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Torts—Interspousal Immunity—The Effects of Community Property and Fraud

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The same fate befell a disfavored driver who was cross-complaining in *Cramer v. Bock*[20] because, "her own testimony is that she noticed its speed from the time she saw it to her right and was at all times acquainted with its speed as it approached the intersection."[21]

The present state of the law is that a disfavored driver may be deceived by the speed at which a favored driver is approaching, but not if he is a good judge of speed or knows that the other's speed is excessive. The law as it now stands puts a premium upon bad judgment and careless observation. Carelessness frees a disfavored driver from contributory negligence instead of charging him with it. It seems more reasonable to follow Judge Rosellini's suggestion that a disfavored driver should never be allowed to claim that he was deceived solely by the speed of the favored driver.

ROBERT L. BEALE

Interspousal Immunity—The Effects of Community Property and Fraud. The Washington position on interspousal tort immunity should be reconsidered in view of two recent California decisions, *Self v. Self*,[1] and *Klein v. Klein*.[2]

The *Self* case involved an assault by a husband upon his wife while the couple were living together. The court overruled its longstanding immunity doctrine[3] and allowed the wife to recover.

Having created its own authority in *Self*, the court proceeded to decide the companion case, *Klein*, which was a negligence action by a wife against her husband. By washing the exterior deck of his pleasure boat with water, he made a slippery and unsafe walking surface upon which his wife fell while she was helping him to clean the boat. Here, too, the marital relationship existed at the time of the tort.

Washington's position on interspousal immunity as compared to the California court's complete abrogation of immunity is illustrated by *Goode v. Martinis*,[4] in which the husband, during the interim between commencement and completion of divorce and while the couple were legally separated, revisited the wife and sexually assaulted her. The Washington court indicated by the tenor of its language that it may be

[20] 21 Wn.2d 13, 149 P.2d 525 (1944).
[21] *Id.* at 16, 149 P.2d at 527. *Accord*, Pasero v. Tacoma Transit Co., 35 Wn.2d 97, 211 P.2d 160 (1949); Jamieson v. Taylor, 1 Wn.2d 217, 95 P.2d 791 (1939).

[1] 26 Cal. Rptr. 97, 376 P.2d 65 (1962).
[2] 26 Cal. Rptr. 102, 376 P.2d 70 (1962).
[3] Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909).
[4] 58 Wn.2d 229, 361 P.2d 941 (1961), 37 WASH. L. REV. 233 (1962).

willing to abolish interspousal immunity in this state. However, the court evidently did not believe that *Goode* was the proper case for that drastic departure. Though the wife was allowed to recover, the decision was expressly confined to the facts.

In *Goode,* though the marriage was not yet ended, divorce proceedings had begun and the couple were legally separated. In addition a property settlement had been made, thus negating the effects of community property law on immunity. *Self,* on the other hand, presents a situation where the assault took place during the existence not only of marriage, but also of cohabitation. *Klein,* a case where the California court dispenses with immunity in a negligence situation, goes one step beyond *Goode* and *Self* (because of the nature of the tort and its occurrence during a normal marital relationship).

It is important to note, as well, that the California court expressly overruled its decisions sustaining interspousal immunity. In contrast the Washington court only stated that the facts of *Goode* did not support a decision upholding immunity upon the narrow ground of the women's emancipation statute.[5] *Schultz v. Christopher,*[6] the only prior Washington interspousal immunity case, had been decided on that basis.

As the discussion in the *Klein* opinion illustrates, many reasons have been advanced for denying to spouses the right to sue each other in tort. For example:

1) A spouse has resort to divorce proceedings.

2) He has a form of remedy in criminal prosecution.

3) At common law the husband and wife were considered a unit.

4) The wife is legally incapacitated for the policy reason that to allow a tort suit is disruptive of marital harmony.

5) A suit arising from one of closest human relationships conduces to the perpetration of fraud on the courts.

6) In community property states the cause of action and the recovery are community property rather than separate property of the injured spouse.

Since a recent note[7] has discussed the first four reasons, this note

[5] RCW 26.16.160.

[6] 65 Wash. 496, 118 Pac. 629 (1911).

[7] See Note, 37 Wash. L. Rev. 233 (1962). There the writer also discusses the effect of the Washington statutes: RCW 26.16.130, RCW 26.16.150 and RCW 26.16.160. He encourages a liberal interpretation of these three statutes read in the aggregate. If this is done the result in Washington must necessarily be the same as the California court reached in *Self.*

is limited in scope to the effects of fraud and community property on interspousal tort immunity.

Intentional torts excepted, the question of fraud presents a difficult problem. In the *Self* wife-beating case, the California court found unconvincing the argument that the husband and wife would collude to defraud the court. This view is realistic, since the animosities surrounding a beating minimize the likelihood that the spouses would be compatible enough to collude. The Washington court in *Goode* also rejected the collusion argument, but for the reason that the tort did not appear to be covered by insurance. The *Self* rationale seems equally valid and of wider applicability.

Klein, however, presented a situation where a negligent tort occurred between persons intimately related, so that the opportunity for fraud was at its maximum. In full awareness of this possibility the California court answered that the basic principle of the law of torts is that a person injured by another's willful or negligent conduct should be compensated unless a statute or compelling public policy dictates otherwise. Finding neither, the court concluded that the opportunity for fraud and collusion does not warrant denial of compensation as a matter of law. Since in the court's opinion fraud and collusion are possible in every case, final reliance has to be placed upon the courts and their ability to detect unmeritorious claims. The alternative is to deny all types of claims because of the fraud possibility.

To support its conclusions the California court cited and quoted from a Washington case, *Borst v. Borst.*[8] That case allowed a child a cause of action for negligent injury to him by his parent except for injuries occurring during the performance of parental duties. The California court found a close analogy to the husband-wife situation, warranting the application of *Borst* on the question of fraud. Accordingly, it accepted this reasoning from the *Borst* case:

> Courts will not immunize tort feasors from liability in a whole class of cases because of the possibility of fraud, but will depend upon the legislature to deal with the problem as one of a question of public policy.[9]

Evidently the Washington court means that some policy questions are much more effectively dealt with by the legislature, since that body was structured to hear the views of all divergent interests, and can take the time and manpower to make a careful, detailed study of the

[8] 41 Wn.2d 642, 251 P.2d 149 (1952).
[9] *Id.* at 654, 251 P.2d 149, 155 (1952).

problem. But, if a court denies recovery to a spouse because it anticipates fraud in future cases, it does so entirely on the basis of intuition[10] and without hearing from all the interests affected. Notably, insurance companies[11] would not be heard from, nor would their opponents.

It has been argued that if immunity is properly a legislative question, then the legislature ought to initiate any change in the present law of immunity. In *Borst* the Washington court met this argument by stating that injury due to another's fault should be compensated, and, if this requires that liability be extended, the court is quite capable of doing so, because "where the proposal is to open the doors of the court rather than close them, the courts are quite competent to act for themselves."[12]

In Illinois the court abrogated interspousal immunity.[13] It believed that, where there is insurance, the insurance company is the real defendant and that fraud is simply an additional risk to be insured against. But the insurance groups of that state then succeeded in convincing the legislature of the seriousness of fraud in the interspousal tort suit, and as a result immunity was re-established by statute.[14] This succession of events aptly demonstrates the workability of the rationale adopted in *Borst* and *Klein.*

The argument for immunity is strongest in a community property state like Washington, where the recovery for a spouse's personal injury is community rather than separate property. In California the

[10] Courts have undertaken a determination of policy for which they are not ideally suited. For example, in Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955), the Oregon court, relying only upon intuition, concluded that the insurance company would be without a voice and thus adversely affected by husband and wife negligence suits. See McCurdy, *Personal Injury Torts Between Spouses,* 4 VILL. L. REV. 303 (1959), which explains that a substantial number of states have allowed interspousal actions for negligent injury for many years. Nevertheless, not even the most affected (and consequently the most interested) parties, the insurance companies, can demonstrate the extent of interspousal claims or the extent of suspected marital collusion. If liability insurers thought it worthwhile, one would think they would collect such information. Professor McCurdy concludes that "questions of policy should not be injected and determined (by the courts) by purely *a priori* conceptions." *Id.* at 337.

[11] New York has one solution. In 1937, that state amended its Domestic Relations Law to allow interspousal rights of action in tort. Concurrently, the Insurance Law was amended to prohibit issuance of a liability insurance policy to cover injuries to the person or property of an insured's spouse, unless expressly included in the policy. N. Y. Dom. Rel. Law § 57 (1937), and N. Y. Ins. Law § 167 (3) (1937).

[12] 41 Wn.2d 642, 657, 251 P.2d 149, 157 (1952). Once the court has extended liability by disposing of immunity, the evidence of successful fraudulent claims through the courts may begin to appear. At that time legislative action becomes appropriate. The host-guest statutes are an example of this law-making process. In the host-guest situation the insurance companies were being oppressed by the great number of fraudulent claims which were successful in court. The insurance groups took action and succeeded in convincing the legislatures of the need for limited liability. See RCW 46.08.080.

[13] Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952).

[14] ILL. REV. STAT. CH. 68 § 1 (1953).

problem no longer exists because a statute provides that "all damages, special and general awarded a married person in a civil action for personal injuries are the separate property of such person."[15] In the *Self* opinion the California court emphasized the effect of this statute. It found this statute to be the final and most convincing elucidation of public policy in favor of abrogating interspousal immunity, although the primary reason for the legislative change was to abolish the doctrine of imputed contributory negligence[16] and its attendant hardships. Before the statute's enactment in 1957, it was somewhat incongruous to let the wife sue the husband for a personal tort since the recovery was community property, controlled and managed by the husband.[17] Also there was circuity of action,[18] since damages recovered by a wife from her husband might have been payable from his separate property, but the recovery was community property in which the husband had a half interest.

To avoid the same difficulties the Washington community property statute must either be amended in the California fashion or given a different judicial interpretation.[19] In any event, the present situation is unfair to injured spouses.

From an analytic property viewpoint it is incorrect to consider damages received for personal injury to one spouse as community property. The basis for the proper rationale is that except for gifts clearly made to the community, community property only consists of

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[15] CAL. CIV. CODE § 163.5 (1957). For a discussion of the effect of this statute see Note 45 CAL. L. REV. 779 (1957); Comment, 9 HASTINGS L.J. 291 (1958). Louisiana at present has statutes which designate the personal injury damages of the wife as her separate property. LA. CIV. CODE ANN. art. 2334, 2402 (West 1952). Texas had a similar statute, TEX. REV. CIV. STAT. ANNO. art. 4615 (Vernon's 1960), but this statute was held unconstitutional in Bell v. Phillips Petroleum Co., 278 S.W.2d 407 (Tex. Civ. App. 1955).

[16] Zarogoza v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949). The same unjust situation exists in Washington. In Ostheller v. Spokane Inland Empire Ry. Co., 107 Wash. 678, 182 Pac. 630 (1919), the wife's administrator attempted to recover from Railroad Co., which had caused husband's and wife's deaths. The court held that the defunct community could not benefit from the husband's contributory negligence and that the wife's recovery, which was community property, was barred. However, should the wife suffer death at her husband's hands she (or at least her personal representative) is in a better position than if she survives because then the administrator or executor can recover from the husband since the imputed negligence defense is inapplicable. Johnson v. Ottomeier, 45 Wn.2d 419, 275 P.2d 723 (1954).

[17] RCW 26.16.030.

[18] 26 Cal. Rptr. 97, 376 P.2d 65, 69 n.5 (1962).

[19] While such interpretation is justified by the policy considerations discussed in the text, the court may hesitate when confronted with the formidable task of overturning numerous past decisions of a closely related nature, including not only interspousal immunity, Schultz v. Christopher 65 Wash. 496, 118 Pac. 629 (1911); but also imputed contributory negligence, Ostheller v. Spokane & Inland Empire Ry. Co. 107 Wash. 678, 182 Pac. 630 (1919); and personal injury suits against third parties, Schneider v. Biberger, 76 Wash. 504, 136 Pac. 701 (1913).

that which is acquired by onerous title,[20] in other words, that property which through their labor or industry the spouses have acquired together. Recovery for personal injury does not fall within that definition. But the Washington court, when first confronted with the problem,[21] noted that the recovery was not by "gift, bequest, devise or descent"[22] and concluded that it had to be community property. This interpretation fails to take into account the principle of onerous title. Since the onerous title doctrine has subsequently been recognized[23] the court should be able to apply it in the personal injury case.[24]

Another anomaly exists by virtue of the Washington interpretation of the community property statute. To the extent that one has property rights in his own body, those rights before marriage are undoubtedy "separate property."[25] Yet, when injury occurs after marriage, the cause of action, since it is a chose-in-action not acquired by

[20] DE FUNIAK, COMMUNITY PROPERTY §§ 82, 83, 151 (1943). Under the principle of onerous title, community property includes only property acquired by the spouses' joint labor and industry. See also Zaragoza v. Craven 33 Cal. 2d 315, 202 P.2d 73 (1949) (dissenting opinion). Washington recognizes the onerous title doctrine. In Togliatti v. Robertson, 29 Wn.2d 844, 190 P.2d 575 (1948), a case where husband and wife had been separated for over ten years, the court had to decide if bonds purchased by the husband during this separation were separate property. It held they were, because "the whole theory of community property is that it is obtained by the efforts of the husband and wife or both for the benefit of the community." *Id.* at 852. This onerous title theory has been reaffirmed. In Re Armstrong's Estate, 33 Wn.2d 118, 204 P.2d 500 (1944). In that case property was received four days after an interlocutory order was entered. The court said that this was separate property since the widow had not contributed to its acquisition nor was it acquired by the joint efforts of the decedent and the widow.

[21] Hawkins v. Front Street Cable Ry. Co., 3 Wash. 592, 28 Pac. 1021 (1892).

[22] RCW 26.16.010.

[23] See note 19 *supra*.

[24] Even though the court may not wish to reinterpret its holding under the statute, other methods of solution are possible. See Jacob, *The Law of Community Property in Idaho,* 1 IDAHO L.J. 1, 42 (1931) where three methods are advanced whereby through property analysis the present difficulty can be circumvented: "(1) If the husband fails to defend a community property interest the wife may do so . . . But this still involves us in the difficulty that after recovery the husband shall have management and control of the damages recovered because of his own tort.

"2) A second and very simple solution . . . would be to say that recovery in tort for injury to the wife by her husband and another is to be regarded as separate property. The weakness in this solution is, first, it is difficult to find a source in separate property to which the wife's damages are attributable, and second, that such damages have always been called community property.

"3) The third possible solution is to say that damages are community property; that their source is the loss of earning power of the wife; that the wife's earnings, though community property, are subject to her management and control; and that where her husband has disqualified himself, by his conduct, to control the money recovered as damages, that that money is to be subject to the wife's management and control as its source was."

[25] Foote v. Foote, 170 Cal. App. 2d 435, 339 P.2d 188 (1959), is authority for this proposition in California. Here a wife recovered from her husband for a pre-marital tort because the cause of action was her separate property and the recovery retained that character. In reality there is no property right in a body. However a person's interest in keeping his body intact falls within the broad definition of property as embracing "every interest . . . which the law regards of sufficient value to obtain judicial recognition." York v. Stone, 178 Wash. 280, 285, 34 P.2d 911, 913.

one of the privileged means,[26] is community property. But property acquired before marriage is separate property and remains separate property after marriage.[27] "Community property" in a person's limbs is, then, an illogical exception to the usual property rules. Such a result is particularly incomprehensible since it fails to consider that compensation is given because an interest has been invaded, and the interest here is the individual's right to personal security.[28] Allowing the wife to recover in her own right would merely restore her to the *status quo ante*. It is true that the community can suffer a loss of services due to the wife's injury, for which loss compensation to the community should be allowed when it is inflicted by a third party.[29] This community interest, however, should not be confused with the wife's interest which, when invaded, should allow her to recover as an *individual* for her own pain, suffering and disfigurement.[30] Here interest in her body's security was her separate "property" before marriage, and marriage did not change its nature. Since property acquired with separate property is itself separate, the damages received in ex-

[26] RCW 26.16.010.

[27] Kinman v. Roberts, 151 Wash. 35, 274 Pac. 719 (1929). See RCW 26.16.020.

[28] This argument has been made previously. Horowitz, *Conflicts of Laws in Community Property*, 11 WASH. L. REV. 121, (pts. 1-2) 212, 229 (1936). See also Comment, 1 WASH. L. REV. 129 (1926).

[29] Lindsay v. Oregon Shortline Ry. Co., 13 Idaho 477, 90 Pac. 984 (1907), where the court gives the community a cause of action for injuries to wife. This is for loss of wife's services to the community. The court then erroneously gave the husband a cause of action for the wife's suffering as was done at common law. Strict, proper application of community property principles would have given the wife the cause of action as her own separate property. See note 20 *supra*.

Washington allows a split cause of action for injuries to a minor, one to the minor for pain and suffering and permanent injuries, and one to the parents for loss of the child's services during minority. Harris v. Puget Sound Electric R. Co., 52 Wash. 289, 100 Pac. 838 (1909). Certainly no policy considerations exist for denying a similar split cause of action to the community and to the wife. Of course, in an interspousal suit the community should be denied recovery because the husband as a member of the community would get back an interest in part of what he is required to pay out.

[30] In Fox Tucson Theatres Corp. v. Lindsay, 47 Ariz. 388, 56 P.2d 183 (1963), although the court considered the damages for personal injury to the wife as community property, it made this reply to the defendant's objection that the wife could not substitute herself as plaintiff for the husband who died while the trial was pending: "[D]efendant has overlooked the reason for the rule [making husband necessary plaintiff] and the capacity in which he is plaintiff. It is not because a cause of action ever existed in him, for it belonged to the person who was injured. As was said in C. B. & Q. R. Co. v. Dunn, 52 Ill. 260, 4 Am. Rep. 606, 'the injury did not accrue to the husband,' it was wholly personal to the wife. It was her body that was bruised; it was she who suffered the agonizing mental and physical pain. The husband merely *represents* the community as a guardian. . . ." *Id.* at 389, 54 P.2d at 184.

The Washington court has expressed similar views. In O'Toole v. Faulkner, 34 Wash. 371, 75 Pac. 975 (1904), the wife sustained permanent disability and the husband died. The court said of the damages for the disability: "[T]he community being dead when this suit was brought, it may be doubted if it was such an entity as could be continued through an administration for the purpose of sharing in the unliquidated and unrecovered damages for the continuing lifetime disabilities of a surviving member." *Id.* at 373, 75 Pac. at 976. In truth the community had ceased to exist in this instance, but the court recognized the extreme unfairness in allowing

change for the spouses' individual right of personal security ought to be separate property.

In Washington a wife may have some basis for a claim if she argues that her personal security is her own right for which she should be allowed to recover. Once she has established her right to sue, *Stephens v. Depue*[31] would say that "whether . . . the damages will belong to her or the community is immaterial to us."[32] In that case the court allowed a wife to recover for alienation of affections, although she was living with her husband when the tort occurred and at the time of suit. Once this right to sue for damages without joining her husband had been established, the court said "[S]he has the concomitant sole right to satisfy and discharge any judgment in her favor." The court refused to decide whether the recovery was community property, stating that it would have been a prejudgment of title. Thus the effect of this decision would seem to be that if a wife overcomes common law reasons for immunity, she can sue, satisfy, and discharge the judgment in her favor without encountering any community property difficulties. Literally read, this case would mean that what she recovers is hers in return for the injury she has suffered.[33] If this is true for alienation of affections, where the marital rights in companionship are affected, it should be no less true when the rights of personal security are invaded.

Community property law presents a major obstacle to abrogation of interspousal tort immunity in Washington. The result which the court has reached seems contrary to the underlying philosophy of the community property system since

> If it is once granted that a wife may sue her husband, it would be a strange thing to say that the property statutes enacted for the wife's protection, should have the effect of making her remediless.[34]

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the community to recover part of the damages to the wife. The unfairness is equally great when the wife is barred from suing her husband because the recovery is community property.

In Wampler v. Beinert, 125 Wash. 494, 216 Pac. 855 (1923), the court expressed in even clearer language that the injury accrues to the wife: "The injury to the wife is not alone an injury to the community but to the wife personally, and this injury may be endured long after the community is dissolved." See also Zarogoza v. Craven, 33 Cal.,2d 315, 202 P.2d 73 (1949) (dissenting opinion).

[31] 151 Wash. 641, 276 Pac. 882 (1929).

[32] *Id.* at 652, 276 Pac. 882, 889 (1929): Holly St. Land Co. v. Beyer, 48 Wash. 422, 93 Pac. 1066 (1908).

[33] In California this possibility existed by virtue of Franklin v. Franklin, 67 Cal. App. 2d 717, 155 P.2d 637 (1945), holding that, while for property of this character, the cause of action could be community, the recovery might be separate property. Zarogoza v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949) overruled *Franklin*. The court stated: "[I]t must be considered that the cause of action for personal injuries suffered by either spouse during marriage . . . as well as the recovery therefore constitute community property . . . and any contrary implications of the Franklin case are disapproved." *Id.* at 320, 202 P.2d at 76.

Were the *Klein* and *Self* cases argued to the Washington court, together with the substantial reasons supporting them, it is possible that Washington too would abrogate interspousal tort immunity.[35]

KENNETH O. JARVI

Monopoly—Medical Services. Washington has been recognized as one of the leading state jurisdictions in which a private organization or party may acquire relief from monopolistic practices of voluntary medical associations.[1] A recent case seems to broaden the available grounds upon which such associations may be subjected to liability.[2] The case also appears to provide some guides for the interpretation of the recently enacted Consumer Protection Act.[3]

Dr. Hubbard, a licensed physician in Spokane County brought an action for damages and injunctive relief upon the cancellation of his contract by the defendant Medical Service Corporation of Spokane County (hereinafter referred to as the corporation) and his automatic termination of membership in defendant Medical Service Bureau of Spokane County (hereinafter referred to as the bureau). The plaintiff alleged that the operation of the corporation and bureau constituted a monopoly in violation of the WASH. CONST. art. 12, § 22. Finding that the corporation's operation was not a monopoly the trial court refused to award damages. It did, however, restrain the defendants from enforcing certain policies concerning payment for X-rays and from prohibiting industrial plant doctors from accepting plant employees as private patients.

On appeal by Dr. Hubbard and cross appeal by the corporation and bureau, the supreme court upheld the trial court's findings concerning monopoly and the propriety of cancelling the contract between the defendant and the corporation. The court nevertheless dissolved the injunction concerning the above-mentioned policies, on the ground that the plaintiff had no identifiable legal interest in determining the bureau's policy in these matters.[4] The court then found that the refusal

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[34] Jacob, supra note 24, at 42 (1931).

[35] Alaska does not have the community property problem, but the Alaska court recently relied upon *Self* and *Klein* in a decision of first impression refusing to establish the immunity, Cramer v. Cramer, 379 P.2d 95 (Alaska 1963).

[1] See Editorial Note, *Expulsion and Exclusion From Hospital Practice and Organized Medical Societies*, 15 RUTGERS L. REV. 327, 347 (1961).

[2] Hubbard v. The Medical Serv. Corp., 59 Wn.2d 449, 367 P.2d 1003 (1962).

[3] Consumer Protection Act, Wash. Sess. Laws 1961, ch. 216.

[4] Here the court cites with approval Porter v. King County Medical Soc'y, 186 Wash. 410, 58 P.2d 367 (1936). The *Porter* case would appear to be easily avoided