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COMMUNITY PROPERTY: THE EFFECT OF PERSONAL INJURY AGREEMENTS BETWEEN SPOUSES

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The recent case of *Kesler v Pabst*[1] has added a new page in California legal history The Supreme Court held that even where a husband released his interest in a community cause of action to his wife, she would be barred by his contributory negligence in a suit against the defendant. Just why the court would not give effect to his attempt to make the cause of action her separate property can only be understood in the light of California law as interpreted by the courts.

A. Causes of Action.

The California rule, in the absence of agreement between the spouses, is that a cause of action for personal injuries is community property [2] The basis for this rule is that the community property laws of California provide that all property acquired by the spouses during marriage, other than by gift, devise, bequest, or descent, is community [3] The courts reason that if damages for personal injuries are acquired during marriage and not in the four prescribed ways, they must be community The logical basis for this rule is that where the earning power of either spouse has been decreased by an injury, then to that extent, the community has been injured. The courts look at the marriage as a matrimonial partnership whereby each spouse contributes to the common benefit of the unit.[4]

DeFuniak points out that when the wife has been injured, both the marital community and the wife as an individual are injured. He reasons.

> "The only logical conclusion, therefore, is that a personal injury to a spouse, or for that matter an injury to reputation, or the like, may give rise to a cause of action in the injured spouse and also in the marital community "[5]

The Legislature in 1951 provided a new section to the California Civil Code which adds new weight to the majority view Section 171c provides:

> " subject to Sections 164 and 169 of this code, the wife has the management, control, and disposition of community property money earned by her or community property money damages received by her for her personal injuries suffered by her, This section shall not be construed as making such money the separate property of the wife, nor as changing the

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[1] Kesler v. Pabst, 43 A.C. 256, 273 P.2d 257 (1954).

[2] Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949), *see* Franklin v Franklin, 71 Cal. App.2d 717, 155 P.2d 637 (1945), which held that the cause of action was not community but the amount recovered would be. The case was disapproved by Zaragosa v Craven, *supra.*

[3] CALIF. CIV. CODE §§ 162, 163, 164.

[4] DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 231 (1943).

[5] *Id.* at 230.

respective interests of the husband and wife in such money, as defined in Section 161a of this code."[6]

This section shows that DeFuniak's view is not gaining much ground.

Logically the statute should be amended to provide two causes of action: one to the injured spouse for pain, suffering, and disfigurement, and the other to the community for future loss of services. It is the person injured whose body suffers the pain for which compensation is made, while the community suffers when that person cannot contribute to the marital partnership.

B. Imputed Contributory Negligence.

The trend of authority in common law jurisdictions is *not* to impute the negligence of one individual to his spouse in suits against third persons.[7] This rule is looked upon with favor in such community property states as Nevada, New Mexico, and Louisiana.[8] California, however, treats the cause of action as well as the damages as community, and holds that contributory negligence of one spouse bars the other. The reason given for arriving at this conclusion is that a failure to impute the negligence of one spouse to the other allows the negligent spouse to profit by his own wrong.[9] New Mexico, Nevada, and Louisiana hold that recovery of damages for personal injuries belong to the person injured.[10] In these states the spouse cannot bar the innocent spouse because the recovery is not considered community property.

As long as California continues to hold to the view that the recovery is community, a negligent spouse will be profiting by his own wrong if recovery by the other is allowed. Because of this California view several questions arise. What is the effect of the rule where the negligent spouse dies in the accident from which the cause of action has arisen? What is the effect if the husband and wife are divorced after the cause of action has arisen? What is the effect, if either before or after the cause of action has arisen, the spouses agree that a recovery for personal injuries by either shall be his or her separate property?

C. Effect of Death and Divorce.

Since the leading California case of *Flores v. Brown*,[11] if the contributorily negligent spouse dies after the cause of action has arisen, the wife may recover for her personal injuries. In that case Mrs. Flores' husband and minor son were killed in an accident by a negligent defendant. The

[6] CALIF. CIV. CODE § 171c.

[7] 42 CALIF. L. REV. 487, 488.

[8] Vitale v. Checker Cab Co., 166 La. 527, 117 So. 579 (1928), Frederickson and Watson Const. Co. v. Boyd, 60 Nev. 117, 102 P.2d 627 (1940), Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952).

[9] Basler v. Sacramento Gas and Elec. Co., 158 Cal. 514, 111 Pac. 530 (1910), Moody v. Southern Pac. Co., 167 Cal. 786, 141 Pac. 388 (1914), 10 Cal.Jur.2d 699, 700.

[10] See note 8 *supra*.

[11] Flores v. Brown, 39 Cal.2d 631, 632, 248 P.2d 922 (1952).

defense contended that Mrs. Flores could not recover for her personal injuries because the husband's negligence was imputable to her. In answer to this the court said.

> "When the husband is dead, not only in the reason for the rule imputing negligence to the 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 profit from his own wrong, surely the former evil may not be balanced by the latter when the latter is no longer present."[12]

From the decision in the *Flores* case it is clear that the Supreme Court of California is in favor of letting the non-negligent spouse recover when there is no possible chance that the husband will be enriched. The result seems just in view of the fact that the defendant has been negligent. No possible benefit can come to the negligent spouse through a recovery by his non-negligent wife.

Where the marriage is dissolved by divorce after the cause of action has arisen, the *Flores* case should be applied. The divorce dissolves the marriage and the husband has no opportunity to profit from his own wrong. Hence, the wife should be allowed to recover.

D. Agreements between the Spouses.

In California, a husband and wife may enter into contracts involving present and future interests.[13] Since *Perkins v Sunset Tel. and Tel. Co.*,[14] a husband may relinquish his interest in a community cause of action for personal injuries either before or after the cause of action arises. It would therefore seem to follow that the imputed negligence rule as between spouses would not apply when the negligent spouse had given up his right to the community recovery There is no possibility of his profiting because all damages would belong to the non-negligent spouse. However, in *Kesler v. Pabst*[15] the court held that even where the husband released his interest, his contributory negligence would still be imputed to his wife. In that case the husband and wife were injured in an auto accident and sued the defendant for personal injuries and property damage. The jury found for the defendant on the ground that Mr. Kesler was contributorily negligent and thus recovery was precluded. Mrs. Kesler on appeal did not contest the finding that her husband was negligent, but maintained that his negligence should not be imputed to her because he had relinquished any right he had to recovery by a release. She argued that the reason for the rule was gone because her husband could no longer be enriched. The District Court of

[12] *Id.* at 632, 248 P.2d at 927

[13] Wren v. Wren, 100 Cal. 276, 34 Pac. 775 (1893), In re Davis, 106 Cal. 453, 39 Pac. 756 (1895), Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15 (1945), see CALIF. CIV. CODE § 158.

[14] Perkins v Sunset Tel. and Tel. Co., 155 Cal. 712, 103 Pac. 190 (1909)

[15] Kesler v. Pabst, 43 A.C. 256, 273 P.2d 257 (1954).

Appeals reversed the lower court's decision and held for Mrs. Kesler by saying:

> "We can see no difference between a situation where because of the death of the husband he no longer has an interest in the recovery and one where by a relinquishment he no longer has such interest. Had the husband prior to the accident relinquished all claim to injuries which his wife might receive should an accident occur, defendant could not raise against her the defense of imputable negligence of the husband. Defendant should not then have the benefit of the defense called a 'windfall' in the Flores case, supra, when at the trial it is found that the husband, so far as interest in the wife's recovery is concerned, is in the same situation he would have been had he made a relinquishment prior to the accident."[16]

The Supreme Court of California reversed the Appellate Court's decision stating:

> "Even if it is assumed that such a relinquishment is effective between the spouses, its execution does not prevent the negligent husband from profiting by his own wrong. By his act of relinquishment Mr. Kesler sought to exercise control over his interest in the community cause of action and give up his rights in the recovery The right to dispose of property, however, constitutes a major interest of the owner therein, and if by the exercise of such right the owner could avoid the effect of his contributory negligence and thus create an enforceable right in his donee that did not theretofore exist, he would in fact profit by his own wrong. Accordingly, the objective of preventing unjust enrichment cannot be accomplished by a voluntary relinquishment of the negligent husband's interest to his wife."[17]

The Supreme Court distinguished the *Flores* case from the *Kesler,* at least theoretically. The difference between the two, in so far as imputing the negligence of the husband to the wife, was that by the voluntary act of relinquishment the husband was considered to have received a benefit, while the involuntary act of death in the *Flores* case resulted in no benefit. This distinction seems artificial. The court in the *Kesler* case seems to have forgotten that the benefit received by the negligent husband must be of such a nature that to receive it would be a greater evil than the defendant's negligence. Assuming the husband does receive a benefit, is it great enough to outweigh the windfall of the defendant? As a practical matter the husband's benefit consists only in receiving an intangible mental satisfaction by giving his share to his wife. Perhaps behind the reasoning of the *Kesler* case was the feeling that even though a formal agreement had been made between the spouses, the husband would eventually receive some of the money which the wife recovered. If we accept the reason the court gives, we reach the conclusion that the court distinguishes the *Flores* case to suit its own purpose. Did not Mr. Flores receive a benefit by having his wife recover for her personal injuries? Assuming the spouses are on agreeable

[16] ——C.A.——, 269 P.2d 651 (1953).
[17] 43 A.C. 258, 259, 273 P.2d 258, 259.

terms, it is a benefit for a husband who knows he is going to die to have his wife compensated for her injuries. We cannot say because he is deceased that he has not been benefited. The benefit is at least equal to the mental satisfaction derived by giving up a cause of action through a formal agreement.

Suppose the relinquishment is made before the accident. Would the court say that the husband was exercising sufficient control to benefit by his own wrong? The wife could argue that he exercised control over the future right at a time when he was not negligent. At the time of the accident the right would be in her. Just what the Supreme Court will do with this problem remains to be seen.

E. Effect of 171c of the California Civil Code.

Section 171c of the California Civil Code was cited in the *Kesler* case by the plaintiff in order to show a legislative intent to give the wife such control over her personal injury money that her husband could not benefit enough to have the imputed negligence rule applied.[18] The court refused to rule on this section as the cause of action arose before the section was passed. In effect, 171c gives the wife management, control, and disposition of community moneys earned by her or received by her for her personal injuries. The husband has control over enough of the recovery to pay expenses incured by reason of the accident. Mrs. Kesler contended, that because of the control over the money which she did not have before section 171c, her husband no longer benefits sufficient to let the defendant escape liability It is doubtful that the Supreme Court would agree. The cause of action is still community in which the husband has a one-half interest.[19] Even though he is not permitted to control the money recovered during his life time, he will get at least one-half of it at her death.[20] Eventually he will take his share and this fact would enable him to profit by his own negligence.

If the wife were allowed to recover under the statute when the husband was negligent, disregarding any agreement, the court would be allowing a greater error than had it sustained the agreement. Under the statute the husband still has a one-half interest and to that extent he benefits. Under the agreement he retains no monetary interest whatsoever and his only benefit is said to be that of relinquishing his right to damages. It would seem that if the court refused to let a spouse profit by exercising an agreement, they would not allow him to profit by retaining a one-half interest in the recovery

From the discussion presented here, agreements between spouses after the accident will be of little value where one of the spouses is contributorily negligent. There is a slight possibility that agreements before the accident would be valid. However, the court may invalidate such agreements if be-

[18] *Id.* at 260, 261, 273 P.2d 259, 260.

[19] CALIF. CIV. CODE §§ 161a, 171c.

hind the reasoning of the *Kesler* case was the feeling that the husband would eventually get part of the recovery; or if the court felt the spouses were trying to get around the contributory negligence of the husband. An agreement executed before the cause of action arose would be executed for the same purposes. The court may reason that a relinquishment before the cause of action is just as much a benefit to the husband because the agreement is of no value to the wife until the cause actually arises. It may reason that the benefit of the control arises when the accident occurs. At this time the husband is negligent and both spouses should be barred under the imputed negligence rule.

[20] CALIF. PROB. CODE § 201.