *Borst* abolished parental tort immunity. Tort law has an extensive common law background, unlike community property, and consequently, there exists a larger judicial role. *Francis* was concerned with insurance contracts and their relation to community property law. It did not alter community property law.

Community property cannot, however, be narrowly construed as being in derogation of the common law. W. DE FUNIAK & M. VAUGHN, *supra* note 9, at §§ 5, 6, 181. Even nineteenth century Washington judges were aware of the difference between community property statutes and statutes in derogation of the common law. R. BALLINGER, *supra* note 21, at § 157 (1895). Community property should be treated as a unified "field of law." Compare the Uniform Commercial Code, WASH. REV. CODE § 62A.1-104, and the official comments, where the U.C.C. is to be treated as a systematic codification rather than a set of statutes in derogation of the common law.

55. Spanish law, however, probably did not recognize negligence as a cause of action.

The majority's failure to follow Spanish law precepts in their entirety does not weaken the position that community property is available for separate tort judgment. Originally, the rule that immunized community property from a separate judgment developed from a misapplied juristic entity theory.[56] Moreover, although Washington statutes exclude the separate property of one spouse from tort liability of the other spouse,[57] they make no reference to community property[58] and do not address the question of community liability for the torts of each spouse.[59] The only authority permitting community property to be reached for the torts of married persons is Spanish law.[60] Because community property is a system of law incorporated practically unchanged from Spanish law, that law should be persuasive,[61] which the Washington Supreme Court recognizes.[62]

By remaining within the positive ambit of Washington statutes, or Spanish law where the statutes are silent, the majority rebuts the dissent's objection that the *deElche* rule allows resort to the innocent spouse's property. For instance, because of a statutory prohibition, spouses cannot, as the dissent claims *deElche* allows,[63] unilaterally give away community property.[64] Also, separate creditors similarly are prohibited from reaching community assets notwithstanding *deElche*[65] although, in any

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See infra notes 77-83 and accompanying text. It is arguable under the doctrine of community liability for individual torts that the community should not be held liable for intentional torts because, generally, the tort will not be foreseeable and, thus, outside the scope of the agency. *See* Cross, *supra* note 1, at 835.

56. For a discussion on the fallacy of the entity theory see *supra* notes 25-29 and accompanying text.

57. WASH. REV. CODE § 26.16.190 (1981).

58. *Id.* Section 26.16.190 states: "For all injuries committed by a married person, there shall be no recovery against the separate property of the other spouse, except in cases where there would be joint responsibility if the marriage did not exist." An earlier version of the statute merely said that the husband was not liable for the torts of the wife. Such statutes, excusing liability of the husband for the torts of the wife, were passed in nearly all American states in order to abrogate the common law rule that a husband is always liable for the torts of his wife. *See* Annot., 59 A.L.R. 1468 (1929); Annot., 27 A.L.R. 1218 (1923); Annot., 20 A.L.R. 578 (1922). This statute was not intended to apply to recovery against community property for separate torts.

59. *See* WASH. REV. CODE § 26.16.190 (1981) (by implication).

60. NOVISIMA RECOMPILACION, *supra* note 51.

61. *See supra* notes 13-15 and accompanying text for authoritativeness of Spanish law.

62. *DeElche*, 95 Wash. 2d at 244, 622 P.2d at 839.

63. *Id.* at 249-50, 622 P.2d at 842.

64. WASH. REV. CODE § 26.16.030(2) (1981).

65. WASH. REV. CODE § 26.16.200 (1981). *See* Johnson, *Limitation on Creditor's*

case, separate creditors can fairly be treated differently from tort victims who must take defendants as they find them. Nor would Spanish law, which affected a partition of the property, authorize the disposal of the innocent spouse's separate property.

Significantly, the *deElche* court fashioned a remedy which balances the interests of the innocent spouse and the tort victim. Under the *deElche* rule, the tort victim can recover a judgment against any property owned by the tortfeasor, regardless of its character, thus assuring injured tort victims of complete compensation for their injuries. At the same time, the court retains the community/separate tort distinction.[66] The victim of a separate tort is therefore allowed recovery against the separate assets of the tortfeasor and up to half of the community assets. In contrast, the community tort victim can reach all of the community assets as well as all of the tortfeasor's separate assets. With a more flexible remedy available, courts may be more inclined than in the past to find separate liability, which protects the innocent spouse by subjecting only half of the community assets to judgment.[67]

The *deElche* rule also permits the use of an equitable lien for the innocent spouse's protection. Such a lien arises when community property is used to improve the separate property of one spouse without the consent of the other.[68] In the case of a

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Rights to Require Spouse's Signatures Under the Equal Credit Opportunity Act and Washington Community Property Law, 4 U. PUGET SOUND L. REV. 333 (1981). A separate creditor, by definition, has relied only on separate assets to secure the debt, though such reliance may have been foolhardy. The creditor can require both spouses to join in the transaction, subject to some requirements, thus making the debt community in character.

66. *DeElche*, 95 Wash. 2d at 245, 622 P.2d at 840. If the spouses jointly committed a tort or if each spouse was partly negligent in causing the victim's injury, all property, whether community or separate, of both spouses could be available for judgment. For instance, one spouse may be driving while drunk and the other spouse negligent in permitting the first to drive. Under vicarious liability doctrines, such as the family car doctrine, only the community assets of the non acting spouse are available. Technological advances unknown to both Spanish and English common law, such as the automobile, justify retention of these vicarious liability doctrines, at least to some degree.

67. The *deElche* opinion suggests this possibility. 95 Wash. 2d at 245, 622 P.2d at 840. Presumably, a case such as Newbury v. Remington, 184 Wash. 665, 52 P.2d 312 (1935), may be decided differently after *deElche*. In *Newbury*, the tort was held separate because the spouse "alighted from the automobile" to strike the plaintiff. If the defendant had remained in the community-owned car, or used the car in the commission of the battery, it would have been a community tort. After *deElche*, courts could rationally determine that the tort was separate regardless of the involvement of the car.

68. Cross, *supra* note 1, at 776.

tort judgment, an equitable lien results when community property is used to satisfy a separate tort judgment.[69] The nontortfeasor acquires a lien against the community that is satisfied, at dissolution of the community at death or divorce, before the community property is divided.

The lien, satisfactory in theory, presents difficulties in practice, especially in conjunction with the item theory of community property.[70] Because the innocent spouse would own half of each item under the item theory,[71] a tort victim would have to assert judgment levy on items worth twice the value of the judgment. Subjecting the tort victim to the increased effort and expense serves no purpose, further challenging the validity of the item theory.[72] Without an item theory, the full value of each item can satisfy the tort judgment until the aggregate value of attached items equals half the value of all the community property.[73]

Another unsolved problem facing the use of the equitable lien is the courts' practice of considering the lien as a loan or right to reimbursement, instead of an investment,[74] with no fixed payment period and no accumulation of interest.[75] If a court, however, did fix an interest rate on the lien's value, then the compounding of interest until marriage dissolution might exhaust the tortfeasor's interest in community assets. That result is an inequitable extinction of the tortfeasor's rights in community assets depending not on the degree of culpability or measure of damages, but on the length of the marriage. On the other hand, the value of a no-interest lien to the nontortfeasor spouse steadily decreases due to inflation and the time value of money as the marital relationship endures. Given the numerous

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69. *See* Comment, *Separate Title and Community Funds, Lien Theory in Washington*, 44 WASH. L. REV. 397 (1968).

70. For discussion of the item theory, see *supra* notes 39-47 and accompanying text.

71. *DeElche*, 95 Wash. 2d at 253, 622 P.2d at 843.

72. For discussion of the doubtful validity of the item theory, see *supra* notes 39-41.

73. This would be the closest approximation to Spanish law which severed the community upon the tort's commission, permitting recovery of up to half the value of the community estate before severance. *See supra* note 59 and accompanying text.

74. *In re* Marriage of Johnson, 28 Wash. App. 574, 625 P.2d 720 (1981). If the lien is an investment then the lienholder could share pro rata in appreciation of the property in question. In *Johnson*, the lien arose when community funds were used to pay off a mortgage on separate real property. The appreciation of this property was the only substantial asset at dissolution, and the lienholder's claim for a share of the appreciation, rather than reimbursement, was denied.

75. Cross, *supra* note 1, at 779.

practical drawbacks, the equitable lien does not appear to be as satisfactory a solution as the *deElche* court assumes, and its future utility will depend on clarifying its operation.[76]

Spanish law avoided the need for an equitable lien by partitioning community assets upon the commission of a tort.[77] But under Spanish law torts were criminal in nature,[78] and the law could not recognize a community tort that would bind a spouse innocent of any crime.

Although Washington courts, adhering to Spanish precedent, generally find that crimes and intentional torts incur separate liability,[79] the community/separate tort distinction should be retained.[80] In appropriate cases, vicarious liability should be used to find liability against the nontortfeasor spouse. Community property contracts rules may suggest the proper balance. Under contract law, either spouse can bind the community to a contract if the transaction is for the community benefit.[81] The basis for this rule is a consensually formed partnership or joint venture, in which each spouse works for the common good. Spanish law employed the same concept under contract analysis.[82] When a tort is committed, the relevant question is whether the parties were engaged in the same type of transaction that would incur community contractual liability. If so, the tort would be a community tort.[83] It does not seem unreasonable to

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76. As its name implies, the exact contours of the equitable lien change from case to case. *See generally* Cross, *supra* note 1, at 776-82. The legislature could perhaps clarify the nature of the lien, allowing for appropriate interest rates, priority, and recording methods to protect subsequent creditors.

77. NOVISIMA RECOMPILACION, *supra* note 51.

78. W. DE FUNIAK & M. VAUGHN, *supra* note 9, at § 81. The Spanish word *delito* described both crimes and what today would be considered intentional torts. Apparently, the doctrine of negligence had not developed in Spain at the time of the *Recompilacion*, about 1804. This inference is drawn because negligence had not developed until later in the nineteenth century in English and American jurisprudence. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 28 (4th ed. 1971).

79. *See* Bergman v. State, 187 Wash. 622, 60 P.2d 699 (1936); Edmonds v. Ashe, 13 Wash. App. 690, 537 P.2d 812 (1975).

80. This is the argument for the family car doctrine, which is a form of vicarious liability similar to the doctrine of community torts. *See* W. PROSSER, *supra* note 78 at § 69. As noted *supra* note 66, technological advances, the development of negligence, and notions of increased tort liability are all policy arguments favoring retention of vicarious liability.

81. WASH. REV. CODE § 26.16.030 (1981). *See* Cross, *supra* note 1, at 820-21.

82. W. DE FUNIAK & M. VAUGHN, *supra* note 9, at §§ 1, 153; Cross, *supra* note 1, at 733-34.

83. *See supra* notes 20-29 and accompanying text for discussion of the entity theory. All partners are normally liable for the torts of one, and the victim can sue any partner,

expect partners sharing in the benefits of their mutual labors to share in the losses, including these tort losses, as well.

The most likely result of the *deElche* decision will be increased findings of separate tort liability.[84] Courts will no longer need to find some tenuous community benefit based on "significant emotional overtones"[85] to provide a recoverable judgment for the tort victim. Although community and separate torts must still be distinguished,[86] distinctions will be more rational because the tort victim can recover to the full extent of the tortfeasor's assets, regardless of the character of the ownership.[87]

The *deElche* decision may impact long term meretricious relationships. Under current law, a tort victim should be able to reach all the interest that the tortfeasor has, whether title is held jointly or singly. But the tort victim cannot reach property held only in the name of the nontortfeasor involved in the meretricious relationship. However, under some circumstances, courts have found that the assets accumulated during these relationships resemble community property.[88] If the relationship is based on a partnership or joint venture, the vicarious liability theory used to reach community assets may also enable the tortfeasor to reach assets held for the partnership, but in the nontortfeasor's name.[89]

The most important question left open by the *deElche* decision is whether the victim of a separate tort can reach community real property.[90] Although the court's reasoning could extend to recovery against real property, *Schramm v. Steele*, which held that real and personal property were indistinguishable for judg-

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even if the partner was previously unaware of the tort. Grissom v. Hofius, 39 Wash. 51, 80 P. 1002 (1905); Garringer v. Hurn, 1 Wash. App. 485, 462 P.2d 556 (1969).

84. 95 Wash. 2d at 245, 622 P.2d at 840.

85. Smith v. Retallick, 48 Wash. 2d 360, 365, 293 P.2d 745, 748 (1956).

86. *See deElche* at 245, 622 P.2d at 840. The dissent criticizes the majority decision as accomplishing nothing if the community/separate tort distinction must still be made. *Id.* at 248 n.5, 622 P.2d at 841 n.5. But if marriage is a partnership, then partners should perhaps be responsible for certain foreseeable injuries caused by the partnership. See cases cited *supra* note 7, where a different result may be reached after *deElche*.

87.. *See deElche*, 95 Wash. 2d at 245, 622 P.2d at 840.

88. *In re* Estate of Thornton, 81 Wash. 2d 72, 499 P.2d 864 (1972). *See* Cross, *supra* note 1, at 739-45.

89. *See* Shank v. Klein, 104 U.S. 18 (1881). The Court held that real property was a partnership asset, although legal title was held in only one partner's name.

90. In *deElche*, the court did not need to reach the question. 95 Wash. 2d at 246, 622 P.2d at 840.

ment satisfaction,[91] was overruled in *deElche*.[92] The principle overruled, however, was the refusal to permit a separate tort victim to recover from community assets.[93] That portion of *Schramm* finding no rational distinction between real and personal property may still be valid,[94] and, in the absence of statutory requirements, should be followed.[95] Otherwise, as the preponderance of community assets is likely to be invested in real property, the position of tort victims will be little improved after *deElche*.[96] In view of the statutory ambiguity,[97] a court faced with the issue should rely on *Schramm*, and permit recovery against real property, subject to statutory homestead exemptions, to facilitate full compensation of tort victims.[98]

In *deElche*, the supreme court was confronted with case law that was inequitable to both the tort victim and the innocent spouse. In some cases, an innocent spouse was held liable under

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91. Schramm v. Steele, 97 Wash. 309, 166 P. 634 (1917).

92. 95 Wash. 2d at 247, 622 P.2d at 840. This statute was at issue in *Schramm*, and the court, in the quotation beginning this note, refused to apply this statute to distinguish real property from personal property for judgment purposes. *Schramm* dealt with three issues; the first was whether there could be a recovery against community property for a separate tort. *DeElche* clearly overruled *Schramm* on this issue. 95 Wash. 2d at 247, 622 P.2d at 840. *Schramm* also announced a policy of *stare decisis*. This holding was explicitly upheld in *deElche*. *Id.* The vitality of *Schramm*'s third point, refusing to distinguish between real and personal property, and holding that WASH. REV. CODE § 26.16.040 is inapplicable, is unclear.

93. *DeElche*, 95 Wash. 2d at 247, 622 P.2d at 840.

94. *See supra* note 92.

95. *But see* Note, *Community Property — Washington Allows Separate Tort Recovery From Community Property*, 57 WASH. L. REV. 211, 220 (1981). The author argues that real property conveyances require joinder of both spouses, therefore real property should be treated differently than personal property. The joinder requirements for conveyances of real property can be met, however, without signatures of both spouses when one spouse ratifies, authorizes the transaction, or is estopped from denying it. Cross, *supra* note 1, at 786. To this extent, at least, real property is treated the same as personal property. Additionally, both spouses must join in the creation of security interests or sale of community household goods, yet despite both signatures, these goods are treated as personal property. *See* WASH. REV. CODE § 26.16.030(5) (1981).

96. The major assets of a marriage are likely to be real estate. As the forced sale of the family residence seems unfair, one must look to statutory protections such as the homestead exemption that, in the legislature's judgment, serve a more important purpose. The actual effect of allowing recovery against real property may only be to activate liability provisions in a homeowner's insurance policy.

97. *See supra* note 95 and accompanying text. *See also* WASH. REV. CODE § 26.16.040 (1981).

98. *See* Werker v. Knox, 197 Wash. 453, 85 P.2d 1041 (1938). "[O]f recent years, the trend of the law has not been toward relieving the community from liability for the torts of its individual members, but has been quite definitely in the direction of finding ways and means of imposing such liabilities upon the community." *Id.* at 456, 85 P.2d at 1042.

a community tort doctrine extended well beyond the reach of vicarious liability policies. In other cases, successful plaintiffs were unable to recover from defendants with substantial assets. With a diminished tendency to find community liability subjecting all community assets to judgment, and the use of an equitable lien when separate liability is found, the innocent spouse obtains a greater degree of protection than was afforded by previous law. The tort victim will no longer face an all or nothing situation and can recover to the full extent of the tortfeasor's assets.

Permitting recovery against community property for separate torts is not a matter that should be left to the legislature, as suggested by the dissent.[99] Furthermore, the exemption of community property from separate tort judgment was a judicially created doctrine based on an entity theory not in accord with community property principles. Community property statutes, representing a discrete body of borrowed civil law, cannot be construed narrowly, as the dissent favors,[100] as being in derogation of the common law. By judicially abolishing the exception, *deElche* is a correction of past judicial mistakes and represents a return to the policy and principles underlying Washington's community property law.

Joseph R. McFaul

99. 95 Wash. 2d at 252, 622 P.2d at 843 (1980).

100. W. DE FUNIAK & M. VAUGHN, *supra* note 9, at §§ 5, 6, 181. Even nineteenth century Washington judges were aware of the difference between community property statutes and statutes in derogation of the common law. R. BALLINGER, *supra* note 21, at § 157.