COMMUNITY LIABILITY FOR THE TORTIOUS ACTS OF ONE OF THE SPOUSES

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The courts of community property states frequently have faced the problem of whether a marital community should be liable for the tortious acts of one of its members. The results show a startling disarray of views and inconsistencies, due in part to the amalgamated nature of community property law, a civil law concept superimposed upon a common law system.

Under English common law the husband was liable not only for his own torts but also those of his wife. Since generally title and possession of marital property were in the husband, the courts recognized a procedural "merger" of the wife's identity with that of her husband.[1] This common law rule has been abrogated by the equitable doctrine of separate estates,[2] and more generally by married women's statutes.[3]

The Spanish law provided by statute that neither spouse was liable to lose his or her separate property, or his or her half of the community property, on account of any delict which the other spouse might commit.[4] The half share of the community property of the wrongdoing spouse, however, could be reached since the community of property between the spouses would be terminated by the declaratory sentence making that spouse's property liable for the delict.[5]

In community property states, as well as non-community property states, where the tort is one for which both spouses would be jointly liable as if unmarried, then both spouses and their property may be subject to liability.[6] But where there is no basis for joint

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[1] Henley v. Wilson, 137 Cal. 273, 70 Pac. 21 (1902); COOLEY'S BLACKSTONE 387 (4th ed. 1899); 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 519 (1943). See also BUCKLAND & MCNAIR, ROMAN LAW AND COMMON LAW, 31, 32 (1912).

[2] Rappeport, *Equitable Separate Estate,* 13 MIAMI L. REV. 85 (1956).

[3] Hageman v. Vanderdoes, 15 Ariz. 312, 138 Pac. 1053 (1914); ARIZ. REV. STAT. ANN. § 25-214 (1956), provides that married women of twenty-one years of age and upwards "are subject to the same legal liabilities as men of the age of twenty-one years of age and upwards. . . ."

[4] NOVISIMA RECOPILACION, Book 10, Title 4, Law 10, originally Law 77 of the LEYES DE TORO (1505).

[5] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 518 (1943).

[6] Hirales v. Boegen, 61 Ariz. 210, 146 P.2d 352 (1944); CAL. CIV. CODE § 171a; VERNON'S TEX. REV. CIV. STAT., Art. 4613 (1936); REV. CODE OF WASH. § 26.16.190 (1951).

liability, and personal liability on the part of one of the spouses is clear, the question of community liability generally arises since the community fund often provides the only available source for recovery.

VIEWS OF COMMUNITY PROPERTY STATES

The statutes existing in the various community property states provide, or are construed so as to provide, liability or non-liability on the basis of widely divergent views: (1) no exception of community property from liability of a tort personal to one of the members, whether husband or wife (Texas);[7] (2) no exemption of the wrongdoing spouse's half interest in the community property from liability for his or her tort (New Mexico);[8] (3) exemption of community property from liability of a tort personal to the wife,[9] but not as to one committed by the husband in his management of the

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[7] In Texas the common-law rule that the husband's separate estate was liable for his wife's torts prevailed until 1921, when the husband's separate estate was exempted by statute (VERNON'S TEX. REV. CIV. STAT., Art. 4613 (1936)) from liability for the wife's torts, but the entire community estate, as well as the wife's separate estate, remained bound. Article 4613 excepts the wife's portion of the community property made up of rents from her separate real estate, the interest on her bonds and notes, the dividend on stocks owned by her and her personal earnings from satisfaction of the torts of the husband, and it thereby implies that the community property is liable for the husband's torts when these exceptions are not present. See Seinsheimer v. Burkhart, 122 S.W.2d 1063 (Tex. Comm'n. App. 1939); Crim v. Austin, 6 S.W.2d 348 (Tex. Comm'n. App. 1928); Jackson v. Dickey, 281 S.W. 1043 (Tex. Comm'n. App. 1926); 23 TEX. JUR. *Husband and Wife* § 191 (1956).

[8] McDonald v. Senn, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966 (1949) construed statutory provisions (in light of Spanish and Mexican civil law) permitting satisfaction from and enforcement of a lien against "real estate of the judgment debtor" after the docketing of "any money judgment" to mean that a wife's interest in community property should be considered vested and segregable for those purposes and not otherwise exempted from liability. Thus, a wife's moiety of the community real property was subject to satisfaction of a judgment against her for her personal tort, regardless of her husband's power of management and control thereover. The New Mexico court discussed but did not decide the husband's liability for his wife's torts committed after marriage not done by means of, or in the use of, or in the assertion of some right in reference to her separate property, indicating that the common law liability of a husband for the tort of his wife has been abrogated. Justice Sadler's dissent argues that "Married Women's Acts" abrogated the common law liability of the husband only insofar as concerns torts committed by the wife in the management of her separate property. As for the liability of the husband for voluntary torts of the wife not connected with the handling of her separate property, the husband is liable and any judgment is satisfiable out of the community as a whole — not from the wife's interest alone, citing, *inter alia,* Hageman v. Vanderdoes, 15 Ariz. 312, 138 Pac. 1053 (1914).

[9] In Smedberg v. Bevilockway, 7 Cal. App. 2d 578, 46 P.2d 820 (1935), where a tort judgment was rendered against a wife, the court held there was no ground for subjecting the wife's interest in the community property to the satisfaction or lien of the judgment in the absence of a statutory provision expressly or by reasonable implication permitting such. See also McClain v. Tufts, 83 Cal. App. 2d 140, 187 P.2d 818 (1947).

community (California);[10] (4) exemption of entire community property from liability for the separate torts of the husband or the wife (Arizona,[11] Washington[12] and Louisiana[13]). As will be indicated later, however, in Arizona, Washington and Louisiana the entire community property may be liable where either spouse commits a tortious act while involved in an undertaking for the benefit or protection of the community.

With the exception of Texas and New Mexico[14] the courts of the community property states face the dilemma of keeping the community economically intact, thereby affording maximum protection to the interests of the wrongdoing as well as the innocent spouse, while risking adequate relief to persons injured by spouses who do not possess substantial separate estates.[15] Arizona and Washington have partially answered the problem by subjecting the community to liability when the act constituting the wrong either (1) results or is intended to result in a benefit to the community,[16] or (2) is com-

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[10] In Grolemund v. Cafferata, 17 Cal. 2d 679, 111 P.2d 641 (1941), the California Supreme Court distinguished California community property liability from that of Washington, in that California has no similar concept of "community debts" for which the community is solely liable. "[The California] community system is based upon the principle that all debts which are not specifically made the obligation of the wife are grouped together as the obligations of the husband and the community property (with the single exception of the wife's earnings, which are exempted from certain types of debt, Civ. Code. sec. 168)." The addition in 1927 of CAL. CIV. CODE § 161a, defining the interests of the spouses in community property, did not change the rule vesting in the husband the entire management and control of the community property, since the later statute expressly recognized CAL. CIV. CODE §§ 172 and 172a. The court found as a logical inference from the legislature's silence with regard to liability of his separate property, or the balance of the community property for his torts, that it was thereby intended that "the husband as agent of the community, should retain the power to divest the parties of their community property by his own act in the same manner that he might divest himself of his separate property, so long as he did not make a gift of the former without consideration."

[11] Shaw v. Greer, 67 Ariz. 223, 194 P.2d 430 (1948); McFadden v. Watson, 51 Ariz. 110, 74 P.2d 1181 (1938). See Cosper v. Valley Bank, 28 Ariz. 373, 237 Pac. 175 (1925).

[12] Bergman v. State, 187 Wash. 622, 60 P.2d 699 (1936); Milne v. Kane, 64 Wash. 254, 116 Pac. 659 (1911).

[13] Hart v. Hardgrave, 103 So. 2d 910 (La. App. 1958); Meibaum v. Campisi, 16 So. 2d 257 (La. App. 1944); Tarleton-Gaspard v. Malochee, 16 La. App. 527, 133 So. 409 (1931).

[14] Under the Texas rule there is no need to consider what constitutes a "separate" tort because the community is held liable for the torts of either spouse. In New Mexico, the wife's interest in the community property is regarded as segregable and subject to the satisfaction of a judgment against her for her personal tort. See notes 7 and 8 *supra.*

[15] MCKAY, COMMUNITY PROPERTY §§ 823-25 (2d ed. 1925).

[16] Shaw v. Greer, 67 Ariz. 223, 194 P.2d 430 (1948); McFadden v. Wilson, 51 Ariz. 110, 74 P.2d 1181 (1938).

mitted in the prosecution of the business of the community.[17] Determining what will constitute such a community undertaking remains for the usually difficult case-by-case development.

Determining Community Interest

In *Hays v. Richardson*[18] the husband brought his family to Phoenix to participate in a T.V. show, and after watching the show he was en route to pick up his wife and children when the collision occurred as a result of his negligence. The court held that the husband was engaged in a community purpose at the time of the accident and expressly repudiated the rule that the mere fact the tort was committed while the spouse was on the way to do something for the benefit of the community is not controlling.[19] The court said, "[W]e must inquire into the very act itself"[20] and into the surrounding circumstances as well to make this determination in negligence cases. Possibly in deference to its pronouncement in *Mortensen v. Knight*,[21] to the effect that the decisions of the State of Washington "while informative, are not necessarily more persuasive than either of those of the states of California or Texas," the court did not refer to the rule set out in the Washington case of *De Phillips v. Neslin*:[22] "The controlling consideration is, was the tortious act of Neslin, the husband, committed by him in the management of the community property or for the benefit of the community? If so committed, the community must be regarded as having committed the act, and thereby rendered itself liable therefor."[23] In effect this is the identical test which the Arizona court applied in the *Hays* case.

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[17] Rodgers v. Bryan, 82 Ariz. 143, 309 P.2d 773 (1957); La Framboise v. Schmidt, 42 Wash. 2d 198, 254 P.2d 485 (1953); McHenry v. Short, 29 Wash. 2d 263, 186 P.2d 900 (1947).

[18] 95 Ariz. 64, 386 P.2d 791 (1963).

[19] 1 de Funiak, Principles of Community Property 526 (1943).

[20] Hays v. Richardson, 95 Ariz. 64,66, 386 P.2d 791,792 (1963).

[21] 81 Ariz. 325, 305 P.2d 463 (1956).

[22] 139 Wash. 51, 245 Pac. 749, 751 (1926).

[23] *Id.* at 751. *Accord,* Newbury v. Remington, 184 Wash. 665, 52 P.2d 312 (1935), where defendant motorist, angered by a driving incident, forced plaintiff motorist to stop, got out of his automobile and committed assault on plaintiff. In that case, the court stated, at 313: "Applying this rule to the present case, it cannot be said that the tort committed by the respondent husband grew out of or was concerned with his management of the community property, nor was it for the benefit of the community — the tort was committed by him as an aggressor wholly beyond and without any such consideration."

Where the torts which are committed by a spouse are clearly for the protection or benefit of the community the test fits rather easily, regardless of whether the tort was intentional or negligent. In *Rodgers v. Bryan*,[24] where defendants owned and operated, as a community enterprise, a service station and restaurant, the husband's alleged assault was by his own admission to protect the morals of his family and guests and his property against trespass — obviously community interests. His conduct and actions were intended to be performed in behalf of the community, and his separate property and that of the community became liable for the results of his violent conduct. Similarly, where the husband's financial interest in a partnership was a community interest and the husband, to protect partnership funds, accused an employee of participating in a faked robbery, such acts of libel and slander were found to be for the benefit of the community and it was held liable.[25] The community was also found liable where an automobile accident occurred as the result of the wife's negligence while she was on her way to pick up her husband after getting their car washed.[26] Numerous cases finding a community-owned automobile operated for the benefit of the community by the nature of the mission have held the community liable.[27]

Where the torts are patently in derogation of the community, the community should not be held liable, but few acts are so translucent. In *Hageman v. Vanderdoes*[28] the community was not answerable where defendant wife, while living separate and apart from her husband, maliciously assaulted plaintiff, an employee of a corporation under the sole management and control of the husband, when the plaintiff refused to leave such employment and refused to sever

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[24] 82 Ariz. 143, 309 P.2d 773 (1957).

[25] McFadden v. Watson, 51 Ariz. 110, 74 P.2d 1181 (1938). The court stated that actual benefit to the community is not necessary; it is sufficient that the tortious act was committed by the spouse with the bona fide intention of protecting the community interest.

[26] Selaster v. Simmons, 39 Ariz. 432, 7 P.2d 258 (1932).

[27] Chapman v. Salazar, 40 Ariz. 215, 11 P.2d 613 (1932); Selaster v. Simmons, 39 Ariz. 432, 7 P.2d 258 (1932); Meibaum v. Campisi, 16 So. 2d 257 (La. App. 1944); Paderas v. Stauffer, 10 La. App. 50, 120 So. 886 (1929); Merritt v. Newkirk, 155 Wash. 517, 285 Pac. 442 (1930); Milne v. Kane, 64 Wash. 254, 116 Pac. 659 (1911).

[28] 15 Ariz. 312, 138 Pac. 1053 (1914).

her associations with the defendant's husband.[29] In *Ruth v. Rhodes*[30] defendant-husband negligently operated his highway patrol car while engaged in the business of the state as a patrolman, and the court ruled that the wife was not personally liable; however, the question as to the liability of the community was not raised on appeal. In *Shaw v. Greer*[31] the community property was not liable to satisfy tort judgments against husbands who maliciously and fraudulently exceeded their authority as a deputy sheriff and as a chief of police in attempting to bring about an unlawful arrest and imprisonment. The court held that the tort was not for the benefit of the state, as employer, and not shown to have been of any benefit to the community, or in connection with the management of any community property, or such as indirectly or by any theory of agency could be associated with the community, but might be similar to a separate crime of one of the spouses.[32] It should be noted, however, that in considering for the first time the liability of the community for the tortious acts of an individual member as a public officer, and in arriving at its decision, the Arizona court in *Shaw* did not choose to follow the reasoning behind the rule of non-liability applied by the Washington courts[33] that the acts of a public officer as such are official and not community acts, therefore the tort does not create community liability. *Shaw* reasoned, instead, that where the married tortfeasor pursues his work or duties in the usual manner and honestly attempts to perform accord-

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[29] The only ground upon which defendant sought to avoid liability for her inexcusable conduct was that her husband was jointly liable because of the marital relation alone. Obviously the financial interests of the community business would not be enhanced by such forcible ejectment of the plaintiff from the place of her employment, but it would be interesting had the wife predicated her act as being one attempting to preserve the community bond per se, *i.e.*, by removal of the alienating party. See also Schramm v. Steele, 97 Wash. 309, 166 Pac. 634 (1917), where the community was not liable for the husband's tort of alienating plaintiff's wife.

[30] 66 Ariz. 129, 185 P.2d 304 (1947).

[31] 67 Ariz. 223, 194 P.2d 430 (1948).

[32] Cosper v. Valley Bank, 28 Ariz. 373, 237 Pac. 175 (1925), inferentially recognized that a fine for a crime committed by the husband, not perpetrated in connection with the management of the community property, is a separate debt, overruling Villescas v. Arizona Copper Co., 20 Ariz. 268, 179 Pac. 963 (1919).

[33] Kies v. Wilkinson, 114 Wash. 89, 194 Pac. 582 (1921) (tort committed by husband in the exercise of duties as county treasurer); Bice v. Brown, 98 Wash. 416, 167 Pac. 1097 (1917) (district officers committing a trespass by wrongfully leaving logs and debris upon private property); Day v. Henry, 81 Wash. 61, 142 Pac. 439 (1914) (wrongful levy by sheriff); Brotton v. Langert, 1 Wash. 73, 23 Pac. 688 (1890) (constable wrongfully sold property on execution). *But see* Kangley v. Rogers, 85 Wash. 250, 147 Pac. 898 (1915) (community was considered engaged in business of notary public so as to be liable for husband's tort committed while acting as notary).

ing to the directions of his employment or office, there is every reason to believe that the acts were intended for the benefit of the community and that the community must be liable for any results. But where one spouse, without participation by the other, maliciously executes a tort, such injury could not benefit the employer, private or state, nor could it *ordinarily* benefit the community.[34] Arizona has steadfastly refused to hold the community liable for debts contracted by the husband that are in no way connected with the community and from which the community received no benefits,[35] and has applied the same considerations to freeing the community from tort liability.[36]

The major difficulty lies in the area where the acts of a spouse are such that the community enjoys no obvious or apparent physical or financial advantages. A Ninth Circuit case, *Babcock v. Tam*,[37] concerned a defendant who made an auto trip from his home in Arizona, visited his convalescing wife in San Diego, and then drove on to Los Angeles for a business conference pertaining to his sole and separate property. On his return he offered a business acquaintance, Mrs. Sparks, a ride to Venice, California, and the collision occurred enroute. The court held that Tam's compliance with Mrs. Sparks' request to take her to Venice was a personal courtesy within the zone of his separate business, and that the trip in its entirety was an individual enterprise not subjecting the community to liability.

FAMILY CAR DOCTRINE

Where a community automobile was being driven by the wife in taking the children to school, the Arizona court, in *Donn v. Kunz*,[38] affirmed a directed verdict for the defendant on the ground that the "family car" doctrine was not applicable, but rather the law governing the community. However, the community had terminated upon the wife's death prior to the commencement of the action. The court

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[34] *But see* Rodgers v. Bryant, 82 Ariz. 143, 309 P.2d 773 (1957); Hansen v. Blevins, 84 Idaho 58, 367 P.2d 758 (1962) (community which owned tavern was held liable for injury inflicted on a customer by husband while operating the tavern and acting in community interest and for its protection); McHenry v. Short, 29 Wash. 2d 263, 186 P.2d 900 (1947) (defendant-husband maliciously assaulted and inflicted fatal injuries upon an individual while ostensibly evicting him from the real property of the community and community held liable).

[35] Perkins v. First Nat. Bank of Holbrook, 47 Ariz. 376, 56 P.2d 639 (1936); Payne v. Williams, 47 Ariz. 396, 56 P.2d 186 (1936).

[36] In MacKenzie v. Sellner, 58 Wash. 2d 101, 361 P.2d 165 (1961), the Washington Supreme Court absolved the community from any liability arising out of a wife's automobile accident which occurred after the commencement of a divorce action; a voluntary property settlement granting the automobile to the wife had been reached and the parties were living separately.

[37] 156 F.2d 116 (9th Cir. 1946).

[38] 52 Ariz. 219, 79 P.2d 965 (1938).

ruled that the " 'family car' doctrine rests upon the basis that the car is furnished by the husband in his individual capacity and as common-law head of the family for the use of the family, and not as agent for another entity, the community."[39] Thus the stage was set for the startling decision of *Mortensen v. Knight.*[40] Reversing *Donn*, the Arizona court held, in a three-two decision, that the family purpose doctrine, under which the wife became the agent of the husband and he was required to respond as her superior, was applicable[41] and that the husband's interest in the community property was liable for the negligent operation of a community automobile by the wife. The court predicated its application of the family purpose doctrine on the husband's management and control of the community property, not on ownership. As manager, the court reasoned, he was charged with complete control of the use of the family car.[42] The court went on to say that "where the wife is not deceased or her personal representative can be joined in the action, the whole of the community property is, of course, subject to the satisfaction of the judgment."[43] In *Mortensen*, as in the *Donn* case, the wife-tortfeasor died prior to the commencement of the action, and satisfaction of the judgment against

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[39] *Id.* at 224-25, 79 P.2d at 967.

[40] 81 Ariz. 325, 305 P.2d 463 (1956).

[41] For an interesting appraisal of the application of the family car doctrine see Smith, *Cases Which the Supreme Court of Arizona Should Revisit*, 2 ARIZ. L. REV. 83 (1960). Professor Chester H. Smith urged repudiation of the doctrine on grounds that (1) to impose liability on a bailor for furnishing a car to one who injures someone "on a frolic on his own" is an unsound legal proposition under principles of agency and (2) the liability imposed by the doctrine is one which should be created by the legislature, not the courts.

[42] Keddie, *Community Property Law in Arizona*, Arizona Weekly Gazette (pamphlet), May, 1957, in considering ARIZ. REV. STAT. ANN. § 25-211(B) (1956), which reads "during coverture, personal property may be disposed of by the husband only," questions the court's conclusion that the legislature did not thereby intend to give the husband sole power to alienate and the husband and wife equal voice in the management of the community property. The author regards the decision as one ignoring and submerging the doctrine of equality of the spouses so essential to our community property law.

[43] Mortensen v. Knight, 81 Ariz. 325,334, 305 P.2d 463,469 (1956). The effect of ARIZ. REV. STAT. ANN. § 14-177 (1956) has not yet been interpreted by the Arizona Supreme Court. It reads as follows:

> Every cause of action, except a cause of action for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium or invasion of the right of privacy, *shall survive the death of the person* entitled thereto or *liable therefor, and may be asserted by or against the personal representative of such person*, provided that upon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed. [Emphasis supplied.]

In Rodriquez v. Terry, 79 Ariz. 348, 290 P.2d 248 (1955), the court ruled that the above section was not retrospective, and applied the decision of Gustafson v. Rajkovich, 76 Ariz. 280, 263 P.2d 540 (1953) and the rule expressed in McClure v. Johnson, 50 Ariz. 76, 69 P.2d 573 (1937), that the cause of action does not survive the tortfeasor's death when he dies before the commencement

the husband was restricted to the extent of his interest in the community at the time of its dissolution "since it is the husband's statutory obligation to manage and control the common personal property."[44] Justice Windes' dissent[45] sharply referred to this ruling as compounding the error, as the family car doctrine rests upon the principle of *respondeat superior* whereby the one who is vicariously held liable is answerable to the full extent of his resources for injuries inflicted by his agent-tortfeasor. The majority opinion represents a deft attempt at placating an injured plaintiff who cannot reach the dissolved community, without imposing full personal liability upon the surviving spouse, while holding his half of the community liable under the family purpose doctrine.

LEGAL BASIS FOR COMMUNITY LIABILITY

Wherein lies the legal basis for finding the community liable at all? Certainly not upon the mere fact of marital relationship.[46] Generally the legal basis for holding the community liable for a tort committed by one of its members has been said to be the doctrine of *respondeat superior*[47] with both spouses answerable to "the community." But in view of *Mortensen v. Knight*,[48] who serves as the "master"? That case soundly repudiated the "legal entity" theory[49] which assigns the property to the community rather than to the conjugal partners jointly. The court emphasized that "the common property is managed or administered by the husband and that neither historically, by statute, or in logic is it correct to say that the husband

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of the action. Impliedly from the language of the court in *Rodriquez* and the unrestricted wording of the 1955 statute, it was the intent of the legislature to change the law prospectively to allow actions against the personal representative of a deceased tortfeasor even though the decedent dies before the action is commenced. Thus the surviving spouse and the personal representative of the decedent can now be joined, subjecting the entire community property to satisfaction of judgment.

[44] Mortensen v. Knight, 81 Ariz. 325, 334, 305 P.2d 463, 469 (1956).

[45] *Ibid.*

[46] McClure v. McMartin, 104 La. 496, 29 So. 227 (1901); Bergman v. State, 187 Wash. 622, 60 P.2d 699 (1936); Olive Co. v. Meek, 103 Wash. 467, 175 Pac. 33 (1918); Schramm v. Steele, 97 Wash. 309, 166 Pac. 634 (1917); Day v. Henry, 81 Wash. 61, 142 Pac. 439 (1914). See Furuheim v. Floe, 188 Wash. 368, 62 P.2d 706 (1936).

[47] Smith v. Retallick, 48 Wash. 2d 360, 293 P.2d 745 (1956); Bergman v. State, 187 Wash. 622, 60 P.2d 699 (1936).

[48] 81 Ariz. 325, 305 P.2d 463 (1956).

[49] Rejecting the "unfortunate" language of La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426 (1914), as applied in Cosper v. Valley Bank, 28 Ariz. 373, 237 Pac. 175 (1925).

is the agent of the common property."[50] The true relationship of the husband to the community personalty is "that of a co-owner and statutory administrator of his co-owner's interest."[51] The dissenting Justice Windes attacked as fallacious the reasoning of the majority which he construed to imply that since there is no such entity as the community for which the husband could be an agent, the wife became *his* agent while driving the car. The dissenting opinion stated:

> We care not whether you call the husband an agent of the marital community, an agent of the wife, trustee or statutory administrator. The result is the same, he is acting in a representative capacity. . . . All we mean and the other courts mean when using the term [entity] is that the husband in handling community property acts not for himself only but for himself and in a representative capacity for his wife for their mutual interests.[52]

That the term "entity" has some value in describing the community relationship has been pointed out by Keddie[53] citing from *Shaw v. Greer*:[54] "[T]he community is not a sanctuary for the wrongdoer; rather it is an entity, possessing the qualities of honesty and integrity and taking its honest gains and assuming its legal obligations."

Despite previous assertions to the effect that the community terminates upon the death of one of its members,[55] at least for purposes of satisfying community debts and liabilities, the community survives, even though so recognized almost anonymously by the Arizona court in *Mortensen*. It is submitted that the discussion of community property liability has been obscured by the semantic warfare surrounding the disestablishment of the community entity. Certainly it is not a legal entity, but if the term "community purpose" is to hold meaning in context with the principle of *respondeat superior*, and in the determination of community tort liability, it is logical to engage as an antecedent the community concept. It represents a conjugal partnership which comprehends the mutual interests of the spouses and provides the responsive tap of recovery for community debts and liabilities.

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[50] Mortensen v. Knight, 81 Ariz. 325, 332, 305 P.2d 463, 468 (1956).

[51] *Ibid.*

[52] *Id.* at 335-36, 305 P.2d at 470.

[53] Keddie, *Community Property Law in Arizona*, Arizona Weekly Gazette (pamphlet), May, 1957.

[54] 67 Ariz. 223, 228, 194 P.2d 430, 433 (1948).

[55] Gustafson v. Rajkovich, 76 Ariz. 280, 263 P.2d 540 (1953); Donn v. Kunz, 52 Ariz. 219, 79 P.2d 965 (1938).

INTENT AND DEGREES OF NEGLIGENCE

Hays v. Richardson,[56] and the cases it cites,[57] dictates the rule that it does not matter what degree of negligence the tortfeasor-spouse may be guilty of or whether such tort is intentional or not, so long as the act itself, as discerned by its surrounding circumstances, was for the benefit of the community. As demonstrated by *Mortensen*, however, the Arizona court is unwilling to carry too far an analogy dealing with agency principles, such as basing a determination of community interest upon whether or not the spouse has gone outside the scope of employment. Yet, what is or is not intended for the benefit of the community often seems an indiscernible boundary without such a signpost. An extreme example is the Washington decision, *La Framboise v. Schmidt*,[58] where the court held the community liable, under the doctrine of *respondeat superior*, for damages resulting from a tort committed by the husband in taking indecent liberties with a six-year-old girl temporarily placed in custody of the community for pay. The ruling rested upon the rather tenuous ground that the husband's acts were committed in prosecution of the business of the community, *i.e.*, the care of the child. In another Washington case,[59] the marital community was absolved from liability where the husband, driving the community automobile alone to visit a friend, became involved in a near collision with another motorist and struck him with his fist. But the community was responsible for the "community transaction" where the husband permitted his wife to drive at will and, while using a substitute car during the servicing of the community automobile, she struck a fourteen-year-old girl on the way to an appointment to try on a sweater she had ordered.[60] Such decisions are said to be based on the premise that recreational activities on the part of either spouse promote and advance the general welfare of the com-

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[56] 95 Ariz. 64, 386 P.2d 791 (1963).

[57] Rodgers v. Bryan, 82 Ariz. 143, 309 P.2d 773 (1957); Shaw v. Green, 67 Ariz. 223, 194 P.2d 430 (1948); McFadden v. Watson, 51 Ariz. 110, 74 P.2d 1181 (1938).

[58] 42 Wash. 2d 198, 254 P.2d 485 (1953).

[59] Smith v. Retallick, 48 Wash. 2d 340, 293 P.2d 745 (1956). See also Verstraelen v. Kellogg, 60 Wash. 2d 115, 372 P.2d 543 (1962) (where, after a collision defendant-motorist assaulted plaintiff and subjected him to false imprisonment by taking away his car keys. Even though defendant's wife accompanied him, the court found no proof that the torts were committed for and on behalf of the community); DePhillips v. Neslin, 155 Wash. 435, 283 Pac. 691 (1930).

[60] Werker v. Knox, 197 Wash. 435, 85 P.2d 1041 (1938).

munity and therefore such recreational activities inure to its benefit.[61] It is doubtful whether such recreational activity could be extended further than it was in *King v. Williams*[62] where the community was held liable when the husband's tort occurred during a night out with the boys and on his way to a dance without his wife, and still be described as beneficial to the community.

CONCLUSION

This purview of the Arizona decisions and the impact of decisions of other community property states reveals that, in general, the community property will be exonerated from obligations resulting from a tortious act of one of the spouses not participated in or ratified by the other, unless the wrongful act was committed, or so intended, for the benefit or protection of the community. In determining such a benefit or protection the court will look long and hard at all the surrounding circumstances, especially where significant social or emotional factors might favor a plaintiff's recovery. The common law concept that the marital property belongs to the husband may have been abrogated by statute or interpretation, but the prospective plaintiff in quest for the community pot of gold will not be circumvented when his cause is just and the facts surrounding the tortious act can possibly bestow a benefit upon the paired community members or their property.

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[61] Moffitt v. Krueger, 11 Wash. 2d 658, 120 P.2d 512 (1921). *But see* series of Louisiana cases cited in 10 A.L.R.2d 988, holding that a husband, as a member of the community, is not liable for the negligence of his wife while driving solely for her own pleasure.

[62] 188 Wash. 350, 62 P.2d 710 (1936).