The Slip and Fall of the California Legislature in the Classification of Personal Injury Damages at Divorce and Death

Helen Y Chang
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Introduction

With the adoption of the 1849 Constitution, California affirmed its continuation of Spanish-Mexican community property principles and expressly rejected the common law of dower and curtesy. The community property system is distinguished from the common law in its retention of separate property interests for property acquired before marriage, property acquired by gifts, and in the concept of equal shared ownership for property acquired during the marriage. Today, California is one of nine community property states but stands alone in its classification and treatment of personal injury damages. The other eight community property states

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2 The Act of April 17, 1850, Calif Stats 1849-50, c. 103, p. 254.

3 “The two pertinent distinguishing characteristics of the community property tradition remain, first, the retention of individual ownership rights by each spouse and, second, both spouses’ shared title in property acquired during marriage. Two forms of property existed: (1) the separate assets of each spouse, acquired before marriage, or during marriage by gift or inheritance; and (2) community property, acquired during marriage, usually involving the exchange of effort or other consideration traceable to and arising out of the time of the marriage.” Michael Diehl, The Trust in Marital Law: Divisibility of a Beneficiary Spouse’s Interests on Divorce, 64 Texas L.Rev. 1301, 1310-11 (1986).

4 The other eight community property states are: Arizona, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin. The community property system is distinguished from the traditional common law in its concept of a shared economic marital unit in which both spouses equally own the marital property.

classify personal injury damages according to the replacement purpose of each component part. For example, compensation for earnings lost during the marriage is classified as community property but compensation for lost earnings after divorce or death is classified as the separate property of the injured spouse. California is the only state that rejects this replacement analysis and instead follows a unitary approach classifying personal injury damages in toto. Personal injury monies are treated as either community property or separate property depending on: (1) when the cause of action arose; and, (2) if the parties divorce. The California statute is silent as to the classification and disposition of such monies at death and are classified as community property by default.

This article addresses the various problems that arise from this convoluted scheme of classification and treatment. By classifying all of the personal injury proceeds as community property during marriage, the California legislature failed to consider the nature of personal injury damages as replacement compensation for both economic damages such as past lost wages, future lost wages, lost earning capacity, medical expenses, as well as non-economic damages of pain and suffering. These component parts could readily be allocated for classification. Instead, the monies are classified as community property in toto during marriage and are awarded to the injured spouse at divorce absent proof that “justice” requires an alternate disposition. The California statute provides an ambiguous standard as to when “justice requires an alternative disposition of the proceeds at dissolution” leaving the court with broad discretion over the division of such monies at divorce and leaving little predictability for spouses.

Although the California Family Code specifies the classification of personal injury damages during marriage, and directs its disposition at divorce, the Family Code fails to provide a specific classification or distribution upon death. Thus, personal injury damages have been treated as community property at death as within California’s general community


6 Family Code Section 2603(b) provides that at dissolution, personal injury damages are assigned to the injured spouse unless the interests of justice require otherwise, but upon such a determination, at least one-half of the damages shall be so assigned.
property definition. The classification of personal injury damages at death has a significant effect on estate tax liability and on a spouse’s testamentary control over such monies. Part I of this article details the California experience in its classification of personal injury damages including an overview of California’s no-fault divorce reform, California’s haphazard piecemeal development of community property laws, and the problems with the current statute classifying personal injury damages as community property during marriage but assigning those damages to the injured spouse at divorce unless the interests of justice require an alternate disposition. Part II discusses the treatment and classification of personal injury damages in the other eight community property states along with a brief historical explanation of each state’s community property origins. Part III concludes that the California statute should be amended to classify personal injury damages according to a replacement analysis for division at both divorce and death.

I. California’s Historical Treatment of Personal Injury Damages

The California legislature’s treatment of personal injury awards for purposes of classification as either community or separate property has historically been inconsistent. Until 1957, California classified personal injury awards as community property. Since separate property was defined as property owned before marriage or that acquired by gift, bequest, devise, or descent, personal injury damages fell into the category of “all other property acquired after marriage” and were therefore, classified as community property. Such awards were also deemed more “property” than “personal” and thus, within the general community property presumption. Although California’s community property classification of such personal injury monies conformed with the other community property states, the

7 California community property is defined as: “... all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in [California].” California Family Code, Section 760. In California, the proper legal term for termination of a marriage is “dissolution” but is used interchangeably with “divorce” throughout this article.
8 W. DeFuniak & M. Vaughn, PRINCIPLES OF COMMUNITY PROPERTY, Section 83.1 (2d ed. 1971)
10 See, Zaragosa v. Craven, 33 Cal. 2d 315 (1949).
classification was not necessarily well grounded. Professor De Funiak commented that:

The frequently evident dissatisfaction with, the frequently inadequate reasons given for the doctrine that compensation for personal injuries to a spouse is community property lie in an incomplete understanding of the true principles of community property.

* * *

Except for gifts clearly made to the marital community, community property only consists of that which is acquired in exchange for 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 therefore, is not property acquired by onerous title. The labor and industry of the spouses did not bring it into being.\(^{11}\)

The distinction between assets acquired by onerous title which are community property, versus those acquired by lucrative title which are separate property, is a remnant of the Spanish community property system.\(^{12}\) The Spanish community property system was first codified in the Fuero Juzgo of 693 A.D. which became the general law of Spain superseding the prior laws of the Romans and the Goths.\(^ {13}\) Spain retained the Visigoth’s community property system in its recognition that property acquired through either spouse’s labor was equally owned by both spouses.\(^ {14}\) This distinction

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\(^{11}\) 1 William Q. De Funiak, Principles of Community Property Section 82, at 225 (1943).
\(^{13}\) “The Fuero Juzgo became the general law of Spain and superseded all prior systems by which Romans or Goths had been previously governed, and notwithstanding the changes attending various revolutions this Visigothic code retains its influence to-day, and still governs wherever the Spanish civil law has found a lodgment.” Richard a. Ballinger, A Treatise on the Property Rights of Husband and Wife Under the Community or Ganancial System § 1 (1895).
\(^{14}\) “Although the community system originated with the Visigoths, the American community system is based on Spanish community property law. Under the Spanish system, the characterization of property as community included all income or gains acquired due to the labor or industry of either spouse during marriage. The consequence of this rule provides each spouse with a vested one-half interest in all that was acquired,
between onerous title and lucrative title still exists in California’s definition of community property: property acquired by donative transfers are not community property and are classified as the separate property of the donee spouse.\textsuperscript{15} Although a personal injury recovery is not necessarily the product of a spouse’s labor, such a recovery is neither the result of a donative transfer and not readily deemed lucrative title.

Moreover, the classification of such monies as community property created problems when one spouse suffered an injury caused by the negligence of both a third party and the injured party’s spouse since classification of the recovery as community property could permit the negligent spouse to profit from the tort.\textsuperscript{16} California corrected this problem through the doctrine of imputed negligence\textsuperscript{17} by barring any recovery to the tortfeasor spouse.\textsuperscript{18} However, the doctrine of imputed negligence was resoundingly criticized as putting a spouse in a worse position than a friend or acquaintance by committing a real injustice – denying an innocent person recovery because of the wrong of another.\textsuperscript{19}

The classification of personal injury recoveries as wholly community also created complications of division at divorce and death. Under California’s Probate Code, each spouse has testamentary control over one-

\begin{footnotes}
\footnotetext{15}{Separate property of a married person includes all of the following: (1) All property owned by the person before marriage. (2) All property acquired by the person after marriage by gift, bequest, devise, or descent. (3) The rents, issues, and profits of the property described in this section.” California Family Code Section 770(a).}
\footnotetext{16}{The rule precluding recovery by the community of damages for a wife’s injury when the husband is guilty of contributory negligence is based on the doctrine of the law’s aversion to unjust enrichment. Novo v. Hotel Del Rio, 141 Cal. App. 2d 304 (1956).}
\footnotetext{17}{The doctrine of imputed negligence derived from the common law notion of a husband and wife as one legal entity. Each spouse’s negligence was chargeable against the other, so that any concurrent contributory negligence by one spouse barred the other from any recovery.}
\footnotetext{18}{In 1968, California abolished the doctrine of contributory imputed negligence. See, Stats. 1968, ch. 457, Section 6; Lantis v. Condon, 95 Cal. App. 3d 152, 155 (1979).}
\footnotetext{19}{See, Brunn, supra note 9 at 588.}
\end{footnotes}
half of each community property asset. At death, the non-injured spouse could testamentarily dispose of one-half of the personal injury award to a beneficiary other than the injured spouse, effectively reducing the funds available for the injured spouse’s future medical and economic needs. At divorce, California mandates an equal division of the community property which would result in a loss of one-half of the personal injury monies for the injured spouse.

Over time, all of the community states eventually rejected the community property classification of personal injury recoveries and re-examined the nature of these monies. In 1957, the California legislature joined this trend and re-classified personal injury recoveries as the separate property of the injured spouse. One of the primary objectives of the re-classification was to abolish the doctrine of imputed negligence between spouses. However, the change in classification of personal injury damages as entirely the separate property of the injured spouse was also not without consequences. Although this change in classification recognized the “personal” nature of the award, it failed to take into account the “property” aspect. For example, since earnings during marriage are classified as community property, compensation paid for lost wages during marriage should be classified as community property. The classification of personal injury monies as separate property also meant that the injured spouse retained sole testamentary control over those monies under the California Probate Code which could deprive the surviving spouse of a substantial asset and possibly, the sole means of support.

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20 California Probate Code, Section 100: “Upon death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent.” See also, California Probate Code Section 6101.


22 Civil Code, Section 163.5 provided that “all damages, special and general” were classified as the separate property of the injured spouse.

23 Brunn, supra note 9 at 604: “Section 163.5 was designed to abolish a rule deemed unjust – the imputation of negligence between spouses.” (citing Estate of Simoni, 220 Cal. App. 2d 339, 343, 33 Cal. Rptr. 845, 848 (1963).

24 If the personal injury damages are classified as the separate property of the injured spouse, that spouse can bequeath all of those monies to someone other than the surviving spouse at death. Probate Code Section 6101. If these monies are the only source of income for the surviving spouse, s/he may be without a means of financial support.
the change in classification as “formalistic” and “creat[ing] more problems than it solves.”  

Recognizing the shortfalls of classifying personal injury proceeds as separate property, the California legislature revised the law in 1968 following a study and recommendation by the California Law Revision Committee. Current law reflects the 1968 change which attempted to effect a compromise solution to the prior classification problems. Personal injury awards are now classified as community property if the cause of action arose during marriage. At dissolution, the monies are treated as separate property and awarded to the injured spouse, unless the interests of justice require otherwise, but the injured spouse always receives at least one-half of the personal injury monies. The primary objective of the statute is to provide a source of financial income for the injured spouse notwithstanding the needs of the non-injured spouse. The statute is designed

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25 Brunn, supra note 9 at 605.
27 “Except as provided in Section 781 and subject to the rules of allocation set forth in Section 2603, money and other property received or to be received by a married 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 community property if the cause of action for the damages arose during the marriage.” California Family Code, Section 780.
28 California Family Code, Section 2603 provides:
“(a) Community estate personal injury damages” as used in this section means all money or other property received or to be received by a person in satisfaction of a judgment for damages for the person in satisfaction of a judgment for damages for the person’s personal injuries or pursuant to an agreement for the settlement or compromise of a claim for the damages, if the cause of action for the damages arose during the marriage but is not the separate property as described in Section 781, unless the money or other property has been commingled with other assets of the community estate.
(b) Community estate personal injury damages shall be assigned 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 or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such a case, the community estate personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of the damages shall be assigned to the party who suffered the injuries.”
to assure that personal injury damages are treated as separate property upon
dissolution.  

Although the California legislature attempted to improve its prior
classifications of personal injury recoveries, the current scheme remains
flawed. Section 2603 is silent as to the classification of the personal injury
monies upon the death of one of the spouses. If the personal injury award is
the separate property of the injured spouse at death, she can bequeath it all to
a beneficiary of her choice to the exclusion of the non-injured spouse. If the
personal injury award is the sole or major asset of the couple, the surviving
non-injured spouse may be without any other financial means. On the other
hand, if the personal injury award is classified as community property, and
the non-injured spouse dies, he can bequeath his one-half interest to a
beneficiary of his choice to the exclusion of the injured spouse. The injured
spouse may need the funds to pay for medical expenses and living expenses.
Either scenario results in an untenable and potentially unfair situation and,
certainly not one that the California legislature intended.

A. No-Fault Divorce and The Principle of Equality

California is long overdue for a change in its treatment of personal
injury damages for community property purposes. The current statute was
enacted in 1968 – two years prior to the 1970 enactment of “no-fault”
divorce in California. California was the leader in what has been called the
“no-fault divorce revolution”. Within five years after California paved the
path for no-fault divorce, most states provided for some form of no-fault
divorce. Today, all states provide for some form of no-fault divorce.
Under this no-fault system either spouse, without the consent of the other, can obtain a divorce by asserting that irreconcilable differences or an irretrievable breakdown has caused the irremediable breakdown of the marriage.  

The onset of the no-fault divorce revolution was the product of changing social attitudes in the 20th century and the declining role of religion in the modern marriage. With an emphasis on individual autonomy, the rise of the women’s movement, heightened protection for family privacy, and the sexual revolution, fault-based divorce quickly became an antiquated notion in the 1960’s.

The no-fault movement in family law was also the result of modern developments in tort law. Legal reforms in workers’ compensation laws, extensions of strict liability for certain ultra-hazardous activities, and automobile no-fault insurance, are all examples of the imposition of legal liability without fault. No-fault divorce was particularly well-suited in California since it was in harmony with California’s principle of equality and rule of equal division of community property at divorce. Fault had no relevance in the divorce proceeding since the law generally mandated an (Consol. 2000). See also, J. Herbie Di Fonzo and Ruth C. Stern, Addicted to Fault: Why Divorce Reform Has Lagged in New York, 27 Pace L. Rev. 559 (2007) (“The conundrum remains: why does New York, alone in the United States, retain an overwhelmingly fault-driven divorce law?”).

34 See, Swisher, supra note 32. See also, Lenore Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America at xv (1985).
37 “The respective interests of the husband and wife in community property during the continuance of the marriage relation are present, existing, and equal interests.” California Family Code, Section 751. At divorce, the court is mandated to equally divide the community property absent an agreement to the contrary or other legal exception. See, California Family Code Section 2550. See also, In re Marriage of Juck, 21 Cal. App. 3d 421 (1971): “The fundamental objective of the legislature with respect to the disposition of community property upon dissolution of a marriage under the Family Law Act was to provide for an equal division thereof as an additional way of advancing its primary no-fault philosophy. The ideal is clearly a mathematically equal division.”
equal division of the community property. The removal of fault as a factor in the division of the marital property has been blamed for the feminization of poverty, the high divorce rate, negative psychological consequences for children, and declining morals.

The combination of a pure or only no-fault divorce system and the equal division rule has led some to conclude that the California experience with no-fault divorce cannot be applied to the majority of other states which are mixed-fault systems – permitting a divorce on fault or no-fault grounds. And while the advent of no-fault divorce heralded a departure from the traditional fault bases for divorce, the change continued California’s disorganized and haphazard evolution of family law jurisprudence. No-fault divorce was welcomed as a fresh and modern approach to marriage and divorce but was implemented without a complete overhaul of the pre-existing rules on the classification of property. One such example is the classification and treatment of personal injury damages.

38 “[N]o-fault divorce laws have been accompanied by increased rates of divorce and significant inequities in the economic consequences of divorce, often referred to as the “feminization of poverty.” Lynn D. Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 Brigham Young Univ. L. Rev. 79, 79 (1991).
39 See, Lynn D. Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 BYU L. Rev. 79, 116-119 ([I]t is apparent that the significant rise in the divorce rate in the United States did not begin until the no-fault divorce reform movement was well-underway.”)
40 Dana Milbank, No-Fault Divorce Law is Assailed in Michigan, and Debate Heats Up, Wall St. J., Jan. 5, 1996, A1, A6, stating that David Popenoe, a sociologist at Rutgers University claims that children of divorce are at a much greater risk of dropping out of school, becoming delinquents, having children out-of-wedlock, or becoming divorced themselves.
41 Milton C. Regan Jr., Market Discourse and Moral Neutrality in Divorce Law, 1994 Utah L. Rev. 605, 607 ([In both the legal and popular imagination… no-fault divorce tends to be associated with a decline in the use of moral discourse in family law.”])
43 Traditional fault grounds necessary to obtain a divorce were: adultery, cruelty, desertion, habitual drunkenness, and criminal conviction. See, Butler, supra note 36 at 166.
44 “[T]he law has developed in a haphazard and unsatisfactory fashion.” Donald C. Knutsen, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240, 243 (1965-66).
The presumptions and classification rules have been applied mechanically, without proper regard to the nature of the particular controversy or the relationship of the particular parties involved. The courts have reasoned from classification to result, and the Legislature, not pleased with the result, has passed corrective legislation directed solely at the immediate problem. Such sporadic and piecemeal development has not only created inconsistencies, but has led to the adoption of classification rules that are not compatible with the basic concepts of the community property system. The California experience with classification of personal injury damages provides a rather dramatic example. (citations omitted).45

The award of personal injury damages to the injured spouse at divorce is considered an exception to California’s rule of equal division,46 and despite the option of a replacement analysis for such damages, the California legislature persisted with its unitary approach and ignored prior commentary suggesting a replacement analysis. Prior to the enactment of the current statute, the California State Bar made two recommendations that personal injury damages be apportioned between community property and separate property estates.47 Perhaps more significantly, apportionment of personal injury damages was considered by the California Supreme Court fifty years ago. In the 1949 case of Zaragosa v. Craven,48 Justice Carter criticized the

45 Id at 243-44.
46 “Former Civil Code 4800, subd. (c ) (see now Family Code Sections 63, 780, 2550, et seq.) (providing for the assigning of community property personal injury damages in marriage dissolution proceedings to the party who suffered the injuries unless the interests of justice require another disposition, represents an exception to the otherwise strict rule that community property must be divided equally.” In re Marriage of Saslow, 40 Cal. 3d 848 (1985).
47 In 1955, the California State Bar proposed that “compensatory damages for pain, suffering and disfigurement and temporary and future disability suffered by a married person ... be [the] separate property of injured spouse.” 30 Cal. St. B.J. 490, 499 (1955). In 1959, the State Bar proposed that “special damages recovered as reimbursement for expenditures made out of community funds are community property but that there shall be no imputation of negligence between husband and wife due to the community nature of such special damages.” 35 Cal. St. B.J. 66, 75 (1960).
48 Zaragosa, supra note 10 at 322-24 (Carter, J., dissenting).
“pigeon-holing”\textsuperscript{49} community property classification of personal injury in his dissent:

“But when we are faced with an injury to the human body we then follow the law blindly, letter for letter, and declare that this money, given to compensate for pain, suffering and disfigurement, does not come to the particular spouse by “gift, bequest, devise, or descent,” so therefore it must be community! After all, what else could it be?”\textsuperscript{50}

Justice Carter continued to argue for an apportionment of personal injury damages in at least two later California Supreme Court opinions,\textsuperscript{51} but his position was never adopted by a majority of the California court. In fact, in the Washington decision, Justice Traynor, while writing for the majority, acknowledged the apportionment rule as perhaps “justified” but then rejected it: “A rule permitting apportionment of the damages as suggested, however, has never been adopted in this state, and in the absence thereof, treating the entire cause of action as community property protects the community interest in the elements that clearly belong to it.”\textsuperscript{52} Justice Traynor’s ‘protection’ of the community estate however, comes at the price of excluding those portions of a personal injury award, such as pain and suffering, that more appropriately belong to the separate property estate.

B. Problems with the Current California Law

Although the California judiciary and the California legislature had opportunities to apportion personal injury damages and adopt a replacement analysis for personal injury awards, both failed to do so, leading to three significant problems in the present statute: (1) judicial interpretation as to when a cause of action arises under Section 5126 is in contrast to the accrual of a cause of action for limitations periods; (2) the standards for division at divorce leave the judiciary with too much discretion; and, (3) the statute is silent as to the classification of personal injury awards at death with potentially disastrous estate tax consequences.

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\textsuperscript{49} Id. \\
\textsuperscript{50} Id. \\
\textsuperscript{52} Washington, supra at 253.
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1. The Cause of Action ‘Arises’ Per Family Code Section 2603

In California, community property is generally defined as all property acquired during marriage except that acquired by gift, bequest, devise, or descent.\(^{53}\) By complement, separate property is defined as all property acquired before marriage, property acquired by gift, bequest, devise, or descent, and property acquired after separation.\(^{54}\) Thus, three distinct time periods emerge as critical to classification: (1) before marriage; (2) during marriage; and, (3) after separation.\(^{55}\)

Section 2603 of the Family Code provides that 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 the person’s personal injuries… if the cause of action for the damages arose during marriage….”\(^{56}\) A first consideration in the classification of a personal injury award at divorce is whether the “cause of action arose during marriage.” For purposes of classification, a personal injury award is “acquired” when it arises. When a personal injury cause of action arises has been interpreted as a separate and distinct date from the accrual of a cause of action.\(^{57}\) Although the court’s interpretation is reasonably consistent with California’s date of acquisition rule for classification, that interpretation is at odds with the understanding of when a cause of action accrues for purposes of the statute of limitations; the seemingly simple statutory language is a potential trap for the unwary.

\(^{53}\) California Family Code Section 760.
\(^{54}\) California Family Code Section 770.
\(^{55}\) The date of separation can be a critical fact in determining the classification of property at divorce. Family Code Section 771 provides that: “The earnings and accumulations of a spouse…while living separate and apart are the separate property of the spouse.” California courts have interpreted the standard of “living separate and apart” as that “condition where the spouses have come to a parting of the ways with no present intention of resuming marital relations, but also, more importantly, conduct evidencing a complete and final break in the marital relationship.” In re Marriage von der Nuell, 23 Cal. App. 4th 730, 736 (1994).
\(^{56}\) California Family Code Section 2603(a).
\(^{57}\) See, Klug v. Klug, 130 Cal. App. 4th 1389 (2005) [distinguishing between when a legal malpractice arises versus accrues].
California courts have long recognized that a property claim\textsuperscript{58} arises for purposes of classification when the right to the interest vests. For example, in a will contest action, the California court concluded that the cause of action arose when the decedent died: “[H]is right to contest the will was cast upon him immediately upon the death of his son…”\textsuperscript{59} Since the claimant was not married at that time, the settlement monies received after marriage were properly classified as the separate property of the claimant.\textsuperscript{60} This approach has also been used in the classification of employment benefits. “Pension rights, whether or not vested, represent a property interest; to the extent that such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding.”\textsuperscript{61} Thus, the classification of employment termination benefits depends first, upon whether the right to such benefits arose during marriage even if the actual benefits were paid after separation or divorce.\textsuperscript{62}

The date of acquisition as determining classification is consistent with an essential California community property principle known as “the source rule.” In the landmark decision of George v. Ransom,\textsuperscript{63} the California Supreme Court departed from the traditional Spanish principles of community property and held that the rents and profits from separate property remain separate property, even if such monies are received during marriage.\textsuperscript{64} Thus, rents, income, profits, and dividends retain the same

\textsuperscript{58} A cause of action to recover money damages, as well as the money recovered is a chose in action and therefore a form of personal property. Vick v. Dacorsi, 110 Cal. App. 4\textsuperscript{th} 206, 212, fn. 35 (2003).

\textsuperscript{59} In re Estate of Clark, 94 Cal. App. 453, 459 (1928).

\textsuperscript{60} “This right was a right vested in him prior to his marriage, and therefore was his separate property.” Ibid at 460.

\textsuperscript{61} In re Marriage of Brown, 15 Cal. 3d 838, 842 (1976).

\textsuperscript{62} In re Marriage of Frahm, 45 Cal. App. 4\textsuperscript{th} 536 (1996). Notably, the Frahm court rejected a replacement analysis for termination employment benefits that other appellate courts had utilized to characterize such benefits: “The past services or future compensation test is inapt for determining the character of the benefit, and looking to its purpose is equally unavailing. Both focus on the wrong question; that which motivates an employer to offer an incentive is an irrelevant consideration because “[t]he schemes are designed for business purposes and may not have as their main concern community property issues.” Id at 543, citing In re Marriage of Gram, 25 Cal. App. 4\textsuperscript{th} 859 (1994).

\textsuperscript{63} George v. Ransom, 15 Cal. 322 (1860).

\textsuperscript{64} See, WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 160-74 (2d ed. 1971).
character as their “source”. Not all of the other community property states are in accordance with California’s source rule.65

The acquisition date has also been utilized to determine the classification of attorneys’ fees and title to real property acquired through adverse possession;66 classification was determined after all the elements for adverse possession were satisfied not when title was judicially quieted. For accounts receivable67 and attorneys’ fees owed but not yet paid at the time of divorce, California courts have held that such fees are community property to the extent that the fees were earned during marriage even if received after separation or divorce.68 Likewise, contingent attorneys’ fees earned while single but received after marriage were classified as separate property since the fees were earned, and therefore “acquired” prior to marriage.69 These cases are also consistent with California’s Family Code which provides that earnings during separation are classified as separate property.70 In all of these examples, the date of acquisition controls the classification of the asset.

The date of acquisition can be tricky in the context of a personal injury cause of action that contains several elements which do not necessarily occur simultaneously. In the case of Klug, the husband and wife retained the services of attorney Christensen to create a limited partnership to protect the couple’s assets from possible litigation from the husband’s

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66 See, Siddall v. Haight, 132 Cal. 320 (1901) [adverse possession elements satisfied before marriage but title quieted thereafter].
70 “[California Family Code] Section 760 states the basic rule that all property acquired during marriage is community property unless it comes within a specified exception. The major exceptions to the basic community property rule are those relating to separate property. See, e.g., Sections 130 (“separate property” defined in Section 760 et seq.), 770 (separate property of married person), 771 (earnings and accumulations while living separate and apart)… .” Law Revision Commission Comments, West's Ann.Cal.Fam.Code § 760.
medical practice. After the parties separated, the husband transferred various community assets out of the country and into accounts under his sole control with the assistance of attorney Christensen. Following the divorce, the wife filed a legal malpractice action against the attorney which eventually settled for $346,000. The husband claimed that the award was community property which the wife disputed. The trial court framed the critical issue as: “Did the cause of action arise during marriage or post-separation? Did the cause of action arise by the mere drafting of the estate planning documents or when they were acted upon in derogation of Mrs. Klug’s rights?” The trial court then concluded that the wife’s legal malpractice action “accrued” after the parties had separated and therefore, classified the settlement monies as her separate property.

Despite the trial court’s erroneous reference to the accrual date for the wife’s legal malpractice claim, the Court of Appeals affirmed the decision, finding that the error was harmless since the cause of action arose after the date of separation. The court addressed the difference between the date of accrual versus the date a cause of action arises. Because the underlying policy considerations for statutes of limitations are distinct and different from causes of action as defined by substantive law, the date a cause of action accrues for purposes of the statute of limitations is “irrelevant” to the question of when a cause of action arises for purposes of classification in the family law context. “The legislative goal underlying limitations statutes is to require diligent prosecution of known claims so that legal affairs can have their necessary and finality and predictability and so that claims can be resolved while evidence remains reasonably available and fresh.” The court explained that a cause of action ordinarily accrues upon the occurrence of the last element essential to the cause of action but, for policy reasons, the legislature may postpone accrual until the date of discovery.

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71 Klug, supra note 57 at 1394.
72 Id at 1395.
73 Id at 1393.
74 Id.
75 Id at 1399.
76 Id (citing, Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 756 (1998)
77 Id at 1399-1400.
property, a cause of action arises when all of the elements have been established regardless of the date of discovery.\textsuperscript{78}

The distinction between the accrual date and the date a cause of action arises is subtle and not readily apparent from the statutory language classifying personal injury damages. The lack of harmony between the general civil law understanding of the date of accrual and the family law interpretation of the date a cause of action arises is a glaring example of the piecemeal development of California family law jurisprudence.

2. Division of Personal Injury Damages at Divorce

Although personal injury damages are classified as community property if the cause of action arose during marriage, such monies are assigned to the injured spouse at divorce unless the interests of justice require otherwise however, the injured spouse will always receive at least one-half of such monies.\textsuperscript{79} Section 2603(b) states that the court should take “into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case” when deciding the amount to be awarded. The award of personal injury damages at divorce is considered an exception to the general rule of equal division of community property at divorce, and therefore, the court may not offset the award with other property to effect a numerical equal division between the spouses.\textsuperscript{80}

Although the statutory language is necessarily broad to allow for judicial flexibility, this same language is also vague, lacks specific standards, and has the potential to lead to anomalous results. The scant number of California appellate cases addressing the award of personal injury damages at divorce reflects the uncertainty of the discretionary rule. In all five of those reported cases, the personal injury damages were awarded in toto to the injured spouse.\textsuperscript{81} In Morris v. Morris\textsuperscript{82}, the wife received over

\textsuperscript{78} Id.
\textsuperscript{79} Family Code Section 2603(b)
\textsuperscript{81} In re Marriage of Jacobson, 161 Cal. App. 3d 465 (1984) (medical malpractice damages all awarded to wife as the injured spouse); Devlin v. Devlin, 138 Cal. App. 3d 804 (1982) (personal injury damages from auto accident all awarded to injured husband); In re Marriage of Mason, 93 Cal. App. 3d 215 (1979) (personal injury damages held in trust all
$42,000 for personal injuries she suffered from a runaway horse. At divorce, the husband sought a portion of the settlement award and in the alternative, an offsetting of other property to equalize the property division. The California Court of Appeals affirmed the entire award to the wife finding that the husband had failed to meet his burden of proving that the interests of justice required an alternate disposition. The court went on to pronounce that the husband’s burden was a showing of “exceptional circumstances” to warrant any award of the personal injury damages to him. “The statute is designed to assure that other than in exceptional circumstances, community property personal injury damages, or the bulk thereof, will be awarded to the injured spouse… .”

The judicial interpretation of the statute creates a significant hurdle at divorce: the non-injured spouse bears the burden of proving that “exceptional” circumstances exist warranting any award of the personal injury damages to him or her. Surely, if the legislature had intended for such a high showing of “exceptional” circumstances, that language would have been included in the statute. Instead, the legislature merely provided

83 Id at 825.
84 Id at 824.
85 “Husband’s contention that the court failed to consider the factors suggested by the statute and to determine that the interests of justice required a disposition other than assignment of the settlement proceeds to wife is devoid of merit. There is nothing in the record to which our attention has been directed suggesting that the court failed to consider all of the circumstances, and no abuse of discretion in assigning all of the settlement proceeds to wife has been demonstrated.” Id at 825.
86 Id at 827.
87 Apparently, “exceptional circumstances” must be established before the court can consider whether to award any of the personal injury damages to the non-injured spouse. See, Timothy R. Ault, Problems With “Community Estate Personal Injury Damages” And Their Allocation in California Divorce Proceedings, 11 J. Contemp. Legal Issues 303. (“The quoted phrase, however, is not a test the court must use in deciding how to allocate the award in the first instance; instead, it is part of the statutory test the court must use before “assigning” any part of the award to the noninjured party, or to the community.”).
for an exception to the otherwise general rule that personal injury damages be awarded to the injured spouse at divorce.\textsuperscript{88}

Since the non-injured spouse apparently bears the burden of proving that “exceptional” circumstances exist warranting any award of the personal injury damages, and given the court’s inclination to award such monies in their entirety to the injured spouse, the non-injured savvy spouse may pursue two rather unpleasant options to realize an interest in such monies: (1) irretrievably commingle the personal injury damages with other community property assets so they cannot be distinguished at divorce; \textsuperscript{89} or, (2) spend the personal injury monies before divorce. Either option defeats the primary purpose of the statute which is to provide financial security for the injured spouse and is a trap for the unwary injured spouse who may be particularly vulnerable following a personal injury.

3. The Classification of Personal Injury Damages at Death

The classification and treatment of personal injury damages has been the subject of much academic, judicial, and legislative discussion over the years culminating in the enactment of Family Code Section 2603 in 1968.\textsuperscript{90} Despite the academic discourse, the California legislature failed to specify the classification of such damages at death; the current statute is silent. In toto classification as either community property or separate property presents problems regarding estate taxes and testamentary disposition.

\textsuperscript{88} Family Code, Section 2603(b).
\textsuperscript{89} The definition of “community estate personal injury damages” specifically excludes personal injury damages that have been commingled with other community property assets. See California Family Code, Section 2603(a), note 22. “Commingling” as used in the statute “refers to the mixture of community property personal injury damages with other community property into one undistinguishable, amorphous mass.” Devlin, supra note 81 at 810.
\textsuperscript{90} Since 1968, the California legislature has made a few minor amendments to the statute. For example, in prior to 1979, the statute defined community personal injury damages as monies actually received during the marriage. See, In re Marriage of Pinto, 28 Cal. App. 3d 86 (1972) (holding that an unliquidated claim or cause of action for personal injury damages did not constitute “community property personal injury damages” within the statute.) The statute was amended in 1979 to include sums “received or to be received” for personal injuries. Jackson, supra note 81 at 483, fn.5(1989).
Classification at death has a critical impact on the spouses’ estate planning and inheritance taxes under state and federal law.⁹¹ A decedent’s estate includes all property owned on the date of death, including the decedent’s one-half interest in any community property.⁹² For decedents in 2008, no federal estate taxes are owed for taxable estates less than $2 million.⁹³ For persons who die in 2009, the applicable exclusion increases so that no federal estate taxes are owed for taxable estates less than $3.5 million.⁹⁴ The federal estate tax is repealed for the year 2010, but is set to return in the year 2011.⁹⁵

Although estate taxes may not be a serious concern for those with smaller estates, estate taxes impact a number of Americans, including those who reside in community property states. Since the value of a decedent’s estate affects the amount of potential estate tax liability, the classification of property as community and therefore, owned in part by a decedent spouse is an important estate planning consideration. The California Family Code details the classification and distribution of personal injury damages at divorce, but fails to make any mention of the classification of such damages at death.⁹⁶

A personal injury recovery can be the single most valuable asset in a marital estate. The ultimate allocation or characterization of

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⁹¹ An extensive discussion of the current estate tax system is beyond the scope of this article.
⁹² Internal Revenue Code Section 2033: “The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.” 26 U.S.C.A. Section 2033. Various deductions are allowed to calculate a decedent’s net taxable estate. See, 26 U.S.C.A. 2053, et seq.
⁹³ Internal Revenue Code Section 2010.
⁹⁴ Id.
⁹⁵ Internal Revenue Code Section 2210. See also, Tye J. Klooster, Repeal of the Death Tax? Shoving Aside the Rhetoric to Determine the Consequences of the Economic Growth and Tax Reconciliation Act of 2001, 51 Drake L. Rev. 633, 648 [“One of the most important aspects of the 2001 Tax Act that is not widely known, publicized or reported is that the 2001 Tax Act ‘sunsets’ in 2011. Section 901 is a ‘sunset provision,’ which repeals all the provisions of the 2001 Tax Act after December 31, 2010. In short, this means that if Congress fails to take action, everything will return to the levels of 2002, or a $1 million applicable exclusion amount and a fifty percent top marginal tax rate.”] (citations omitted).
⁹⁶ Family Code Section 2603.
that recovery can have far-reaching and potentially devastating results. Simply put, characterization of a tort recovery is an issue which comes to the forefront each time a marriage ends in death or divorce while a fair amount of the proceeds remain intact.\footnote{George, supra note 21 at 589-90.}

The impact of classification on a decedent’s estate tax liability can be illustrated in the hypothetical case of a decedent Dan and his widow Wendy. Dan sustained serious personal injuries that were ultimately fatal when he was electrocuted because of a negligently installed wire at his workplace. Dan sued the tortfeasor and recovered a $3 million personal injury settlement. Dan dies in the year 2009. His taxable estate includes his one-half interest in their family home valued at $1 million, a $1 million life insurance policy and the personal injury settlement. If the personal injury award is classified as community property, then Dan’s gross taxable estate includes only one-half of the settlement, bringing the total of his estate to $3.5 million within the federal applicable exclusion, and not subject to estate taxation. If the personal injury award is classified in its entirety as Dan’s separate property, the entire award is included in Dan’s gross taxable estate, bringing the total value to $5 million, in excess of the federal applicable exclusion, and subject to estate taxation.\footnote{This simple hypothetical assumes no deductions in calculating Dan’s net taxable estate. One such deduction is the unlimited “marital deduction” which provides that certain transfers of assets from a decedent to a surviving spouse may be deducted from the decedent’s gross estate. See, Internal Revenue Code Section 2056. One of the purposes behind the marital deduction was to achieve parity of estate tax treatment between decedents in common law property states versus those in community property states. See, Bogert’s Trusts and Trustees, Section 275.10 (“The Revenue Act of 1948 repealed the community property provisions added to the Code in 1942 and created the “marital deduction.” The effect of the 1948 law was to restore the pre–1942 federal estate tax treatment to spouses in community property states and to give spouses in common law states a substantially equal federal estate tax advantage.”).}

In Estate of Kirby,\footnote{Estate of Kirby, 59 Cal. App. 3d 288 (1976).} the widow challenged the separate property classification of a personal injury settlement received by her late husband because its inclusion in his estate resulted in estate tax liability. Mr. Kirby was injured in an accident in 1966 and filed a personal injury action.\footnote{Id at 290.} At the time of Mr. Kirby’s injury, California classified personal injury damages
as the separate property of the injured spouse.\textsuperscript{101} However, Mr. Kirby did not settle his claim and receive any monies until 1969.\textsuperscript{102} At the time of his settlement and actual receipt of monies, California had re-classified personal injury damages as community property.\textsuperscript{103} He died in 1970.\textsuperscript{104} 

The California Court of Appeals summarily rejected the widow’s argument to apply the newly enacted statute since the personal injury monies had vested as separate property at the time of the injury. “The act reclassifying such sum as community property could not impair that right by changing the separate property character of money paid to a spouse in settlement of his personal injury action commenced before the effective date of the act, even though the money was paid after that date.”\textsuperscript{105} Kirby suggests that personal injury damages would have been properly classified as community property if Mr. Kirby’s injury had arisen after the effective date of the new statute.\textsuperscript{106} 

A similar conclusion was reached by the California Court of Appeals in Estate of Hafner.\textsuperscript{107} In Hafner, the decedent was survived by a legal wife, a putative wife,\textsuperscript{108} and four daughters.\textsuperscript{109} Charles Hafner legally married Joan in 1954.\textsuperscript{110} They resided in New York and had three daughters together. In 1957, Charles left Joan and moved to California where he met

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\textsuperscript{101} See, former California Civil Code Section 163.5: “All damages, special and general, awarded a married person in a civil action for personal injuries, are the separate property of such married person.” See, Kirby, supra note 99, at 291, fn. 2. \\
\textsuperscript{102} Id at 290. \\
\textsuperscript{103} Id at 290-91: “[T]he Legislature in 1968, amended Civ. Code Section 163.5 to restore the community property status of personal injury damages recovered during the marriage, and enacted Section 169.3 to provide that damages received after dissolution are the separate property of the injured spouse.” (citations omitted). \\
\textsuperscript{104} Id at 290. \\
\textsuperscript{105} Id at 292. \\
\textsuperscript{106} The newly enacted statute was former Civil Code Section 163.5. \\
\textsuperscript{107} 184 Cal. App. 3d 1371 (1986). \\
\textsuperscript{108} If a marriage is void or voidable but at least one of the spouses in good faith believes that a legal marriage exists, the parties may be “putative” spouses and the property acquired during their putative marriage deemed “quasi-marital property”. See, California Family Code Section 2251. If the division of property is in issue, the quasi-marital property will be divided in the same manner as the community property of a valid marriage. See, California Family Code Section 2251(a)(2). \\
\textsuperscript{109} Hafner, supra note 107 at 1376. \\
\textsuperscript{110} Id at 1377.
\end{flushright}
and then ‘married’ Helen in 1962.\footnote{Charles and Helen attempted to marry in 1962 but were later advised by an attorney that the marriage was not valid. They “re-married” in 1963. Id at 1379.} In 1973, Charles was involved in a car accident and sustained permanent physical injuries and brain damage.\footnote{Id.} He sued and recovered a $900,000 settlement.\footnote{Id at 1380.} In 1982, Charles died intestate survived by a legal spouse Joan, a putative spouse Helen, and four daughters.\footnote{“The principle issue presented by this case is: as between the surviving, innocent, wife and children of a bigamous husband, and his surviving, innocent, putative spouse and their child, who is entitled to succeed to the husband's intestate estate when that estate is, as to his surviving wife and children, the husband's separate property and is, as to the putative spouse, quasi-marital property?” Id at 1376-77.} His entire estate consisted of the remains of the personal injury settlement.\footnote{Id at 1380.} The California Court of Appeals struggled with the proper distribution of the estate. After considering both California intestate succession and community property laws, the court ultimately awarded one-half of the personal injury settlement to Helen as the putative spouse.\footnote{“We find that the property of the estate of decedent Charles Hafner should be awarded one-half to his putative spouse, Helen Hafner, and the other half to be awarded to and divided among his legal and surviving spouse, Joan, and his four children, Catherine, Lillian, Dorothy and Kimberly, in accordance with former section 221 of the Probate Code. Id at 1400.}

Hafner is significant because of the court’s assumption that the personal injury settlement would be classified as the marital property of the putative spouses if there had not been a surviving legal spouse. The court could have classified the personal injury settlement in its entirety as the decedent’s separate property and then distributed his estate accordingly.\footnote{Under former Probate Code Section 221, the intestate distribution of a decedent survived by a spouse and two or more children would result in the decedent’s separate property distributed one-third to the surviving spouse and two-thirds to the children.} Instead, the court interpreted the general statute regarding the division of the quasi-marital property of putative spouses and concluded that the personal injury settlement was within its scope as marital property.\footnote{“[I]f we were to look only to \textit{Civil Code section 4452}, and to give it the broadest possible construction, Charles' entire intestate estate would be treated as though it were the community property of Charles and Helen and, pursuant to former section 201 of the Probate Code, the entire estate would go to Helen, and Joan and the four children would receive nothing.” Hafner, supra note 107 at 1393.}

\[\text{References}\]

\footnote{Charles and Helen attempted to marry in 1962 but were later advised by an attorney that the marriage was not valid. They “re-married” in 1963. Id at 1379.}
\footnote{Id.}
\footnote{Id at 1380.}
\footnote{“The principle issue presented by this case is: as between the surviving, innocent, wife and children of a bigamous husband, and his surviving, innocent, putative spouse and their child, who is entitled to succeed to the husband's intestate estate when that estate is, as to his surviving wife and children, the husband's separate property and is, as to the putative spouse, quasi-marital property?” Id at 1376-77.}
\footnote{Id at 1380.}
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principles of equity, the court analyzed the estate “from the perspectives” of both the legal and putative spouses. From the perspective of the putative spouse, the personal injury was quasi-marital property. From the perspective of the legal spouse, the personal injury settlement was the decedent’s separate property. The court concluded by awarding one-half of the estate to the putative spouse and the other one-half to the legal spouse to be shared with all four children.

While the Hafner decision may appear fair and the court’s classification of the personal injury settlement correct under the California rules, the classification of personal injury proceeds as community property at death raises potential problems. First, classification of personal injury damages as community adds to the value of a decedent’s probate and taxable

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119 "It is clear that our statutes are not designed to provide for the unique circumstances present in this case. When statutes are in conflict, the requirements of some being in irreconcilable opposition to others, only the chancellor can protect the innocent and render justice.” Hafner, supra note 107 at 1394.
120 Id at 1383.
121 "As to Helen, the entire probate estate is quasi-marital property.” Id.
122 The court held that from the perspective of the legal spouse, the personal injury settlement should be classified as the decedent’s separate property since the decedent and Joan were separated at the time of the settlement. “At the time Charles's personal injury settlement money was received, in 1975, Civil Code section 5126 provided, in pertinent part: “(a) All money ... received by a married person ... for damages for personal injuries ... 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 ... is received .... (2) While either spouse, if he or she is the injured person, is living separate from the other spouse.”” Id.
123 The dissent argued that the majority ignored California’s intestate distribution laws by failing to award the putative spouse a share in the decedent’s estate since one-half of the personal injury settlement as quasi-marital property was already owned by the putative spouse and not a part of the estate. “The proper legal distribution of the decedent's estate in this case should result in the surviving putative spouse taking one-half of the decedent's entire estate pursuant to section 4452 as her quasi-marital property. As to the remainder of the decedent's estate, ... the putative and legal spouses should be treated equally. Therefore, under former Probate Code section 221, the proper legal distribution of the remainder of the decedent's estate should be as follows: one-third of that portion of the estate should be divided equally between the surviving putative and legal spouses; the remaining two-thirds should be distributed in equal shares to the decedent's four children by both relationships.” Id, dissenting opinion at 1403.
estate, thereby potentially increasing probate fees and estate taxes.\textsuperscript{124} Second, classification of the personal injury settlement as community property can result in the non-injured decedent spouse devising the monies to a third party. For example, if Helen Hafner had died testate leaving all of her property to her mother, Helen’s mother would inherit one-half of Charles’ personal injury settlement!\textsuperscript{125}

This result could have disastrous consequences for a surviving injured spouse who may be financially dependent on the personal injury monies to survive, especially if there are no other assets. Certainly, the California legislature could not have intended to leave a surviving injured spouse bereft of the very monies paid to compensate for lost wages, medical expenses, and pain and suffering.\textsuperscript{126}

A simple solution is to classify the personal injury damages according to their component parts pursuant to a replacement analysis. Compensation for lost wages which would have been earned during marriage and therefore community property, would be classified as community property. If the parties separate or divorce, compensation for future lost wages (after separation or divorce) would be classified as the separate property of the injured spouse.\textsuperscript{127} Medical expenses paid by the community could be reimbursed back to the community estate from the personal injury damages.\textsuperscript{128} Compensation for medical expenses occurring after separation or divorce should be classified as the injured spouse’s separate property since s/he would be liable for such debt. Pain and suffering should also be

\begin{footnotes}
\item[124] In California probate fees are based upon a percentage of the decedent’s gross probate estate. See generally, California Probate Code, Sections 10800 and 10810.
\item[125] Since each spouse has testamentary control over his or her one-half community property, Helen Hafner could leave her one-half of the marital property to a beneficiary other than her husband. See, California Probate Code Section 100.
\item[126] On the other hand, a separate property classification for personal injury damages at death can lead to a similar unjust result. If the injured spouse dies first, s/he can bequest all of the monies to a third party and deprive the community of reimbursement for paid medical expenses. The surviving spouse may have spent years caring for the injured spouse, may be older, and may have difficulty re-entering the workforce.
\item[127] “The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse,” California Family Code Section 771(a).
\item[128] As early as 1959, the California State Bar made this same recommendation. See, note 47.
\end{footnotes}
classified as the injured spouse’s separate property.129 This is the conclusion that the other community property states have reached: apply a replacement analysis to classify personal injury damages.

II. The Classification of Personal Injury Damages in the Other Community Property States

A. Arizona

When Congress carved out Arizona from the New Mexico territory in 1863, the newly formed territorial government simply continued the community property rules followed in New Mexico.130 In 1926, the Arizona Supreme Court first considered the classification of personal injury damages and held that such monies were properly community property.131 In so ruling, the Arizona court cited the “Ruling Case Law Treatise” and referenced several other community property state decisions, including California: “As a general rule, causes of action for injury to the person of either spouse during marriage and the damages recovered therefor are community property, and where this rule prevails contributory negligence on

129 Dissenting with the majority of the California Supreme Court in 1949, Justice Carter criticized the community property classification of a wife’s personal injury damages as reminiscent of the common law view of women as chattel. “The holding of the majority in this case is reminiscent of the period when a wife was a mere chattel of her husband, possessing no rights or property not subject to his ownership or control. The majority ignore the fact that a married woman, when wrongfully injured by a third person, may recover damages for her disfigurement and pain and suffering, which are elements of damage personal to her, and by no reasonable construction of our statutes can be said to constitute community property.” Zaragosa, supra note 10 at 322 (Carter, J., dissenting).
130 M.R. Kirkwood, Historical Background and Objectives of the Law of Community Property in the Pacific Coast States, 11 Wash. L. Rev. 1, 9 (1936). Although Arizona repudiated all of its civil laws in 1864 in favor of the English common law, the state re-adopted its civil laws in 1865. Id at 5.
131 Pacific Constr. Co. v. Cochran, 29 Ariz. 554, 243 P.2d 405 (1926). In Cochran, husband and wife sued their employer for personal injuries suffered by the wife when she fell into an unmarked ditch. The husband’s contributory negligence was imputed to the wife since any recovery was community property. See also, Jurek v. Jurek, 124 Ariz. 596, 597, 606 P.2d 812, 813 (1980) (citing Pacific Constr. Co.): “The long-standing rule in Arizona has been that a cause of action for injury to the person of either spouse during marriage and the damages recovered therefore are community property. The rule announced in 1926 has been followed consistently ever since.”
the part of the husband will defeat an action to recover for an injury to the wife.”

For the next fifty-four years, the community property classification of personal injury damages remained the rule in Arizona despite the demise of the imputed negligence doctrine and the rise of the women’s movement. In 1980, the Arizona Supreme Court had an opportunity to re-visit the issue and sitting en banc, reversed the community property classification of personal injuries for married persons. The Arizona court admitted that its ruling fifty-fours years earlier was without “analysis”:

The rule announced in Pacific Construction was based upon the general rule in community property states particularly California. There was no analysis in our early cases of the various component parts which make up a recovery for personal injuries. (citations omitted).

The Arizona court went on to criticize the unitary classification of personal injury damages as a misunderstanding of the general community property definition and the failure to distinguish between onerous and lucrative title. The court concluded that the personal injury damages should be apportioned in accordance with its component parts:

In the case at issue the serious injuries to the appellant are personal to him. In the same fashion as pointed out in Soto, the body which he brought to the marriage is certainly his separate property. The compensation for injuries to his personal well-being should belong to him as his separate property. Any expenses incurred by the community for medical care and treatment and any loss of wages resulting from the personal injury should be considered community in nature, and the community is entitled to recover for such

132 Jurek, supra note 127 at 597, citing, 5 R.C.L. Section 23, p. 843 (1914).
133 Id.
134 Id.
135 “In construing community property statutes, the basic principles applicable to such property are often ignored. The underlying distinction between onerous and lucrative titles is often overlooked.” Id.
losses.  

Arizona has since followed this replacement/apportionment classification for personal injury damages. The Jurek court recognized that each spouse “owns” his or her body and that compensation for “personal” injuries should be classified as the separate property of the injured spouse. This line of reasoning is similar to that of Justice Carter who in 1949, called the majority of the California Supreme Court “absurd” for failing to recognize that each spouse “owns” his or her own body as separate property and compensation for personal injuries should be classified accordingly. The Arizona judiciary asserted its authority to re-classify personal injury damages in 1980, but the California courts have been reluctant to exercise its judicial power without more specific legislation.

B. Idaho

When Idaho became a part of U.S. territory in 1863, its provisional government specifically adopted legislation recognizing and continuing the common law of England. Four years later, the provisional government rejected the common law and instead adopted the community property

136 Id at 598.
137 In Brumbaugh v. Pet Inc., 129 Ariz. 12, 628 P.2d 49 (1981), the Arizona court held that a mother’s recovery for the wrongful death of her son was her separate property. “We believe that the pain, suffering and mental anguish which appellant has suffered as a result of her loss are injuries to her well being within the contemplation of the Jurek court and thus, any award she recovers for these injuries is her separate property.” Brumbaugh presented tragic facts: the minor son was killed by his father’s negligent driving. The mother sued Pet Co. claiming that the father’s negligence occurred within the scope of his employment for Pet Co.
138 “As an illustration of just how absurd this attitude is, one need only note that property owned by either spouse before marriage is considered his or her separate property. And yet, when the undeniably separate property of the wife’s person is disfigured, or she suffers pain because of an injury to that property, any damages recovered are community property.” Zaragosa, supra note 10 at 323 (Carter, J. dissenting).
139 “[T]he common law of England and principles of equity, not modified by the statutes of Iowa or of this government, and not incompatible with its principles, shall constitute a part of the law of the land.” See, Gary R. Stenzel & Jeff Banks, Defunct Marriage: Its Possible Application in Idaho Divorce Law, 30 Idaho L. Rev. 725, 741 (1994), quoting an announcement from the Idaho territorial government.
140 Idaho did not become a state until 1890.
The new community property laws were modeled after California’s community property laws.142 There is little explanation why Idaho adopted the community property system. It appears that this decision was based on several reasons; first, at that time in history the common law was being debated as archaic, womanizing and devoid of equality, the community property laws were more “women” oriented than England’s common law; second, the West was looking forward to a new world, like that created in California, who had already adopted this new law focused on a shared marital relationship; third, this law seemed to encourage women to settle in this new frontier; and fourth, forward thinking legislators could see taxation as the inevitable process for collecting government revenue in the future and they saw the possibility of tax advantages with a system that split ownership of property and clarified its character. (citations omitted).143

Idaho was slow to develop its community property laws, in part because of its common law roots but also because of such “male chauvinism and victorian concepts of chivalry, that [Idaho] appeared to never gain an insight into the proper application of this new more egalitarian system of community property law.”144 Despite this beginning, the Idaho Supreme Court rejected the in toto classification of personal injuries in 1975 in the case of Rogers v. Yellowstone Park Co.145 In Rogers, a wife sued her husband’s employer for personal injuries resulting from her husband’s negligent driving of his employer’s car.146 The employer’s argued that the

142 See TERRITORY OF IDAHO LAWS 1866-67 (1892). See also, Kelly M. Cannon, Beyond the “Black Hole” – A Historical Perspective on Understanding the Non-Legislative History of Washington’s Community Property Law, 39 Gonz. L. Rev. 7, 17 (2003-2004) (“The territory of Idaho, like Washington, abandoned the common law with respect to marital property rights and instituted a community property system in its place. There is no explicit explanation for the decision of Idaho, but, again, it is clear that the California law of 1850 served as the model.”)
143 Gary R. Stenzel & Jeff Banks, supra note 139 at 741-42.
144 Id at 744 (citing Brockelbank).
145 Rogers, supra note 5.
146 The defendant employer had given permission for the wife and infant son to be in the car for a business trip from San Francisco to Yellowstone Park. The husband fell asleep at the wheel while driving and caused the car to leave the highway. Wife claimed $4200
wife’s action was barred since any recovery would be community property and inure to the husband’s benefit. The Supreme Court of Idaho rejected the doctrine of interspousal immunity and more importantly, adopted a “nature of the right” analysis for classifying personal injury damages:

We now come to the critical issue concerning the nature of the interest which appellant by this action seeks to protect. If one relies on the cases previously cited by respondent involving tort claims against third party tort-feasors, it is clear that there is only one answer, i. e., appellant's recovery for damages suffered in the automobile accident would be community property and this present action would be barred. However, without exception none of those cases considered the character of the right harmed for which the damages were sought.

* * *

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

Citing a Washington decision setting forth the proper classification for the component parts of a personal injury award, the Idaho Supreme Court adopted the following formula: (1) Special damages are community property because they are a community liability; (2) Loss of future earnings which would otherwise be classified as community property are one-half recoverable by the injured spouse as separate property; and, (3) Damages for pain and suffering and emotional distress are the separate property of the injured spouse.

in medical expenses, $10,000 in future medical expenses, and $50,000 for pain and suffering. Id at 567.

147 Id at 568.

148 Id at 570.


150 Rogers, supra note 5 at 572.
The Idaho court’s “nature of the right” approach is simply a replacement analysis: the classification of the damages follows the classification of the property it replaces. This approach was again followed by the Supreme Court of Idaho in 1981 to classify the component parts of a workers compensation award at divorce.\(^{151}\) Thus, compensation for past lost earning capacity during marriage was community property but after divorce, that portion of the award replacing future lost earning capacity would be the separate property of the injured spouse.\(^{152}\) Whether called a “nature of the right” approach or a replacement analysis, the logic is identical: personal injury damages should not be classified in toto but instead according to its component parts.

C. Louisiana

The state of Louisiana has a rich history with roots in French, Spanish, and Roman law.\(^{153}\) Although much of Louisiana’s family law is based upon Roman law, its community property system descends directly from Spanish law.\(^{154}\) Dating back to 1808, Louisiana’s community property system is the oldest among the nine community property states.\(^{155}\)


\(^{152}\) “[S]ince workmen’s compensation is paid to make good the impairment or loss of an individual’s future capacity to earn, the community cannot lay claim to the whole of the benefit where it compensates for a period of disability which extends beyond the time of divorce. To hold otherwise would result in the deprivation of an individual’s basic source of financial security. The dispositive question in classifying workmen’s compensation benefits as community or separate property, therefore, is not whether the right to receive benefits vested during marriage, but rather to what extent the award compensates for loss of earning capacity during marriage.” Cook, supra note 151 at 654.

\(^{153}\) See, Dane S. Ciolino, Why Copyrights Are Not Community Property, 60 La.L.Rev. 127,131 (1999). See also, Cannon, supra note 142 at 10-11.

\(^{154}\) Cannon, supra note 142, citing 1 Katherine S. Spaht & W. Lee Hargrave, Matrimonial Regimes § 3.46 at 175 in 16 Louisiana Civil Law Treatise (2d ed. 1997); Nina N. Pugh, The Spanish Community of Gains in 1803: Sociedad de Gananciales, 30 La. L. Rev. 1, 2 (1969);

William Q. de Funiak & Michael J. Vaughn, Principles of Community Property § 37, at 55 (2d ed. 1971) (“the Spanish law displaced the French law in the Louisiana territory, and although France later regained that territory from Spain, it was sold to us so soon after the French repossession that the Spanish law was still in force”); 2 Matthew Bender
One of the basic tenets of a community property regime is the recognition that each spouse contributes to the success of the marital partnership and therefore, shares equally in the ownership of marital property. Addressing the possible preemption of Louisiana’s community property laws by the federal Employee Retirement Income Security Act of 1974 (ERISA), the United State Supreme Court recognized that the community property system is “more than a property regime,” since it represents “a commitment to the equality of husband and wife and reflects the real partnership inherent in the marital relationship.” Despite this settled principle of equality, Louisiana adhered to a “head and master” rule which placed the husband as the sole manager of the community property for many years. The head and master rule gave rise to procedural complexities since the husband was a necessary party litigant for all claims inuring to the benefit of the community. This procedural rule was not inconsistent with the archaic non-legal status of married women and worked with the pre-1902 rule classifying a wife’s personal injury claim as community property.

& Co., Valuation and Distribution of Marital Property § 20.01[3][a], at 20-11(1998); (Louisiana “relies on a community property system based largely upon Spanish law.”).


156 American Law Institute, Restatement of the Law of Property #23 § 9.1, cmt. (b) at 231. (“The prevailing view of marriage is that it is an economic partnership, which imports a goal of equalizing the marital assets. The community property system implements this theory of marriage.”). See also, Spaht and Hargave, supra note 154, Section 3.2 at 47 (“From the earliest times, the most important legislative policy underpinning the Louisiana community property regime has been that spouses share equally ‘the produce of the reciprocal labor and industry of both husband and wife.”).

157 Boggs, supra note 155.

158 The concept of equal ownership dates back to the Visigoths. See, de Funiak & Vaughn, supra note 146, § 1, at 3; id. § 7; 3 Marcel Planiol & George Ripert, Treatise on the Civil Law, pt. 2, ch. 1, no. 891, at 74 (La. St. L. Inst. trans., 11th ed. 1959) (“It is most probable that the community system came into being in the late Middle Ages, perhaps between the 8th and 10th centuries.”).


160 La. Code Prac. art. 107. “[A]ctions for personal injuries and wrongs to the wife should be brought in the name of the husband only, as the amount realized, if any, falls into the
After 1902, Louisiana changed the classification of the wife’s personal injury claim to her separate property but retained a community property classification for the husband’s personal injury claim. 161 Louisiana’s gender specific rule regarding the classification of personal injury damages created procedural and substantive anomalies; only the wife had standing to sue for her personal injuries but only the husband as the “head and master” could sue for any recovery owed to the community. 162 Recovery to the community included recovery for the loss of “services as a housewife” 163 and claims for medical expenses for either spouse. 164

The case of McConnell v. Travelers Indemnity Company is an example of the procedural problems created by Louisiana’s gender specific classification of personal injury damages when applied with its “head and master” rule. 165 In McConnell, both spouses were injured in an automobile accident. The wife sued in state court for her personal injuries and the husband joined to recover the monies paid for her medical expenses. 166 The husband then filed a new action in federal court seeking $85,000 in damages for his personal injuries and medical expenses. 167 The defendant first sought a summary judgment in federal court arguing that the husband was not permitted to split his cause of action under Louisiana law. 168 To avoid this potential defense, the husband dismissed his state court claim with prejudice. 169 The federal court then denied the defendant’s summary

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161 “Prior to January 1, 1980, personal injury awards inuring to the husband were deemed community property, whereas in similar instances involving the wife, the same was deemed her separate property.” Mead v. Mead, 442 So.2d 870, 872 (La. App. 3 Cir., 1983). See also, McConnell v. Travelers Indem. Co., 346 F.2d 219, 220 (1965). (“Under Louisiana community property law, the wife’s claim for personal injuries is her separate property; the husband’s claim for personal injuries belongs to the community.”).

162 “[I]t is clearly the settled jurisprudence of the State of Louisiana that the husband is head and master of the community, and he is its only legal representative in suits by or against the community.” Muse v. United States Casualty Co., 306 F.2d 30 (C.A.La.1962).


164 McConnell, supra note 161 at 220.

165 Id.

166 Id at 220-21.

167 Id.

168 Id at 221.

169 Id.
The defendant then filed a second summary judgment motion claiming res judicata on the basis of the husband’s dismissal with prejudice in the state action. Writing for the Fifth Circuit Court of Appeals, Judge Wisdom acknowledged the “disastrous effects” for the husband under these circumstances.

We are aware that the result we reach produces an anomaly. The husband and wife may split their tort claims, but the husband's lawsuit must include any claim for the wife's medical expenses. In effect, therefore, the parties may twice litigate the issue of the wife's injuries. On the other hand, the plaintiff's theory of the case would also produce an anomaly. The purpose of the tort claims is compensation. Under Louisiana law the community of acquets and gains suffers the injury. The plaintiff's theory would divide community damages among several potential lawsuits. It is the Louisiana community property system that causes the anomaly, not the rules of res judicata. This Court must apply the Louisiana law as the Court finds it.

The Louisiana Supreme Court also struggled with the proper application of the gender specific classification of personal injury damages as best exemplified in the 1971 case of Chambers v. Chambers. Mr. Chambers suffered personal injuries while working as a railroad flagman; he filed suit seeking over $1 million. Although Mr. Chambers was married when the accident occurred, he did not file the complaint until after he and his wife had separated. However, the settlement was reached and the monies paid after the divorce became final. The wife claimed a one-half

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170 Id.
171 Id.
172 “This hard case involving, for the plaintiff, disastrous effects from splitting his cause of action, is an invitation to make bad law. We decline the invitation.” Id at 220.
173 Id at 223-24.
174 “There is a disparity in the treatment of husband and wife, but ‘The office of judges is jus dicere not jus dare, to interpret law, not make law or give law. The instant case is a matter that addresses itself to the legislature not to the courts.” Chambers v. Chambers, 259 La. 246, 264, 249 So.2d 896, 902, cert. denied, 404 U.S. 856 (1971), overruled by West v. Ortega, 325 So. 2d 242 (La. 1975).
175 Id at 253-54.
176 Id.
community property interest in the settlement.\textsuperscript{177} In the first Chambers opinion,\textsuperscript{178} the Louisiana Supreme Court appeared to apportion the settlement monies by reimbursing the community estate for paid medical expenses but then affirmed the trial court’s classification of the settlement as community and award to the wife.\textsuperscript{179} In its later per curiam opinion, the court appears to hold that the all of the personal injury damages are community property without any apportionment for medical expenses paid by the community estate.\textsuperscript{180}

The Chambers decision was criticized and later expressly overruled in 1975 case of West v. Ortega.\textsuperscript{181} In West, the Louisiana Supreme Court overruled Chambers and held that personal injury damages should be classified according to their component parts: “[W]here a husband's settlement monies, acquired after dissolution of the community, but based upon a pre-dissolution, accident-related cause of action, compensate for both pre-dissolution and post-dissolution losses, that portion of the settlement which compensates for post-dissolution losses falls into the separate estate of the husband.”\textsuperscript{182}

\textsuperscript{177} Id at 255.
\textsuperscript{178} On application for a rehearing, the court issued a per curiam opinion. Chambers, 259 La. at 277, 249 So.2d at 907 (per curiam).
\textsuperscript{179} Id at 265 -66.
\textsuperscript{180} “[A] husband's cause of action for damages resulting from a tort committed against him while living with his wife in community property. It follows that the damages received by judgment of court or the funds received in settlement of a compromise of such cause of action are also community property.” Id at 276.
\textsuperscript{181} In 1975, the Louisiana appellate court reluctantly followed the Chambers decision but granted a rehearing pending the Louisiana Supreme Court’s reconsideration of the issue. “Our original opinion in this case was adopted and filed by this panel with considerable reluctance. It was the feeling of the Court that the result reached was inequitable, but we felt constrained to follow the opinion of the Supreme Court in Chambers v. Chambers, 259 La. 246, 249 So.2d 896 (1971). In doing so, however, we had serious doubt that the ultimate decree in that case actually reflected the majority view of the Court. We held up action on the application for rehearing in view of the decision of the Third Circuit Court of Appeal in West v. Ortega, 309 So.2d 883 (March 19, 1975) and the granting of writs in that case by the Supreme Court. It was our hope that the Chambers decision would be reconsidered by the Supreme Court and the jurisprudence on the issue clarified.” McLeod v. McLeod, 325 So. 2d 883, 886 (La Ct.App. 1976), \textit{on rehearing}.
\textsuperscript{182} West v. Ortega, 325 So. 2d 242, 249 (La. 1975).
The Louisiana legislature codified the West decision, effective January 1, 1980, by amending article 2344 of its Civil Code to cure its gender specific classification of personal injury damages and codify a rule of apportionment between the separate and community property estates.\textsuperscript{183} Personal injury damages are now the separate property of the injured spouse but any recovery for expenses paid by the community are community property and any recovery for lost earnings is community property.\textsuperscript{184}

D. Nevada

In 1848 by the Treaty of Guadalupe Hidalgo, the United States acquired the Territory that today comprises Arizona, Nevada, and part of New Mexico.\textsuperscript{185} When Nevada became a state in 1864, its constitution continued the community property system leftover from its Spanish heritage.\textsuperscript{186}

In 1940, Nevada became the first court to recognize the separate property nature of personal injury damages.\textsuperscript{187} Declining to follow California’s classification of such monies, the Nevada Supreme Court classified the wife’s recovery for personal injuries as her separate property but also followed the common law “head of household” rule in permitting

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\item \textsuperscript{183} LSA Civil Code Article 2344. provides: “Damages due to personal injuries sustained during the existence of the community by a spouse are separate property. Nevertheless, the portion of the damages attributable to expenses incurred by the community as a result of the injury, or in compensation of the loss of community earnings, is community property. If the community regime is terminated otherwise than by the death of the injured spouse, the portion of the damages attributable to the loss of earnings that would have accrued after termination of the community property regime is the separate property of the injured spouse.” See also Chambers, supra note 174.
\item \textsuperscript{184} Compensation for lost earnings post-dissolution are classified as separate property but if the marriage is terminated by death, the recovery for lost earnings is community property in the interest of the surviving spouse. See, 1979 Revision Comments to LSA Civil Code Article 2344.
\item \textsuperscript{185} Cannon, supra note 138 at 11, citing, Robert L. Mennell & Thomas M. Boykoff, Community Property in a Nutshell 14 (2d ed. 1988).
\item \textsuperscript{186} Cannon, supra note 138 at 11.
\end{itemize}
\end{footnotesize}
the husband to recover for any medical expenses paid and loss of wife’s services.\textsuperscript{188}

The husband as head of the community sustains the same relation to the wife as at common law, so far as the present question is concerned—he is entitled to her services, and is liable for the expense of her care and cure, and for the violation of these rights he should recover. But neither at common law or by the law of community does he hold the wife's right to personal security and should not be permitted to recover for the violation of this right. It does not belong to him nor to the community. The wife's physical pain and suffering are not his loss nor the loss of the community.\textsuperscript{189}

The Nevada legislature codified the apportionment replacement rule for the classification of personal injuries in 1975.\textsuperscript{190} The present statute provides that damages for personal injuries and pain and suffering are the separate property of the injured spouse but that damages for loss of services and medical expenses are community property.\textsuperscript{191} The Nevada rule recognizes that compensation for personal injuries belong to the injured spouse but that lost earnings and compensation for medical expenses should be classified as community property since those monies replace lost community income.

E. New Mexico

The 1848 Treaty of Guadalupe Hidalgo ended a two year war between

\textsuperscript{188} Frederickson, supra note 183 at 628.
\textsuperscript{189} Id at 629.
\textsuperscript{190} Nevada Revised Statutes 123.121.
\textsuperscript{191} “When a husband and wife sue jointly, any damages awarded shall be segregated as follows: 1. If the action is for personal injuries, damages assessed for: (a) Personal injuries and pain and suffering, to the injured spouse as his separate property. (b) Loss of comfort and society, to the spouse who suffers such loss. (c) Loss of services and hospital and medical expenses, to the spouses as community property. 2. If the action is for injury to property, damages shall be awarded according to the character of the injured property. Damages to separate property shall be awarded to the spouse owning such property, and damages to community property shall be awarded to the spouses as community property.” Nevada Revised Statute 123.121.
Mexico and the United States that began over the United States’ annexation of Texas. Part of the treaty’s terms included the sale of certain land (which included New Mexico) to the United States, effectively doubling the territory of the United States and reducing that of Mexico’s by one-half. Contained in the treaty was a specific promise by the United States to “inviolably respect” the property rights of Mexicans residing in New Mexico. Article VIII of the Treaty stated: “In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guarantees equally ample as if the same belonged to citizens of the United States.”

The Treaty of Guadalupe Hidalgo did not differentiate the property interests of men versus women. This omission left the Mexican women in New Mexico caught between two very different marital property systems: the common law and the civil law. In 1848, married women under the common law system lacked the legal capacity to hold property but the Spanish civil law system recognized a married woman’s equal ownership

192 The Treaty of Guadalupe Hidalgo is considered by some academics to be one of the most important treaties in American history. See, Refugio I. Rochin, Reflections on the Treaty of Guadalupe Hidalgo and the Border it Established, 5 Sw.J.L. & Trade Am. 141 (1998).
195 Id.
196 “While the wording of the ratified Article IX suggests that under the Treaty, Mexicans would receive all the rights of Americans, if Mexican women were to take on the rights of American women, it is unclear what the legal status of their property holdings would have been. The Treaty was a document created by men, for men, and its potential impact on women was ignored.” Dana V. Kaplan, Women of the West: The Evolution of Marital Property Laws in the Southwestern United States and Their Effect on Mexican-American Women, 26 Women’s Rights Law Reporter 139, 144 (2005).
197 “Women in the United States were still living under this theory of feme covert in 1848, when the United States annexed the Mexican territories. The law deprived a married woman of the right to own any type of property…” Id at 145.
interest in marital property. Thus, Mexican women continued to hold property under Mexican community property laws but were left to the mercy of the United States courts in application and interpretation of those rights under the common law. An example of such a case is Botiller v. Dominguez.

Dominga Dominguez held legal title to property under Mexican law but she lost that title to homesteaders in the American courts. Considered a “test” case as to whether the United States would “inviolably respect” the property rights of Mexicans as promised in the Treaty of Guadalupe Hidalgo, the Supreme Court refused to enforce the treaty stating: “This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard.” Ms. Dominguez lost her land for failing to register her property with the land grants office despite her vested rights under Mexican law. Although the United States promised to honor the property interests of the Mexican-born citizens who remained in the newly acquired territory, most lost their property rights within several years.

In 1884, New Mexico formally adopted the Spanish community property system which it recognized in its state constitution in 1912. Although New Mexico’s community property laws are now codified, their...
Mexican and Spanish heritage is reflected in both judicial application and interpretation.\textsuperscript{206}

New Mexico’s community property presumption provides that “Property acquired during marriage by either a husband or wife, or both, is presumed to be community property.”\textsuperscript{207} As to the classification of personal injury damages, the critical question is whether such monies are “acquired” during marriage and within the community property presumption. The New Mexico Supreme Court addressed this issue for the first time in the 1952 case of Soto v. Vandeventer.\textsuperscript{208} After considering the case law in several other community property states, the New Mexico court decided upon a narrow interpretation of the word “acquired” consistent with the concept of onerous title:

We are persuaded that the word should be read and interpreted in the light of the uses and purposes of community property and the establishment of community rights; and in so reading it we doubt very much whether it logically can be said that the Legislature used the word in the sense that it was to be all-comprehensive. It seems more logical to conclude that the word was used in the more restricted sense of embracing wages, salaries, earnings, or other property acquired through the toil or talent or other productive faculty of either spouse; that they did not have in mind compensation for an injury to the person which arises from the violation of the right of personal security, which said right the wife brings to the marriage.\textsuperscript{209}

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\textsuperscript{206} “Although [New Mexico’s] community property scheme is statutory, it “was modeled after the civil law of Spain and Mexico and those laws will be looked to for definitions and interpretations.”” Portillo v. Shappie, 97 N.M. 59, 62, 636 P.2d 878, 881, citing McDonald v. Senn, 53 N.M. 198, 201, 204 P.2d 990, 991 (1949).

\textsuperscript{207} New Mexico Statutes Annotated 1978, Section 40-3-12.

\textsuperscript{208} “The questions involved have never been decided in New Mexico, but the other community property states except Louisiana (where a statute gives the cause of action to the wife) and Nevada (where the cause of action and the judgment for the injury, pain and suffering is held by judicial decision to belong to the wife) hold the cause of action, as well as the judgment for such injury, is property, and as such falls into the community as ‘other property’ under identical or practically identical statutes as are quoted above.” Soto v. Vandeventer, 56 N.M. 483, 485, 245 P.2d 826, 827(1952).

\textsuperscript{209} Id at 488, 828-29.
\end{footnotesize}
The New Mexico Supreme Court proceeded to recognize the component portions of personal injury damages and classified them as community or separate according to a replacement analysis. Thus, personal injury damages are the separate property of the injured spouse but recovery for medical expenses, lost earnings, and loss of services to the community are properly community property. In its opinion, the New Mexico court cited an article written by a former California law school dean who labelled the California community property classification of personal injury damages “utter nonsense” and “absurd”.

F. Texas

When Texas became the twenty-eighth state in 1845, it continued the Spanish-Mexican community property system in its state constitution. Although Texas has since amended its constitution, the constitutional definition of community property has remained virtually unchanged. Article 16, Section 15 of the Texas Constitution provides: “All property, both real or personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property…” The definition of community property is by “implied exclusion”: anything not

210 “[W]e hold the cause of action for the personal injury to the wife, and for the resultant pain and suffering, belongs to the wife, and that the judgment and its proceeds are her separate property. She brought her body to the marriage and on its dissolution is entitled to take it away; she is similarly entitled to compensation from one who has wrongfully violated her right to personal security.” Id at 494, 832.
211 “The cause of action for the damages to the community for medical expenses, loss of services to the community, as well as loss of earnings, if any, of the wife still belongs to the community, and the husband as its head is the proper party to bring such an action against one who wrongfully injures the wife.” Id at 494, 833.
212 Id at 489, 829.
213 Article VII, Section 19 of the 1845 Texas Constitution provided that “[a]ll property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or, descent, shall be the separate property; and laws shall be passed more clearly defining the rights of the wife” in relation to separate and community property.” See also, Aloysius A. Leopold, “Loss of Earning Capacity” Benefits in the Community Property Jurisdiction – How Do You Figure?, 30 St. Mary’s L.J. 367, 376-77 (1999).
214 Tex. Const. art. XVI, § 15.
specifically delineated as separate property is by exclusion, community property.\(^{215}\)

Early cases appear to classify personal injury damages as community property because such monies were not otherwise acquired by lucrative title. In the 1883 case of Ezell v. Dodson,\(^{216}\) the wife brought suit complaining of an assault and battery. The Texas Supreme Court held that the claim was community property and dismissed the suit since the husband was a necessary party plaintiff and had refused to join in the lawsuit.\(^{217}\) Notably, the court’s dismissal rested upon its classification of the personal injury claim as community property. “Of course such property as is derived by reason of a personal trespass committed upon her falls under neither of these heads of gift, devise or descent, and necessarily forms part of the acquits and gains of the marital partnership.”\(^{218}\) Three years later, the Texas Supreme Court created an exception to the community property classification in the case of Nickerson v. Nickerson, classifying a wife’s personal injury claim as her separate property.\(^{219}\) The court affirmed the soundness of its earlier decision classifying a wife’s personal injury claim as community property\(^ {220}\) but held that an exception existed where the husband was one of the tortfeasors and the parties were separated due to the fault of the husband.\(^ {221}\)

In 1915 and again in 1925, the Texas legislature made two unsuccessful attempts to classify personal injury damages as entirely the

\(^{215}\) Leopold, supra note 213 at 377-78, citing Arnold v. Leonard, 114 Tex. 535, 539-40, 273 S.W. 799, 802 (1925) (discussing the rule of implied exclusion).

\(^{216}\) 60 Tex. 331, 1883 WL 9331 (1883).

\(^{217}\) “The refusal of a husband to become a party to an ordinary suit to recover community property would not give the wife the power to sue alone… .” Id at 2.

\(^{218}\) Id.

\(^{219}\) 65 Tex. 281, 1886 WL 4666 (1886).

\(^{220}\) “In Ezell v. Dodson, 60 Tex. 334, it was held that damages to be recovered from a third person for a tort committed upon a wife, by such person alone, would be community property, and we have no doubt of the correctness of this general proposition.” Id.

\(^{221}\) “The husband and wife were living separate when the injury was inflicted, and the cause of this separation was such as to justify the wife in withdrawing from his society. Under such facts, it may be true that she could have maintained this action, before divorce, against Matson; and that the facts which rendered the separation from her husband justifiable, would, as to her right to the sum to be recovered, place her in the same position in which she would have been had she been a feme sole at the time the injury was inflicted, had her husband not been a party to it.” Id.
separate property of the injured spouse. Both statutes were struck down as unconstitutionally overbroad since they failed to specify any apportionment for lost earnings. In 1967, the Texas legislature amended its Family Code to specifically classify personal injury damages as the injured spouse’s separate property “except any recovery for loss of earning capacity during marriage.” The Texas definition of separate property is nearly identical to that of California’s: property acquired before marriage and that acquired by lucrative title is separate property. However, unlike the California statute, the Texas statute codifies an apportionment of the personal injury award and replaces the community estate with those amounts it lost because of the personal injury: lost earnings.

Although the Texas statute fails to classify medical expenses, the Texas Supreme Court addressed this issue in Graham v. Franco and classified recovery for medical expenses as community following a replacement analysis. “To the extent that the marital partnership has incurred medical or other expenses and has lost wages, both spouses have been damaged by the injury to the spouse; and both spouses have a claim against the wrongdoer. The recovery, therefore, is community in character.” Texas’ attempts to classify personal injury damages as entirely separate property were unconstitutional for failure to recompense the community estate for its losses. Likewise, California’s classification of personal injury damages as entirely community property may be subject to constitutional challenge.

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222 Graham v. Franco, 488 S.W.2d 390, 395-96 (1972) (discussing the early legislation and overruling the holding in Ezell v. Dodson).
225 “A spouse's separate property consists of: (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.” Id.
226 488 S.W.2d 390 (1972).
227 Id at 396.
228 Article 1, Section 21 of the California Constitution provides “Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property.” Pursuant to Family Code Section 2603, the California legislature has specified that personal injury damages are community property if the cause of action arises during
G. Washington

Unlike the other community property states, Washington, Idaho, and Wisconsin do not have strong historical ties to Mexico and Spain to explain its adoption of a community property system. Washington was initially part of the Oregon Territory whose provisional government first adopted the common law of Iowa in 1843. In 1853, Congress carved out the Washington territory and further provided that the laws previously in place from Oregon simply continue. In 1869, the provisional government of Washington abruptly repudiated the common law and adopted the community property system. Little evidence exists as to why the community property system was chosen but the two principal reasons appear to be the large influx of Californians who moved into Washington and the desire to attract more women into the state.

Based on what little information there is regarding the lack of women in Washington Territory, it is clear that the bachelors of the territory were interested in a certain kind of woman. The conditions of frontier life meant that a woman had to be willing and capable to perform hard work and to live in difficult circumstances. The community property system gave more rights to women and was more likely to attract the strong-minded and adventurous women needed on the West Coast. In fact, it has been...
asserted that the continuation of the doctrine of community property in the Pacific Northwest was due to the challenges to survival that were faced by frontier settlers; challenges which were similar to those confronted by the Visigoths in western Europe.234

In 1869, the provisional government passed its first community property legislation titled “An Act Defining the Rights of Husband and Wife” modeled on the California’s community property statute.235 Although over 150 years have since passed, Washington’s current community property statutes have “remained largely unchanged” with the exception of amendments in 1972 which specifically provided for equal management for both spouses.236 Washington defines community property as all property not otherwise separate property “acquired after marriage or after registration of a state registered domestic partnership….”237 Separate property includes property acquired before marriage, property acquired by donative transfer, and the rents, and profits thereof.238

The Washington courts had an early opportunity to consider the classification of personal injury damages for an injury caused by a third party tortfeasor. In the 1892 case of Hawkins v. Front St. Cable Ry. Co.,239 the wife was injured while riding as a passenger on a streetcar. The court classified the recovery as community property, in part because of adherence to the common law rule that only the husband had standing to sue for the wife’s injuries: “But inasmuch as the right to sue for a tort which one has suffered is a chose in action, and therefore property, in those states where, as here, all property acquired by either spouse otherwise than by gift, bequest, devise or descent is common or community property, this chose in action is

234 Id at 24-25.
235 Id at 15, citing Real Property Statutes of Washington Territory from 1843 to 1889 Comprising the Laws Affecting Real Property Enacted by the Legislative Committee and Legislative Assembly of Oregon Territory Previous to 1853 Including the Statutes of Iowa of 1839 and 1843, Together with the Organic Acts, Enabling Act, State Constitution and Treaties, Proclamations and Special Laws of Congress, such as the Donation Act, Railroad Grant and Other Private Acts, Indian Treaties, Executive Orders, etc., No. 94, P 13, at 90 (Twyman Osmond Abbott comp., Olympia, Wash. 1892).
236 Cross, supra note 229 at 18-19.
239 3 Wash. 592, 28 P. 1021 (1892).
suable by that member of the community who has the disposition of the community personality.”

Subsequent Washington cases followed the Hawkins rule and classified personal injury damages as community property until 1984. The community property classification rested upon the court’s inability to find that a personal injury claim fell within the definition of separate property:

This “waste basket” definition of community property results in property being characterized as community unless it meets the definition of separate property. The Washington rule is that fortuitous acquisition of damages for personal injury by a third party tortfeasor is community property because it does not fit within the definition of separate property.

In 1984, the Washington Supreme Court again considered the classification of personal injury damages and reviewed cases from the community property states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and Texas. The Washington Supreme Court noted the community property classification of personal injury damages was “criticized by legal commentators” and rejected by all of the community property states with the exception of California. The court concludes that the Hawkins rule was based “upon a too literal reading of our community property statutes, [and] was wrong from the beginning.”

H. Wisconsin

240 Id at 595-96, 28 P. 1021.
242 Brown, supra note 237 at 734, 1210.
243 Id at 735-37, 1211-12. Wisconsin was not a community property state at the time of the Brown decision.
244 “Only California has a different rule.” Id.
245 Id at 737, 1212.
The community property origins for Wisconsin are very different from the other eight community property states. Unlike the others, Wisconsin became a community property state in the 20th century and is the only state to base its community property laws on the Uniform Marital Property Act. Although Wisconsin refers to acquisitions during marriage as “marital property” and “individual property”, Wisconsin is considered to be the last community property state; the Wisconsin Marital Property Act went into effect on January 1, 1986.

Fortunately, the reasons for Wisconsin’s change from a common law property state to a community property one are well-documented. Public discussions and legislative debates over marital property rights and property distribution at death and divorce began at least twelve years prior to the formal enactment of the Wisconsin Marital Property Act. Setting the stage for the community property change were the new divorce reform laws enacted in 1977 which recognized marriage as a partnership.

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246 The Wisconsin Marital Property Act went into effect on January 1, 1986, and was based upon the Uniform Marital Property Act. See generally, Howard S. Erlanger and June M. Weisberger, From Common Law Property to Community Property: Wisconsin’s Marital Property Act Four Years Later, 1990 Wis. L. Rev. 769, 769-70 (1990).
247 Id. “Because the Wisconsin statutes (and the Uniform Act) refer to the adoption of a marital property system rather than a community property system, there was initially some question as to the community property status of the Wisconsin system, especially for federal tax purposes. This point was clarified for state law purposes by section 766.001 of the Wisconsin statutes, adopted as part of Trailer Bill I, which states that “It is the intent of the legislature that marital property is a form of community property.” Soon after the enactment of WMPA, Internal Revenue Service officials informally recognized that WMPA would transform Wisconsin into a community property state.” Id at fn 2, citing, Boykoff, Wisconsin Tax Practice and the Marital Property Act, 68 Marq. L. Rev. 424, 427 (1985).
248 Id at 771.
reasons for the change include the existence of community property jurisprudence in other states from which to draw upon, the adoption of the Uniform Marital Property Act by the National Conference of Commissioners on Uniform State Laws, bipartisan support for the community property model, and the lobbying efforts of influential women’s groups.  

Section 766.31 (7f) of the Wisconsin Marital Property Act specifies a replacement approach for the classification of personal injury damages. The statute classifies such monies as individual property “except for the amount of that recovery attributable to expenses paid or otherwise satisfied from marital property and except for the amount attributable to loss of income during marriage.”

One year after codifying the replacement approach for personal injury damages, the Wisconsin Supreme Court applied the approach to classify a spouse’s unliquidated personal injury claim. In Richardson v. Richardson, the wife filed a medical malpractice suit against a physician for personal injuries which rendered her unable to have children. While the suit was pending, the parties divorced necessitating a classification of the personal injury claim for division at divorce. Curiously, the Wisconsin Supreme Court did not consider the jurisprudence on this issue from the other community property states. Instead, the Wisconsin court relied upon the reasoning in a New Jersey case which followed a replacement analysis for the division of a personal injury award at divorce:

As the [New Jersey] court and others have noted, compensation for loss of bodily function, for pain and suffering and for future earnings replaces what was lost due to a personal injury. Just as each spouse is entitled to leave the marriage with his or her body, so the presumption should be that each spouse is entitled to leave

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250 Id at 771-775.
252 139 Wis. 2d 778, 779, 407 N.W. 2d 231, 232 (1986).
253 The wife urged the Wisconsin court to follow the replacement analysis in the New Jersey case of Amato v Amato, 180 N.J. Super. 210, 434 A.2d. 639 (1981). Id at 783, 233.
the marriage with that which is designed to replace or compensate for a healthy body. We therefore conclude that the statutory presumption of equal distribution should be altered with respect to certain components of a personal injury claim. Instead of presuming equal distribution of a personal injury claim, the court should presume that the injured party is entitled to all of the compensation for pain, suffering, bodily injury and future earnings. With regard to other components of a personal injury claim, such as those that compensate for medical or other expenses and lost earnings incurred during the marriage, the court should presume equal distribution.\[254\]

As the most recent community property state, Wisconsin did not experience the socio-economic changes and growing pains of the older community property states and was able to avoid the problems of reconciling the doctrine of imputed negligence with the community property presumption of equal division.\[255\] Likewise, the Wisconsin court did not engage in an in-depth discussion as to the nature of personal injury claim as property acquired by onerous or lucrative title; rather, the court simply concluded that the personal injury claim was “property” within the meaning of its marital property statute and subject to division at divorce.\[256\] The replacement analysis also applies at death so that future lost earnings of the injured surviving spouse are classified as his/her individual property after the death of the noninjured spouse.\[257\] The logic and rationale of the replacement analysis which the Wisconsin legislature and judiciary so readily adopted and applied has apparently eluded the California legislature and judiciary for over forty years.

\[254\] Id at 786, 234-35.
\[255\] See discussion infra Part II.
\[256\] “Mrs. Richardson fails to offer a definition of property, a rationale or relevant precedent justifying the exclusion of a claim for personal injury from the concept of “property” under sec. 767.255. Accordingly we conclude that a claim for personal injury is property subject to division under sec. 767.255.” Richardson, supra note 248 at 783-84, 234.
\[257\] “To the extent that marital property includes damages for loss of future income arising from a personal injury claim of a surviving spouse, the surviving spouse is entitled to receive as individual property that portion of the award that represents an income substitute after the death of the other spouse.” Wis. Stat. Ann. Section 766.31 (7m).
III. Conclusion

California’s community property jurisprudence once had a significant influence in those states choosing a community property system. However, California’s community property rules have developed haphazardly in response to specific problems without an overhaul of the entire system of rules and case law.

One such example is California’s mechanistic classification of personal injury damages. Such damages are classified in their entirety as community property during marriage, awarded to the injured spouse at divorce absent “exceptional circumstances” to the contrary\(^\text{258}\), and treated as community property upon the death of either spouse. This unitary approach fails to protect the injured spouse during marriage or at death, and can be patently unfair to the non-injured spouse.

During marriage, the couple may unwittingly commingle the personal injury damages so that segregation at divorce is impossible. Even without commingling, an award of the personal injury damages in their entirety to the injured spouse is not fair to the non-injured spouse who has forgone economic opportunities to care for the injured spouse. The community property classification of personal injury damages at death is also potentially unfair. If the non-injured spouse dies first, he/she can testamentarily dispose of one-half of the personal injury damages to a third party depleting the funds available to pay for any future needs of the injured spouse.

California’s community property classification of personal injury damages should be changed to reflect the economic component parts of a personal injury award. Whether called a replacement analysis or an analytic approach, all of the other community property states and a majority of the common law states divide personal injury awards into their component parts and classify them accordingly at divorce and at death.\(^\text{259}\) A breakdown of a

\(^{258}\) See discussion infra Part I, B, 2.

\(^{259}\) “A majority of courts in both community property and equitable distribution states have now adopted the analytic approach to classification of personal injury awards. This approach takes into consideration whether the award is compensation for loss experienced by the marriage or loss experienced by the individual and classifies each component of the award as marital or separate property accordingly.” Amanda Wine,
personal injury award as compensation for past and future medical expenses, lost earnings, loss of earning capacity, pain and suffering, and punitive damages represents a practical and realistic assessment of the losses to the community estate and the injured spouse.\textsuperscript{260}

California’s in toto classification of personal injury damages is outdated. No-fault divorce reform, social and legal changes in the recognition of women’s rights, and modern tort law have all undergone significant developments since California’s 1968 statute classifying personal injury damages as community property but awarding any remainder to the injured spouse at divorce unless the interests of justice warrant otherwise. The California statute fails to provide a workable and specific standard for the court to determine when circumstances warrant any award to the non-injured spouse at divorce. Indeed, none of the reported California cases have ever awarded any portion to a non-injured spouse at divorce.\textsuperscript{261} Notably, the statute does not require proof of “exceptional circumstances” to justify such an award but this high standard was judicially created in 1983 and has remained the rule since.\textsuperscript{262} The “exceptional circumstances” exception has never been met leading one to question whether this judicially created standard fulfills the legislature’s intent regarding the treatment of personal injury damages at divorce. While this article is not the first to urge the California legislature and judiciary to revise its mechanistic approach in the classification of personal injury damages, perhaps it will be one of the last before such reform.

\textsuperscript{260}Since punitive damages are intended to punish the tortfeasor, deter similar wrongful conduct and “to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations” an argument can be made that such damages should be classified as the injured spouse’s separate property. See, George, supra note 21 at 614-15. (quoting Black’s Law Dictionary 390 (6\textsuperscript{th} ed. 1990). A review of the community property states’ classification of each portion of a personal injury award is addressed in George, supra note 21.

\textsuperscript{261}See discussion infra Part I, B, 2.

\textsuperscript{262}See Morris, supra note 80.