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The Classification of Personal Injury
Damages Under California
Community Property Law:
Proposals for Application and
Reform

KIRK H. NAKAMURA*

The difficulty in the classification of personal injury awards as separate or community should not be underestimated, for persuasive arguments can be advanced for both categories. When the cause of action arose, when the award is received and what the award represents all are

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1. This is illustrated by the diversity among the community property states in their classification of such awards. Washington stands alone in classifying such damages as all community and not subject to reclassification upon dissolution of the community by construing a statute which defines separate property acquired during marriage as that acquired by "gift, devise or descent" as an all inclusive definition of separate property. WASH. REV. CODE ANN. §26.16.020 (1961); Perez v. Perez, 11 Wash. App. 429, 523 P.2d 455 (1974); Erhardt v. Havens, Inc., 53 Wash.2d 102, 330 P.2d 1010 (1958); Hawkins v. Front St. Cable Ry., 2 Wash. 592, 28 P.1021 (1892). However, in interspousal suits the injured spouse recovers ½ of all earnings and all pain and suffering as separate property. Freehe v. Freehe, 81 Wash. 183, 500 P.2d 771 (1972).


It should be noted that at least in respect to Workers' Compensation Awards, benefits to be
relevant considerations in determining the characterization of the award.

This article provides proposal for the classification of personal injury damages under existing California law by separating such damages into their component parts: lost past earnings, lost earnings capacity (or lost future earnings), and past and future medical expenses and the ele-

received after dissolution on an award during marriage is separate property after dissolution, i.e.


Unlike Washington, Texas was not restrained by a state constitutional provision defining separate property as that "owned or claimed by a wife before marriage" and acquired by "gift, devise or descent," in classifying parts of the personal injury award as separate. In Graham v. Franco, 488 S.W.2d 390 (Tex., 1972), the Texas Supreme Court overruled prior decisions holding that personal injury recoveries were separate property. In so doing the court held that Texas Family Code section 5.01(a)(3), which classified pain and suffering damages as separate and medical expenses, lost earnings and lost earning capacity as community, was consistent with the state constitutional provision. Northern Texas Traction Co. v. Hill, 297 S.W. 778 (Tex. Civ. App. 1927), had previously struck down a similar statute as unconstitutional. The Graham court reconciled the statute and the constitutional provision by interpreting the state constitution as adopting basic principles of Spanish and common law. See also Brazos Valley Harvestore Systems v. Beavers, 535 S.W.2d 797 (Tex. Civ. App. 1976) in which it was held the total amount of long term disability payments a spouse received was community property since it was a vested property right acquired during marriage as part of that spouse's remuneration during marriage. York v. York, 579 S.W.2d 24 (Tex. Civ. App. 1979), suggested that a workers' compensation award could be separated into future lost capacity (separate property) and past lost capacity (community property) on dissolution, indicating reclassification was proper on divorce. It should be noted that at least in respect to personal property classified as community the imputed negligence doctrine is still alive in Texas. Lawrence v. Hardy, 583 S.W.2d 795 (Tex. Civ. App. 1979).

In Louisiana the wife's personal injury recovery is separate and the husband's recovery is community unless the husband was living apart from his wife through her fault. LA. CIV. CODE §2334, 2402 (West 1974). This distinction has been criticized. See Note, Community Property Husband's Personal Injury Award 51 TULANE L. REV. 354, 355 n.11 (1977). However, upon divorce both the lost earnings damages and the pain and suffering damages are apportioned to the husband during the marriage. West v. Ortego, 325 So.2d 242 (La. Sup. Ct. 1975); McLeod v. McLeod, 325 So.2d 883 (La. Ct. App. 1976); London v. Ryan, 349 So.2d 1334 (La. Ct. App. 1977); Hall v. Hall, 349 So.3d 1349 (La. Ct. App. 1977). The Louisiana courts, however, reject reclassification for causes of action which arise prior to marriage. Broussard v. Broussard, 340 So.2d 1309 (La. Sup. Ct. 1976).

ments of pain and suffering, as well as a critical examination of existing law. The proper classification for punitive damages is discussed as well as the propriety of treating awards for pain and suffering damages and punitive damages as a disguised award of attorneys' fees. Finally, the success of California law in achieving the desired results is assessed.

THE CLASSIFICATION OF PERSONAL INJURY AWARDS UNDER CALIFORNIA LAW

Past Law

Prior to 1957, personal injury causes of actions as well as the damages received from such causes of action were community property. Although such causes of action were community, it was recognized that the wife could also bring an action for pain and suffering without joining her husband, who was considered the sole manager of the community property. It was further held that when the wife brought the action separately, the decisions in the first action brought by the husband were binding in the suit brought by the community.

Although personal injury causes of action as well as the damages received from these causes of action were community property, courts created exceptions to this general rule. For example, in Flores v. Brown, husband driver and wife passenger were involved in an auto accident with a tortfeasor. The husband died but was found negligent. The wife sued for the death of her minor son, also a passenger in the car. Although the court admitted wife's recovery would be community property, the court held that since the deceased husband would not profit from the wife's recovery, the recovery was separate and not barred by the husband's negligence. The subsequent case of Kesler v. Pabst severely restricted the Flores exception. In Kesler the negligent husband voluntarily assigned his interest in the wife's cause of action

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One commentator has suggested such a classification by elements is impossible, stating:

No rule can adequately distinguish the personal from the property elements of many items of recovery—For example, punitive damages, damages for loss of consortium or invasion of privacy, or an award for pain and suffering (which may serve as a disguised award of attorney's fees.)


4. Id (citing Sanderson v. Niemann, 17 Cal.2d 563, 110 P.2d 1025 (1941)).

5. Zaragoza v. Craven, 33 Cal. 2d 315, 202 P.2d 73 (1949) (a decision against the husband barred a wife from recovering from her own injuries).


prior to judgment in an attempt to avoid having his negligence imputed to her cause of action. The court held that this assignment by the husband was invalid since the exercise of the right itself constituted a sufficient interest to invoke the imputed negligence defense.

Another exception to the community cause of action and recovery rule was created in *Washington v. Washington,*\(^8\) in which an injured husband's wife sought one half of the personal injury award of an action which arose while the community was intact, but which was received after dissolution of the community. The trial court awarded the wife one half of the damages after deducting the attorney's fees. The California Supreme Court reversed, holding that apportionment was unfair since it was premised on the fact that the community would continue. Further, the court stated a cause of action for personal injury was not assignable until the judgment was final and until that time the divorce court had no jurisdiction to assign the cause of action. The court also stated that the noninjured spouse was adequately protected by an alimony award.

As a reaction to the imputed negligence doctrine as implemented in the case of *McFadden v. Santa Ana, Orange & Tustin Street Railway,*\(^9\) the California Legislature enacted Civil Code section 163.5\(^{10}\) in 1957 designating "all damages, special and general" recovered in a personal injury action as separate. Although the imputed negligence doctrine was effectively eliminated, various other problems arose which made the operation of the statute unfair.\(^{11}\) Professor Reppy writes:

> 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 expenses 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, intervivos gifts, or commingling with community funds. As a result of the 1957 statute, the half interest that had been owned under McFadden by the nonvictim spouse was the sepa-

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11. *See Damages for Personal Injuries to a Married Person as Separate or Community Property CAL. LAW REV. COMM. 1389, 1390 (1967)* in which it was stated:

> This (personal injury damages as separate) can be most unjust, for example, where the parties are divorced after the injured spouse has fully recovered and returned to work, for the damages received for personal injuries are not subject to division on divorce even though such damages represent earnings that would have been subject to division.

It should be noted that the inclusion of phrase "after the injured spouse has recovered and returned to work" implicitly recognized that residual pain and suffering and loss of enjoyment of life is community.
rate property of the victim, and taxed accordingly.\textsuperscript{12}

In 1968, the California Legislature presumably reinstated the old law in enacting Civil Code section 4800(c) which again provided that personal injury damages were community property. Section 4800(c) provided:

... community property personal injury damages shall be assigned (at divorce) to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages, and all other facts of the case, determines that the interests of justice require another disposition. In such case, the community property personal injury damages shall be assigned to the respective parties in such portions as the court determines to be just, excepting that at least one half of such damages shall be assigned to the party who suffered the injuries. As used in this subdivision, "community property personal injury damages" means all money or other property received by a married person as community property in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the settlement of a claim for such damages, unless such money or other property had been commingled with other community property.\textsuperscript{13}

Furthermore, Civil Code section 5126 provided:

(a) All money or other property received by a married person in satisfaction of a judgment for damages for his personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages is the separate property of the injured person if such money or other property is received as follows

(1) After the rendition of a decree of legal separation or a final judgment of dissolution of marriage.

(2) While either spouse, if he or she is the injured person, is living separate from the other spouse.

(3) After the rendition of an interlocutory decree of dissolution of a marriage.

(b) Notwithstanding subdivision (a), if the spouse of the injured person has paid expenses by reason of his spouse's personal injuries from his separate property or from the community property or from the community property subject to his management and control, he is entitled to reimbursement of his separate property or the community property subject to his control and management for such expenses from the separate property received by his spouse under subdivision (a).\textsuperscript{14}

\textsuperscript{12} Reppy, supra note 1, at 1373. This writer finds it strange that the classification of personal injury damages should be in any way determined by tax laws rather than the converse.

\textsuperscript{13} Cal. Stats. 1970, c. 1575, § 2, at 3282 (amending Cal. Civ. Code §4800(c)).

\textsuperscript{14} Id. §5126 (emphasis added).
A problem with this statute, of course, is that the date of receipt of the damages, rather than the date upon which the cause of action arose, is the date by which one determines whether or not the damages inure wholly to the benefit of the separate spouse or is subject to equitable division.\textsuperscript{15}

Perhaps the most significant case in interpreting the 1968 statutes is the 1972 \textit{In re Marriage of Pinto}\textsuperscript{16} decision in which it was held that if one spouse has a cause of action for personal injury damages but has received no money by way of settlement or payment of a judgment, the cause of action must be awarded to the victim spouse upon division and is not community property that can be divided by the court pursuant to section 4800(c).

The result of the \textit{Pinto} decision was the conceptual difficulty in classifying the cause of action because of the court's reluctance to adhere to traditional tracing principles. Moreover, it left the issue of the classification of the cause of action unresolved. Did the \textit{Pinto} case hold that (1) the cause of action was separate property until the receipt of the money when the community was intact when the action was turned into community property by statutory decree (and retains its character as separate property when the parties divorce prior to judgment), or did the case hold that, (2) the cause of action is community property which is changed into separate property on divorce (and retains its character as community property if the parties receive the money when the community is intact)?\textsuperscript{17} The classification of the cause of action has additional importance because a spouse may choose not to pursue a meritorious claim with impunity if it is separate. In any case, the victim spouse could effectively bar the nonvictim spouse from any participation in the award by obtaining a divorce prior to the receipt of damages.\textsuperscript{18}

The subsequent case of \textit{In re Marriage of Jones}\textsuperscript{19} suggested that the damages can again be reclassified upon dissolution and awarded disability pay received subsequent to dissolution solely to the injured spouse under the rationale that such payments were primarily to compensate for lost earning capacity and current suffering.

\textsuperscript{15} Reppy, \textit{supra} note 1, at 1404-1405.
\textsuperscript{16} In re Marriage of Pinto, 28 Cal. App. 3d 86, 104 Cal. Rptr. 371 (1972).
\textsuperscript{17} \textit{Contra} W. REPPY & W. DEFUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 180 (1973) (stating that Pinto presumably made the cause of action separate).
\textsuperscript{18} Professor Reppy aptly pointed out that the statutes did not encourage marital harmony since the victim spouse was encouraged to seek divorce prior to judgment to assure separate ownership of property under California Civil Code section 126(a)(2) rather than to risk an equitable division under Civil Code section 4800(c). Reppy, \textit{supra} note 1.
\textsuperscript{19} 13 Cal.2d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).
Present Law

The 1980 revisions of Civil Code sections 4800 (c) and 5126 presumably remedied the problems under the old law. Civil Code section 4800(c) now provides that:

As used in this subdivision, "community property personal injury damages" means all money or other property received or to be received by a person in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages, if the cause of action for such damages arose during the marriage but is not separate property as defined in Section 5126.\(^\text{20}\)

This section seems to mandate that all damages received from a personal injury damage claim are community if the cause of action arose when the community was intact, regardless of whether they are special damages or damages awarded for physical pain and suffering. It should be noted that in the new section 4800(c) the phrase "as community property" in the definition of "community property personal injury damages" has been deleted. This was a circularity in the definition of "community property personal injury damages" which seemed to leave open the question of whether pain and suffering damages (particularly loss of enjoyment of life) were received "as community property." Now it is clear that the phrase "as community property" previously referred to property not classified as separate under 5126, not the various elements of the damages award.\(^\text{21}\)

Civil Code section 5126 now provides:

(a) All money or other property received or to be received by a person in satisfaction of a judgment for damages for personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages is the separate property of the injured person if the cause of action for such damages arose as follows:

1. After the rendition of a decree of legal separation or a final judgment of dissolution of a marriage.
2. While either spouse, if he or she is the injured person, is living separate from the other spouse.
3. After the rendition of an interlocutory decree of dissolution of a marriage.

This subdivision shall apply retroactively to any case where the prop-

\(^{20}\) CAL. CIV. PROC. CODE §4800(c).

\(^{21}\) It must be emphasized, however, that no case has yet to define the scope of "community property personal injury damages" and it is certainly arguable that certain elements of an award (particularly loss of enjoyment of life or punitive damages) are not encompassed by this code section despite the 1980 clarification.
erty rights of the marriage have not been adjudicated by a decree of
dissolution or separation which has become final.

(b) Notwithstanding subdivision (a), if the spouse of the injured
person has paid expenses by reason of his spouse's personal injuries
from his separate property or from the community property subject
to his management and control, he is entitled to reimbursement of his
separate property or the community property subject to his manage-
ment and control for such expenses from the separate property re-
ceived by his spouse under subdivision (a).

(c) Notwithstanding subdivision (a), if one spouse has a cause of
action against the other spouse which arose during the marriage of the
parties, money or property paid or to be paid by or on behalf of a party
to his or her spouse of that marriage in satisfaction of a judgment for
damages for personal injuries to such spouse or pursuant to an agree-
ment for the settlement or compromise of a claim for such damages is
the separate property of the injured spouse.22

Under the 1980 Civil Code section 5126(a) a claim is separate if the
cause of action arises after dissolution. It now appears the Pinto deci-
sion is no longer of any significance and there is no situation in which
the divorce of the parties will enable the victim spouse to avoid the
equitable distribution of the personal injury award under section
4800(c).

OPERATION OF CALIFORNIA LAW WHERE CAUSE
OF ACTION IS SEPARATE

Under current Civil Code sections 4800(c) and 5126 the cause of ac-
tion is separate when it arises while the community is no longer intact
under section 5126.23 The proceeds from such a cause of action remain
separate property and are immune to community property creditors.24
The victim spouse has sole control over whether to settle or prosecute
the action. Moreover, the imputed negligence doctrine of McFadden
will not defeat nor reduce the damages received by the victim spouse.25

22. CAL. CIV. CODE §5126. Underlining denotes additions and asterisks denote deletions in
1980 statute.

23. The classifications of all personal injury damages as separate while the spouses are living
"separate and apart" in California Civil Code section 5126(a)(2) has been criticized. Bruch, supra
note 2, at 1070. Professor Bruch suggests that the phrase "separate and apart" in section
5126(a)(2) should be applied only if the parties have entered into a relatively permanent separa-
tion. Id. at 1069. See also infra note 27. It should be noted that even under a broad definition of
"separate and apart" the noninjured spouse will still have support rights.

24. It appears that merely living separate and apart under California Civil Code section
5126(a)(1) at the time the cause of action arose will allow the injured spouse to receive the entire

25. See CAL. CIV. CODE §5112. Civil Code section 5112 states in full:
Injuries to married person by third party; extent concurring negligence of spouse al-
lowable as defense.
If a married person is injured by the negligent or wrongful act or omission of a person

980
This result is sound since the cause of action must arise while the couple is cohabiting, 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.

The continued viability of all forms of the imputed contributory negligence doctrine is presently in doubt in California. Although it has been pointed out that the doctrine of imputed negligence has not been abrogated in the joint venture field, Reppy, supra note 1, at 1378 (citing Buckley v. Chadwick, 45 Cal. 2d 183, 190, 288 P.2d at 12, 15-16 (1955) and Coleman v. California Yearly Meeting of Friends Church, 27 Cal. App. 2d 579, 581 P.2d 469, 470 (1978)), the case of Lantis v. Condon, 95 Cal. App. 3d 152, 157 Cal. Rptr. 22 (1979), laid to rest any doubts whether California Civil Code section 5112 would bar any reduction in recovery under comparative negligence.

The doctrine of implied contributory negligence had its birth when an English judge ruled that the negligence of an omnibus driver should be imputed to a passenger in his vehicle so as to bar the passenger’s recovery. Thorogood v. Bryan, 8 C.B. 115, 137 Eng. Rep. 452 (1849). The doctrine survives in a substantially modified form in the Second Restatement:

A plaintiff will not be barred from recovery by the negligence of a third person unless the relation between them is such that the plaintiff would be vicariously liable as a defendant to another who might be injured.

RESTATEMENT (SECOND) OF TORTS §485 (1965).

Some of the irrationality of the original ruling still remains in the Restatement rule and the particular harshness of the Restatement position is demonstrated when the third party is not financially responsible (the effect is the plaintiff is uncompensated and the negligent party goes free, assuming a strict contributory negligence system) and when all the joint tortfeasors are persons with whom the plaintiff would have been vicariously liable (each tortfeasor will impute the negligence of the other tortfeasors so as to bar the plaintiff’s recovery completely, assuming a strict contributory negligence system).

Furthermore, there is no consistency in the application of the imputation of negligence in the two party situation. For example, in Timmons v. Assembly of God Church of Van Nuys, 40 Cal. App. 3d 31, 115 Cal. Rptr. 917 (1974), the appellate court rejected the contention that all of defendant's negligence would be imputed to plaintiff and bar recovery because plaintiff and defendant were joint venturers. The court held that in a controversy between joint venturers the doctrine of imputed negligence does not obtain. Although the imputed negligence doctrine has been described as a rational counterpart of the doctrine of vicarious liability, see e.g., Gregory, Vicarious Responsibility and Contributory Negligence, 41 YALE L.J., 831, 831 (“Vicarious responsibility must work both ways if it works at all”), such argument places emphasis on symmetry when the doctrine of joint and several liability is inherently asymmetric.

California has used the imputed negligence doctrine sparingly and has refused to apply it in several instances. See Herpfeld v. Wadley, 89 Cal. App. 2d 171, 200 P.2d 564 (1948); Walker v. Adamson, 9 Cal. 2d 287, 70 P.2d 914 (1937) (holding a passenger must have joint control over a vehicle for imputed negligence to apply; evidence of joint enterprise not sufficient). The favored policy of compensation as iterated in American Motorcycle Association v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), Li v. Yellow Cab, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) and Lantis, indicates the doctrine of joint and several liability should prevail over the doctrine of comparative negligence. See also Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 496, 147 Cal. Rptr. 262 (1978), in which it was stated:

We analyze the Supreme Court decisions as creating a hierarchy of interests. First in the hierarchy is maximization of recovery to the injured party for the amount of his injury to the extent fault of others has contributed to it. (See Li v. Yellow Cab Co. supra, 13 Cal. 3d 804, eliminating the bar to recovery of contributory negligence, and American Motorcycle Assn. v. Superior Court, supra, 20 Cal.3d 578, retaining the rule of joint liability of concurrent tortfeasors and holding named defendants liable for damage assessable against unnamed persons.) Second is encouragement of settlement of the injured party's claim. (American Motorcycle Assn. v. Superior Court, supra, 20 Cal.3d at pp. 603-604.) Third is the equitable apportionment of liability among the tortfeasors. (Id., 20 Cal.3d at pp. 603-605)

Interestingly, the community property defense is the only imputed negligence doctrine implemented solely on the relationship of the parties and the characterization of the award rather than by the relationship of the parties and the nature of the activity.

It appears to this author that the only situation in California in which the “community property defense” will arguably apply is to the community portion of the recovery when the husband and
munity is dissolved under section 5126 and at that time the victim spouse received no benefits from the community nor was the community legally recognized as an entity. The conclusion follows, therefore, that the negligence of the nonvictim spouse should not be imputed to the community, since there was no community in existence at the time.  

Perhaps the only situations in which section 5126 will operate unfairly are the situations in which a single injured spouse marries, a separated injured spouse is reconciled or a divorced injured spouse remarries. Although one would wish to reclassify the damages received from the previous award for economic loss of wages and future pain and suffering from the date of the marriage, reconciliation or remarriage, the very fact that a reapportionment of these damages was possible would seem to discourage marriage, reconciliation or remarriage on the part of the injured spouse. Section 4800(c) is therefore properly limited to situations in which the cause of action arose during the marriage and not subject to section 5126.

When the Cause of Action is Community

When the cause of action arose while the community was intact, under sections 4800(c) and 5126 the cause of action is community and the proceeds from this cause of action are subject to reclassification under section 4800(c) on dissolution by divorce. The classification of the cause of action as community presents problems in that the noninjured spouse in effect has the power to block any settlement even though the damages received for loss of enjoyment of life should be the separate property of the injured spouse. Further, the fact that classification of the damages received from the cause of action is community allows the nonvictim spouse to will half the proceeds to a third party should that spouse die prior to divorce.

wife are engaged in an activity for the benefit of the community. This analysis focuses on not only relationship of the parties and the characterization of the award but on the nature of the activity and is completely consistent with the Restatement and the California community property liability law. California Civil Code section 5122(b) (enacts a priority system in the satisfaction of debts depending upon whether the spouse was performing an activity for benefit to the community in which case community assets are primarily liable). It should be noted that the statute is consistent with California's broad policy of compensation and in either instance the community is at least potentially at risk. However, in light of the broad language in Lantis, such an argument, however appealing, will probably be rejected.

In Texas the imputed negligence doctrine is still alive in respect to community personal property. Lawrence v. Hardy, 583 S.W.2d 795, 800 (Tex. Civ. App. 1979) but in Nevada the doctrine has been rejected for community personal property damage. Cook v. Faria, 328 P.2d 568 (Nev. 1958).

26. Although there are arguments for reclassification upon marriage, these have usually been rejected. See Broussard v. Broussard, 340 So.2d 1309 (La. Sup. Ct. 1976).

27. Dissolution by death of the injured spouse is governed by statute. If the injured spouse
Apparently, under the 1980 Civil Code all personal injury awards will be classified as community when the cause of action arises while the community is intact. Therefore, all community creditors are entitled to be satisfied from this award, including non-necessity creditors of the uninjured spouse who may be satisfied from pain and suffering damages. The implementation of a priority system would avoid this

dies by reasons other than his injuries received in the tort, the surviving estate is limited only to medical expenses. Cal. Prob. Code §573. If the injured spouse dies by reason of his injuries, recovery is governed by the wrongful death statute. Cal. Civ. Proc. Code §377.

There are major differences between a cause of action for personal injuries and one for wrongful death. In a suit for wrongful death, standing is given to all heirs and although the community was injured (in fact destroyed) by the tort all of the damages (except perhaps predeath medical expenses) are the surviving spouse's separate property and pass outside the will of the deceased. This is inconsistent with the treatment of personal injury damages for causes of action arising during marriage but received after dissolution. Under California Civil Code section 4800(e) such damages are treated as community if the court determines it would be "in the interests of justice" even though the community does not survive until the date of recovery.

Further, unlike the operation of Civil Code section 5126(a)(2), which prevents community recovery in personal injury cases when the spouses are living "separate and apart," it appears an informally separated spouse may recover for wrongful death. See Powers v. Sutherland Auto Stage Co., 190 Cal. 487, 213 P. 494 (1923). The California Supreme Court affirmed a wrongful death award to a widow living separate and apart but not legally separated from her husband. The widow had not received ordered support payments but the Supreme Court held the loss of the right to support allowed a finding of pecuniary loss. The court expressly indicated that nothing could be awarded for nonpecuniary loss. See also Louis v. Cavin, 88 Cal. App. 2d 107, 198 P.2d 563 (1948), in which it was held the loss of the possibility of reconciliation supported a wrongful death award to a spouse separated from the decedent at the time the cause of action arose. Such results have been criticized. See Casenote, Damages—Wrongful Death—Compensation to Wife for Loss of Possibility of Reconciliation After Interlocutory Decree, 22 So. Cal. L. Rev. 478, 480 (1949), which states:

It appears that this decision extends to the jury the opportunity to award speculative damages. . . . opening the door in the future to permit extraction of compensatory damages on a remote possibility. True, the plaintiff suffered a loss by the defendant's wrongful act, namely the possibility of reconciliation with her husband and its attendant benefits, but it is damnum non injuria, a prima facie loss unproven by any amount of certainty.

Although not expressly a basis for the opinion in Powers or Luis, it should be noted that until 1951 the husband's earnings after legal separation or an interlocutory decree of divorce were community. See Jacquemart v. Jacquemart, 125 Cal. App. 2d 122, 269 P.2d 951 (1954). Civil Code section 5118 now provides all earnings while the spouses lived separate and apart are separate property. Furthermore, the rationale behind the allowance of pecuniary losses in Powers was the loss of the right to support. Since 1978 such a right does not exist in respect to post separation earnings (the only relevant income in a wrongful death case) under California Civil Code section 5126 and the precedential value of Powers is reduced.

The sole rationale behind allowing the separated surviving spouse to recover in a wrongful death action is that the tortfeasor deprived the plaintiff of the possibility of reconciliation. As noted above, such reasoning allows juries to award damages on a remote possibility and is totally inconsistent with the treatment of nondeath personal injury recoveries since a plaintiff is barred from any interest in the damages of his or her separated spouse's personal injury recovery under Civil Code section 5126(a)(2) but is allowed to recover once death intervenes. It appears the legislature has made a conscious decision to characterize the earnings subsequent to informal marital separation as separate and such classification should apply to wrongful death causes of action. The disallowance of pecuniary loss in death cases to the plaintiff spouse separated from the decedent is also consistent with the right of the surviving spouse to a family allowance under California Probate Code section 680. Estate of Brooks, 28 Cal. 2d 748, 171 P.2d 724 (1946). But cf. Bruch, supra note 2, at 1071 (advocating the amendment of the nondeath personal injury statutes and repeal of §5126 so as to be consistent with the wrongful death statute).

It is presumed that courts will strictly construe the “separate and apart” provision of section 5126(a)(1) so as to apply only to relatively permanent marriage separations so as to prevent undue harshness in the application of this section.
result. The classification of the cause of action as separate, however, would appear to be as unfair to the community as a community classification would be to the injured spouse. The solution may be to allow the injured spouse to file a declaratory relief action as to his proportion of the entire award prior to the receipt of any damages and otherwise, the cause of action is community. The problem of the community classification of the damages could also be solved by allowing the injured spouse to bring a declaratory relief action. Moreover, the problem of the noninjured spouse bequeathing one half of the proceeds away to a third party could be solved by expanding section 4800(c) to cover dissolution by death of the noninjured spouse as well as divorce.

After divorce, Civil Code section 4800(c) retains the community classification for damages which the court, after considering the economic condition and needs of each party, the time which has elapsed since the recovery of damages, and "all other facts of the case" determines to be "in the interest of justice." If the suggestions of this article are followed this exception encompasses all medical expenses paid by the community, all pain and suffering (mental and physical anguish but not loss of enjoyment of life) to date of divorce and all earnings to date of divorce. It is further arguable that because the statute refers to the economic needs of the spouse first pecuniary losses should be given priority. However, the fact that there is a 50% limit on the amount of the damages a noninjured spouse may recover weakens this argument.

Civil Code section 5126(c) provides for a total separate recovery in interspousal suits. This may work a harsh result then the tort was unintentional, committed by a spouse while working for the benefit of the community, the settlement was satisfied by liability insurance purchased with community funds and if one presumes the marriage will continue. Considering the California court's rejection of the imputed negligence defense, which allows the community to recover de-

28. See infra text accompanying note 64.
29. Ideally, the personal injury cause of action should be properly classified by its elements prior to any reclassification. See infra text accompanying notes 74-75.
30. See infra text accompanying footnotes 33-77.
31. See infra note 64.
32. Although it is arguably that the injured spouse should receive 50% of the award since at worst, the entire award is community, there are situations when implementing the system giving priority to pecuniary losses will end up with a greater percentage of the award to the noninjured spouse. For example, an award of $5,000 with medicals of $5,000 paid by the non-injured spouse with separate property should be entirely the noninjured spouse's while Civil Code section 4800(c) compels a 50-50 split. Curiously, Civil Code section 5126 recognizes that medical expenses are entitled to priority but loss of earnings are not and when the cause of action is the separate property of the injured spouse under Civil Code section 5126 the same result is reached as a priority system and the entire proceeds are the separate property of the non-injured spouse.
spite the negligence of the noninjured spouse, the recognition of part of the award as community (e.g. lost past earnings) would seem to be most proper.

A Rational Scheme Classifying Personal Injury Damages by the Elements of the Recovery

Few courts or legal commentators have provided in depth analysis in attempting to classify personal injury recoveries according to the elements of the recovery. Others have not recognized the superficiality of classifying the several courts damages award as a whole. The result been the classification of the entire personal injury cause of action as separate property or community property on arguments which are only persuasive in respect to a particular element of the recovery. Moreover, there is a decided dearth in the case law providing guidance in what constitutes the “interests of justice” under Civil Code section 4800(c) once it is determined the cause of action is community and dissolution occurs.

Such an analysis follows in hopes of providing guidance in interpreting the existing statutes and to illustrate the shortcomings of the present law.

Special Damages

A. Lost Earnings to Date of Recovery

It is clear that the lost earnings portion of a personal injury award represents lost wages. Therefore, these damages should be classified as community. A problem arises when the community dissolves after the cause of action arises but before the award is received. The loss of earnings award obviously should be apportioned between what the injured spouse would have received when the community was intact (the community portion) and what the injured spouse would have received after the community had dissolved (the separate portion). The prob-

33. For an example of arguments for the classification of pain and suffering as separate and loss of earnings as community see Reppy, supra note 1.
34. For example, the arguments the New Mexico Supreme Court in Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952) found persuasive in classifying the cause of action for personal injuries as separate only appear persuasive in respect to pain and suffering damages. See infra text accompanying notes 46-61.
35. Aside from the economic condition and needs of the parties and the time which elapsed from the date of recovery the court is directed to look at “all other facts” of the case to determine the appropriate classification under Civil Code section 4800(c).
36. The significance of this amount should not be underestimated. If the injury is severe, the loss of earnings are continuing and the divorce occurs shortly after injury the amount may be substantial, especially when considering that in certain areas in California it is not uncommon for personal injury cases to take nearly six years from the date of injury prior to reaching trial because of heavily congested court calendars (one year for statute of limitations imposed by California
problem with this absolutely just classification is that the injured spouse has the incentive to divorce to obtain a larger portion of the lost earnings award as separate property.\(^3\)

There are two possible solutions to the problem of a divorce strictly for the purpose of obtaining a larger separate share for the injured spouse. First, a judicial determination may be made to test the good faith of the injured spouse in bringing the divorce suit. The alternative “solution” would be to classify these damages as inalterably community despite any intervening divorce. There appears to be no persuasive arguments for a total separate classification to these damages.

**B. Medical Expenses**

Insofar as the damages received for medical expenses are used to compensate for expenses already incurred (vis-a-vis future medical expenses) such damages should be classified according to the source of payment of those expenses. If the medical expenses were paid by a collateral source, the characterization of the medical expenses damages should be the same as those funds that were used to pay for the premiums, which presumably would be community.\(^3\)

References:

- Code of Civil Procedure section 340(3) for personal injury actions plus five years under California Code of Civil Procedure section 583(6) to bring the case to trial from the date of filing. Additionally, it is not inconceivable that a case would take eight years or longer to get to trial in cases of postponed accrual of the statute. For example, California Code of Civil Procedure section 340.5 provides a three year outer limit for medical malpractice actions when the plaintiff could not have discovered the injury within one year of filing.

37. An analogous problem was first recognized in Reppy, *supra* note 1, advocating the inalterable classification of the cause of action in separate and community portions depending upon when the cause of action arose rather than when the damages were received. This was apparently the reason for the 1980 amendment of California Civil Code section 4800(c). *See supra* text accompanying notes 3-22.

38. It should be noted that the problem of the greedy divorcing injured spouse would probably be a very rare incident which could only possibly occur in cases which do not settle quickly. There are many incentives for plaintiffs to settle once a reasonable settlement offer is made. Among these reasons are the desire for immediate funds on the part of both the client and the plaintiff attorney as well as statutes which provide for only discretionary low interest rates on an award. CAL. CIV. CODE §3287, United States National Bank v. Waddington, 7 Cal. App. 172, 93 P. 1046 (1907). *But cf.* CAL. CIV. CODE §3291 (effective January 1, 1983) (provides a 10% prejudgment interest rate for that portion of a judgment which exceeds a CCP 998 offer). Furthermore, the duty of good faith and fair dealing imposed by insurance “bad faith” cases under Royal Globe Insurance Company v. Superior Court, 23 Cal. 3d, 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979), and its progeny provide incentives for insurance companies to extend prompt reasonable offers when liability is reasonably clear and the defendant is insured.

38. *See also* Brunn, *California Personal Injury Damage Awards to Married Persons* 13 UCLA L. REV. 587, 591 (1966). *But cf.* Comment, *Reclassification of Tort Recovered by Spouses—Possible Effects of Graham v. Franco, 4 TEX. TECH. L. REV. 359 (1973). This comment suggested that medical expenses should be classified as community since the nature of the obligation is fixed. Such recovery, however, would still be subject to the right of restitution for separate funds used to pay for such expenses. This reasoning is sound and is particularly persuasive when the award for medical expense award is insufficient to compensate the spouse who uses separate property to pay for medical expenses. Civil Code section 5126(b) provides for the reimbursement of separate property or community property used for medical expenses subject to the noninjured spouse’s control prior to the classifi-
Insofar as the award represents future expenses, this portion should be classified as community since the community would be obligated to pay for such expenses. Assuming that this obligation ceases upon termination of the community, such damages should be reclassified as separate property on dissolution.39

LOST EARNINGS CAPACITY VS. LOST FUTURE EARNINGS: A CHOICE IN ANALYSIS

An award for lost earning capacity is usually considered identical to an award for lost future earnings. Indeed, each is a function of the other, although in some cases the terms have not been considered synonymous.40 It should be noted, however, that the characterization of the recovery award may strictly depend upon whether the award is viewed as one for lost earnings capacity vis-à-vis lost future earnings.

A. The Lost Earnings Capacity Analysis

If we view these damages as a loss of earning capacity the arguments for a separate classification are compelling. Since the spouse brought a certain amount of earning capacity into the marriage, the recovery for the damage to the spouse’s earning capacity should be separate. An argument may be made that the loss of earning capacity of the injured spouse occurred prior to marriage and the increase, if any, of the earning capacity after marriage. However, the fact that the community has no interest in a spouse’s education seems to weaken this argument.41

39. It could be persuasively argued that if future medical expenses of the injured spouse are considered in determining whether this award will be entirely separate under California Civil Code section 4800(c), they should not be considered in determining support obligations. See Washington v. Washington, 47 Cal. 2d 249, 302 P.2d 567 (1956), in which the court awarded all of personal injury damages to the injured spouse and stated the noninjured spouse was adequately protected by the award of alimony.

40. See 18 ALR.3d 88 (citing McIver v. Gloria, 140 Tex. 556, 169 S.W.2d 710 (1943)). The court stated the amount of the plaintiff’s previous earnings must ordinarily be shown to recover for lost earning capacity. But cf. DOBBS, REMEDIES §8.1, at 541 (1976) (citing McLaughlin v. Chicago, M. & S. P. & R. Ry., 31 Wis. 2d 378, 143 N.W.2d 32 (1966)). The plaintiff, who was a priest and had taken a vow of poverty and in no event would earn or retain a salary, was allowed to recover for his lost earning capacity objectively measured by the market value of the plaintiff’s time.

41. Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969). (spouse’s law practice was a community asset but not the spouse’s education); see also In Re marriage of Aufmuth 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979). But cf. In Re Marriage of Sullivan 127 Cal. App. 3d 656,
B. The Lost Future Earnings Analysis

It is strange that the mere changing of the label of the damages called "lost earnings capacity" to "lost future earnings" results in a totally different analysis. When these damages are viewed as compensation for earnings in the future vis-à-vis an earnings capacity brought to the marriage, the community argument becomes more persuasive, especially if the damages are received when the community is intact.

If the damages are received when the community has dissolved, these damages clearly should be separate. However, several problems arise with the separate classification. First is the previously mentioned problem of the injured spouse obtaining a divorce prior to receipt of the damages to assure a separate classification of this award. Second is the problem that occurs when the spouses reconcile or remarry: since the injured spouse was able to receive virtually all his future wages in a lump sum, the second community is cheated out of what the injured spouse would have contributed during the existence of the second community. Third, since the cause of action is presumably community, a settling tortfeasor probably would not settle unless both spouses agree to the settlement, and, the injured spouse could try to delay the receipt of the damages until the community had dissolved.

If the damages are received when the community is intact these damages clearly should be community. Upon a divorce subsequent to the receipt of the award, however, a persuasive argument may be made that this award should be apportioned between the portion of the award that compensated for earnings lost while the community was intact and the portion of the award that compensated for earnings lost after the divorce. Again, in such an instance the good faith intent of the injured spouse must be tested.

C. Capacity or Future Earnings—Which Analysis?

Since these damages may be classified either as separate or community, depending upon whether they are viewed as future earnings or lost earnings capacity, there remains the difficult determination of which analysis to use. Because of the varying times at which a personal injury award may be received and how this affects the proportions of

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43. The first problem is solved by testing the bona fides of the divorce; the second problem is solved by reclassifying the damages on remarriage (however, an injured spouse has an incentive not to remarry in such a situation); the third problem probably is not extremely significant given the reasons in footnote 2.
separate and community property under the lost capacity analysis, these damages should be classified as community subject to reclassification on dissolution by good faith divorce, that is, viewed as loss of future earnings vis-à-vis capacity. For example, if such damages were classified as separate under the loss of earning capacity argument, the time of receipt illogically would have tremendous importance in determining the classification; the longer the noninjured spouse could delay the receipt of the damages, the greater the recovery in the case of continuing lost wages. Furthermore, the cause of action may settle quickly and result in a larger separate recovery in one instance while the identical cause of action may be subject to a long, protracted court struggle which results in a much smaller separate recovery if the earning capacity analysis is used. There seems little logic in such variations in proportion to separate to community merely because of the date the damages award is received. The loss earnings damages should be classified as community until a good faith divorce occurs and at that time the award should be apportioned. 44

PAIN AND SUFFERING

Various arguments have been presented for the classification of physical injury awards as separate property. 45 Since the pain and suffering portion of the award for personal injuries usually constitutes most of the personal injury award, these arguments are discussed in this section.

Many legal commentators and courts have stated that pain and suffering damages should be considered separate property since such damages can be traced to property owned by the injured spouse prior to the marriage, that spouse's body. The Supreme Court of New Mexico illustrated this argument:

Under the majority doctrine (personal injury damages are community property), if the wife were riding a horse she had brought to the marriage and some driver of a motor vehicle negligently struck her and the horse, throwing both into a wire fence, breaking the leg of each and also disfiguring them, *the cause of action for the damage to

44. Another problem with the classification of these future earnings damages as community is that the award presumes the community will be intact for the entire period in the future when earnings were to be received. If the couple would have divorced a year after the injury even if the injury did not occur, a total community classification would appear to be unjust. If we are to assume that one of the policies behind no fault divorce laws is that one spouse may sever the community with the selfish motive of changing the classification of his or her future income to separate property, the argument for a separate classification appears stronger. See California Civil Code section 4801(a), which states fault shall play no part in determining an award for permanent support. A solution to this problem may be to allow the trier of fact to make the difficult, if not impossible, determination of when the community would have dissolved in the future.

45. See supra note 2 (particularly the recent decisions in Texas, Louisiana and New Mexico).
the horse would belong to the wife, but that for the injury to her would belong to the community and the husband would receive one half of the proceeds of a judgment.\textsuperscript{46}

Similarly, Orrin K. McMurray, former Dean of the College of Jurisprudence, University of California stated, "... in truth, the doctrine is absurd (classification of personal injury damages as community), and aside from some judicial dicta, can find no support. 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."\textsuperscript{47}

However, it is unsound to draw analogies to personal property. For example, it has been implied that the case in which an artificial leg, which was the separate property of the spouse, is severed, is virtually indistinguishable from the situation when the spouse's real leg is severed and, therefore, pain and suffering damages are separate.\textsuperscript{48} The reasoning is appealing but not compelling. First, this analysis fails to recognize that the community maintained that limb and second, if we are to apply strict tracing principles to the loss of limb situation there is a strong argument for apportionment since cells are usually quickly replaced and the most recent replacement cells are directly traceable to a community source, food bought by community funds.\textsuperscript{49}

It has been argued that since the damages for pain and suffering can be traced to the right of personal security which one held prior to marriage, personal injury damages should be separate. For example, one Texas commentator states:

Aside from its other weighty arguments, the point made by the court in concluding sentence quoted, \textit{viz}, the right of personal security, which said right the wife brings to the marriage has compulsion which cannot be successfully withstood. It places the emphasis where it belongs, i.e., upon the right of the wife to personal security. It is this right which has been injured and \textit{all} that follows is incidental to it. It is this right which she brought to the marriage and it continues to be hers as a person. It is this right which she is seeking to vindicate.\textsuperscript{50}

In McKay, \textit{Community Property}, the author states that the cause of action for personal injuries takes its character from the primary right—the right to personal security, which right is individual—and cannot be

\textsuperscript{46} Soto v. Vandeventer, 245 P.2d 826, 832 (N.M. 1952) (Emphasis added).
\textsuperscript{47} McMurray, Comment, \textit{Statute of Limitations; Marriage as Disability: Right of Wife to Sue Alone for Personal Injuries}, 2 \textit{CALIF. L. REV.} 161, 162 (1914).
\textsuperscript{48} Reppy & Defuniak, \textit{supra} note 17, at 129.
\textsuperscript{49} Such an argument could reach extreme complexity. For example, what portion of the limb is to be apportioned to the "design" of the limb, the DNA, which obviously is separate property?
\textsuperscript{50} Greer, \textit{The Texas Death Act}, 26 \textit{TEX. L. REV.} 461, 483 (1947) (Emphasis added).
However, what is the basis to distinguish the right to personal security that one brought to the marriage from the right to personal wages that one brought to the marriage? Why is one capable of community ownership and another is not? This writer can find no compelling reasons for this distinction.\(^5\)

**Classification of Pain and Suffering Damages by Division of These Damages into Mental and Physical Anguish and Loss of Enjoyment of Life**

There are two basic elements for the award of pain and suffering damages: mental and physical anguish and loss of enjoyment of life.

**A. Mental and Physical Anguish**

There is really no precise legal or even medical conception of pain.\(^5\) Damages for mental and physical anguish are not compensation in any ordinary sense in that they make the plaintiff whole or replace what has been lost, since the damages are not pecuniary and there is no market in pain and suffering by which the damages could be estimated.\(^5\) This demonstrates that it is useless to justify classifying these damages as separate by tracing back to the body the injured spouse brought to the marriage, because pain and suffering damages are not for compensation; they are for the very term the label indicates: past and future pain and suffering. Although the analogy is imperfect, physical pain and suffering can be viewed as earnings resulting from involuntary labor. This may be illustrated by the example in which a spouse is drafted into the military service; the “pain and suffering” inures to the benefit of the community in the form of wages.\(^5\) It should be noted that treat-

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51. G. McKay, **Community Property** §378 (2nd Ed. 1925).
52. However, when pain and suffering damages are separated into anguish and loss of enjoyment of life these arguments are compelling in classifying loss of enjoyment of life as separate property. See infra text accompanying notes 53-61.
54. See James, *Damages in Accident Cases*, 41 CONN. L.Q. 582 (1956).

Except for gifts clearly made to the marital community, community property only consists of that which is acquired in exchange of community property (which, of course, was acquired itself by onerous title, again with the exception as to the gift). It must be plainly evident that a right of action for injuries to person, reputation, property or the like, or the compensation received thereof, is not property acquired by onerous title. The
ing these damages as wages does not compel a community classification for the entire award; this would assume all the pain and suffering occurred when the community was intact. If damages were treated as wages the same problems of apportioning the damages between the pain and suffering when the community was intact and the pain and suffering when the community was not intact arise as in the classification of lost earnings. When there are no residual injuries and all the pain and suffering occurred while the community was intact a total community classification for these damages appears proper. However, when there are severe residual injuries on the part of the injured spouse such damages should be apportioned on good faith dissolution.

B. Loss of Enjoyment of Life

Loss of enjoyment of life has been recognized as a separate item of pain and suffering damages in California, which is the modern trend. The usual case when loss of enjoyment of life is awarded involves the plaintiff's inability to engage in a particular activity that the plaintiff engaged in prior to the injury. The distinction between loss of enjoyment of life and mental and physical anguish is not as difficult as it may superficially appear. In as much as the award represents mental and physical anguish, vis-à-vis the enjoyment of life lost as a result of the anguish, these damages should be considered community property. The damages received for loss of enjoyment of life should be separate since the injured spouse brought a certain amount of capacity to enjoy life to the marriage. Some arguments for apportionment can be made for the amount the injured spouse "enjoyed" life more because of the marriage but such instances would not be common. Furthermore, the arguments raised for the classification of pain and suffering damages as

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Id. Reppy, supra note 1, at 1377 (calling such a position "bizarre.").

56. This reasoning is implicitly approved in cases holding that per diem arguments, which focus on the pain and suffering over long periods of time, are proper. Beagle v. Vasold, 65 Cal. 2d 166, 417 P.2d 673, 53 Cal. Rptr. 129 (1966).

57. The court in In Re Marriage of Jones, 13 Cal. 3d 457, 462, 531 P.2d 420, 119 Cal. Rptr. 109, 111 (1975), implicitly adopted this reasoning stating:

So long as the marriage subsists, the veteran's reduced earnings works a loss to the community. But such community loss does not continue after dissolution; at that point the earnings or accumulations of each party are the separate property of such party. (Civ. Code, Section 5119). Then any diminution in earning capacity becomes the separate loss of the disabled spouse.


59. Id. at 549.

60. For example, if a large amount of the award was to compensate the injured spouse for the loss of the ability to play the guitar and the spouse learned to play the guitar during the marriage the argument for a community classification or most of the award can be made.
separate, because these damages can be traced to the right of personal security, are compelling when used to justify the classification of loss of enjoyment of life as separate. These damages may be traced to a specific capacity that the spouse brought to the marriage, which is recognized as a distinct portion of a personal injury recovery, rather than a nebulous "right"—the capacity to enjoy life.

Specific examples will illustrate the fairness of this classification:

1. Injured spouse has his arm severed by tortfeasor's defective chainsaw. There is no residual pain and no loss of earnings. Only a small part of the damages award will be community: the pain on the severance of the arm and the pain incurred while it healed. The remainder of the award will be separate.

2. Injured spouse has his arm mutilated by tortfeasor. There is no residual pain and no lost earnings. Only the pain of the initial mutilation and recovery will be community property.

3. Injured spouse has whiplash in a rear-end accident and is fully recovered in 3 months. There was no limitation in activities. All the award is community.61

**Pain and Suffering Damages as Compensation for Attorneys' Fees**

Commentators have suggested that pain and suffering damages are in reality a means of financing contingent fee litigation, since without them the fee would come out of the medical expenses of the client and even a successful lawsuit may fail to compensate the plaintiff.62 If this assumption is made and if the personal injury case was handled under a contingent fee arrangement, it would appear proper to use the amount awarded for pain and suffering to compensate the attorney before using the amount awarded for other damages. For example, if the total damage award was $100,000, $70,000 of which were for pain and suffering and $30,000 of which were for lost earnings (assuming no punitive damages awarded), and there was a 50% contingent fee arrangement (so that the client’s net recovery is $50,000), the entire $50,000 used to compensate the attorney would come out of the pain and suffering award with no reduction in the lost earnings award. Therefore, of the $50,000 going to the client, $30,000 would be lost

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61. In contrast, the result under the 1963-1979 California law was that the entire recovery was separate.

62. Dobbs, supra note 40, states at page 550-51,

The pain and suffering damages, in other words, are simply a means of financing the contingent fee litigation, since without them the fee would come out of the medical expenses of the client and even a successful lawsuit would fail to compensate him.
earnings and $20,000 would be awarded for pain and suffering.\(^6\) Insofar as one is to assume pecuniary losses (including attorneys' fees) are entitled to a higher priority than compensation for nonpecuniary losses (pain and suffering), this result is compelled. If the attorneys' fees were paid on a noncontingent basis the fees should be first paid from the pain and suffering portion of the award. If the damages for pain and suffering exceed the attorneys' fees it is probably fair to have the pecuniary award (loss of earnings and medical expenses) share the expense pro rata. Pecuniary losses could be given even greater priority by assuming any reduction in the award because of comparative fault to be general damages.\(^6\)

Although there is some merit in the argument that pecuniary losses should be given priority over nonpecuniary losses, damages for pain and suffering should be given equal priority with pecuniary losses until the legislature decides otherwise. Although this reasoning may deprive the noninjured spouse of separate property used to pay for medical expenses, giving pecuniary losses priority may leave the injured spouse with no compensation for his or her pain and suffering and loss of enjoyment of life. Further, this analysis appears to undermine the integrity of the jury system because the award the jury so carefully made to compensate for pain and suffering is actually being used to compensate the attorney. If, in reality, pain and suffering damages are for compensating the attorney, the method of calculating general damages should

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6. Interestingly, by increasing the community portion in this manner community creditors are benefited.

6. This is illustrated by the following example: The award for the spouse's personal injuries are $30,000 for lost past earnings, $15,000 for lost future earnings (or earning capacity), $5,000 for past medical expenses and $50,000 for pain and suffering (mental and physical anguish and loss of enjoyment of life). The 50% comparative negligence of the injured spouse had reduced the award to the above figures, i.e., the jury found $60,000 in lost past earnings, $30,000 for lost future earnings prior to the 50% reduction for comparative negligence. The net $100,000 judgment should be declared to be comprised of the following amounts: $60,000 recovered for lost past earnings, $30,000 recovered for lost future earnings, and $10,000 recovered for lost past medical expenses and classified accordingly. There is no recovery for pain and suffering.

The preference for pecuniary damages could be further extended to include punitive damages recovered in the portion of the damages not entitled to preference and attorney's fees as an "element" of the award to be characterized as pecuniary loss and therefore entitled to preference. For example, taking the damages in the above example with an additional $200,000 in punitive damages recovered and attorney's fees of $50,000 the assessed 50% comparative fault gives a net recovery of $200,000 comprised of the following amounts: lost earnings $60,000; lost future earnings $30,000; medical expenses $10,000; $50,000 attorney's fees; the remaining $50,000 is pain and suffering (mental and physical anguish and loss of enjoyment of life) and split in proportion of the award for mental and physical anguish vis-a-vis loss of enjoyment of life.

The effect of this system is that nonpecuniary damages are treated similarly to low priority creditors in the bankruptcy situation. It may be argued that punitive damages do not deserve the lowest priority in the situation in which there was specific intent on the part of the defendant to injure the spouse since this would dilute the deterrence rationale behind the award of these damages. If one assumes that the monetary impact is enough a deterrence to the offender (and should be, since punitive damages are adjusted to the offender's ability to pay) this consideration is probably not sufficient to accord punitive damages a higher priority.
be changed to allow the jury to take this into consideration when determining the award. Since this has not been done, it appears that pain and suffering damages should be entitled to equal status to special damages and not considered as attorneys' fees. To do otherwise works a post-award deception upon the jury.\(^6\)

**PUNITIVE DAMAGES**

Punitive damages frequently are awarded attendant to personal injury awards and it is unclear whether such recoveries will be classified as personal injury damages and subject to the classification rules of Civil Code sections 4800(c) and 5126. With such awards reaching into millions of dollars, the need for classification of these damages is clear. This section discussed the arguments for categorizing punitive damages under various classifications.

**A. Separate Property Arguments**

Generally, punitive damages have been recognized as constituting a windfall to the plaintiff.\(^6\) In this sense, the punitive damages award may be viewed as a gift and is the separate property of the injured spouse. Although the award cannot be considered a gift from the defendant, the award may be considered a gift from society to the plaintiff. The argument can be made that the award is a two step process: first, the offenders pay society for offending its moral principles (much like a fine)\(^6\) and second, society awards a "gift" in the amount of the fine to the plaintiff. The problem with considering the award of punitive damages as a gift is that there is no clear expression on behalf of the jury as to whether the award was intended to benefit the community of the injured spouse or the injured spouse individually. It is safe to assume, however, that the award was intended to benefit the injured spouse individually since it was the rights of that spouse that were violated.

It could further be argued that the deterrence purpose of punitive damages is better served by a separate classification. Potential offenders will be shown that intentional injury, probably the most frequent basis for punitive damages, is likely to put the injured spouse in a better

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\(^6\) Another argument against using the reduction in comparative negligence to reduce the pain and suffering (including loss of enjoyment of life) award is that if the negligence occurred during a community activity for the benefit of the community the separate property of the victim spouse (loss of enjoyment of life) should not be used to "pay" for the negligence. See infra note 66.

\(^6\) See Dobbs, supra note 40, at 219.

\(^6\) But see Weatherbee v. United Insurance Company, 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971) in which the court held a punitive damage award was not a fine.
financial position than he was before. This argument is particularly compelling when there was specific intent on the part of the defendant to harm the injured spouse and not the community as a whole.

**B. Community Property Arguments**

Punitive damages may be viewed as a bounty for bringing the action against a wrongdoing defendant, and are therefore wages to the plaintiff spouse and must be classified accordingly. This argument appears to have particular force in the area in which there is a need for an incentive for plaintiffs to bring suit, for example, antitrust cases.

A further argument is that since technically these damages are neither acquired by onerous title nor by lucrative title, the community property presumption prevails and they are community.

The assumptions which lead to a separate classification, i.e., an intent to specifically injure the injured spouse, are equally applicable to a community classification. That is, when there is no specific intent to injure the spouse individually, it can as easily be assumed the jury intended to benefit the community as a whole, rather than the spouse individually. Therefore, such damages should be classified as community rather than separate except in cases in which there was specific intent to injure the damaged spouse.

**C. Punitive Damages as a Disguised Award of Attorneys' Fees**

It has been suggested that apart from the deterrence rationale, punitive damages, like pain and suffering damages, are compensation for

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68. California Civil Code section 3294 is the statutory authority for punitive damages in California. Section 3294(a) states as follows:

In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

California courts are becoming increasingly receptive to punitive damage claims even when there is no specific intent to injure. See Nolan v. National Convenience Stores, Inc., 95 Cal. App. 3d 279, 157 Cal. Rptr. 32 (1979) (conscious disregard of rights of others constitutes sufficient malice to support award of punitive damages); G.D. Searle & Co. v. Superior Ct., 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1973) (evil motive the central element of "malice" which justifies punitive damages); Taylor v. Superior Ct., 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (voluntary consumption of alcohol to point of intoxication and subsequent operation of motor vehicle is sufficient evidence of conscious disregard of rights of others to constitute "malice"). However, such damages are still disfavored and the requirement of specificity in pleading facts supporting such damages remains, especially in fraud actions. Cyrus v. Hazen, 63 Cal. App.3d 306, 133 Cal. Rptr. 246 (1976); Brousseau v. Jarrett 73 Cal. App. 3d 864, 141 Cal. Rptr. 200 (1977); G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

69. DOBBS, supra note 40, at 550 (citing numerous articles which call for the elimination of pain and suffering damages, of which he states Jaffe's probably as being the most influential). Jaffe, Damages for Personal Injuries: The Impact of Insurance, 18 LAW AND CONTEMP. PROB. 219 (1953).

70. This is similar to the reasoning in note 56.
attorneys' fees. The most common criticism of both punitive damages and pain and suffering damages is that they do not compensate pecuniary losses. The problems of classifying pain and suffering damages have been discussed previously, however, there appears to be no good reason for the punitive damages award not to be used for the compensation of attorneys' fees. Unlike the classification of pain and suffering as attorneys' fees, the classification of pain and suffering damages as attorneys' fees would not work a deception upon the jury since these damages are not compensation in any sense of the word and are a windfall. Therefore, punitive damages should be used to compensate the attorney and if there is any punitive damage award over the attorneys' fees, the excess should be community unless there was specific intent on the part of the tortfeasor to injure the individual spouse.

PRACTICAL DIFFICULTIES OF CLASSIFYING PERSONAL INJURY AWARDS BY ELEMENTS

As discussed in the above sections, a personal injury award may be classified into both separate and community portions by its elements:

Past Medical Expenses—community or separate (according to source of payment).

Future Medical Expenses—community (until good faith divorce and termination of obligation to pay such expenses.)

Lost Past Earnings—community (assuming cause of action arises while community intact and subject to reclassification on good faith divorce)

Lost Future Earnings/Lost Earnings Capacity—community

Pain and Suffering (mental and physical anguish)—community (subject to reclassification if anguish is continuing on divorce).

Pain and Suffering (loss of enjoyment of life)—separate

Punitive Damages—initially used to compensate for attorneys' fees and excess is community except when specific intent to injure damaged spouse.

There are three dates upon which a personal injury award may be classified. First, the date the cause of action arises, second, the date the award is received, and third, the date of dissolution. The difficulty in

71. DOBBS, supra note 40, at 203, 220.


73. It should be noted that the classifications assume that there has been no intervening good faith divorce between the date the cause of action arose and the date damages are received.

74. The argument may be made that any marriage, remarriage or reconciliation date may logically be a date for reclassification. However, to allow reclassification of personal injury dam-
attempting to classify these damages in this fashion is that it is rarely known what part of the damages award represent the various elements of the award, that is, past earnings, future earnings. Juries almost invariably give lump sum awards. Even if a jury could separate damages awards into separate elements, the time and effort involved in making these determinations may not be worth the administrative effort, particularly in very small awards. Further, specific classification of the award is yet another determination a jury must agree upon and therefore lengthens the already difficult time consuming deliberation process for the jurors. Moreover, most personal injury cases are settled prior to reaching trial and the apportionment must either be made in a subsequent court determination or by the plaintiff's attorney.\(^7^5\)

When there is a large award, a determination should be made regarding what part of the award constitutes loss of enjoyment of life. That portion of the award would be given to the injured spouse as his separate property immediately after the award is made if that spouse so desires. The law should further provide that the injured spouse can prosecute his cause of action for loss of enjoyment of life in a separate lawsuit.\(^7^6\) Another solution may be to allow the injured spouse to obtain a declaration of the respective rights of the spouse and have the court apportion what percentage of the upcoming award or settlement would constitute loss of enjoyment. The tortfeasor could then settle with the injured spouse and could offset this amount from anything that is awarded in the subsequent action.\(^7^7\)

**Conclusion**

The 1980 provisions of the Civil Code sections 4800(c) and 5126 give a more rational system of classifying personal injury awards by referring to the date the cause of action arose, rather than to the date of receipt of these damages. Section 5126 provides an equitable reclassification of the community cause of action upon divorce.

However, the amendments also removed some of the ambiguities in the sections which could have been used by imaginative courts to classify damages on such dates would also discourage the injured spouse from marrying, remarrying or reconciling. Louisiana rejects marriage as a potential reclassification date for damages received from a cause of action arising prior to marriage. See Broussard v. Broussard, 340 So.2d 1309 (La. Sup. Ct. 1976).

\(^7^5\) This would appear to involve ethical problems for the plaintiff attorney representing two adverse parties. Such an agreement would have impact on creditor's rights but probably would be binding if not clearly fraudulent.


\(^7^7\) This is similar to California Code of Civil Procedure section 877 (a) which allows a non-settling judgment debtor to offset any judgment by the prior settlements of other joint tortfeasors.
ify the various parts of the personal injury award appropriately at the receipt of the award. Unless the courts boldly adopt a narrow definition of the phrase "personal injury damages" in 4800(c) and 5126 which does not include loss of enjoyment of life and provide means for the injured spouse to prosecute and recover such damages as separate property the Civil Code sections will fail to provide any remedy short of, or prior to, dissolution to allow an injured spouse that portion of the personal injury award that is undeniably his for such damages. Until dissolution such damages will remain community property subject both to joint management and control as well as community property creditors. Also the very fact that reclassification of an award received as community to separate property is possible would appear to be an incentive for the injured spouse to obtain a divorce. The code sections further fail to cover the situation of dissolution by death of the noninjured spouse and presumably one half of the proceeds from the community property award may be willed away at the noninjured spouse's death. The code further appears to be inconsistent in providing for reimbursement of medical expenses when the cause of action is separate and such damages are paid from community funds or the separate property of the noninjured spouse while making no such analogous provision when the cause of action is community. Finally, the classification of all the damages in interspousals suits as separate would appear to be unjust and inconsistent with the rejection of the imputed negligence defense in certain instances.