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COMMUNITY PROPERTY AND TORT LIABILITY IN WASHINGTON

HOWARD P. PRUZAN*

I. INTRODUCTORY

Of no small proportions was the task faced by the judges of this state when the legislature saw fit to superimpose upon our background of common law a system of community property, a development of the civil law. And nowhere are the difficulties of reconciling these two conflicting systems felt more acutely than in the field of tort liability.¹ In addition to inherent difficulties there is the urge which constantly influences judges to circumvent existing law when it requires turning away a just claimant empty-handed (or, what amounts to the same thing, turning him away with a judgment which cannot be satisfied). This urge is often buttressed by a strong public policy in favor of protecting the class of claimants to which the plaintiff belongs.² Little wonder then that the decisions in this field do not always preserve inviolate the "symmetry" of the "edifice of justice."³

A recent addition to the law in this field is *McHenry v. Short*.⁴ It is believed by the writer that this case represents a definite extension of the limits of community liability. It is proposed in this comment to use this case as a springboard into an examination of the various routes taken by the Washington court in imposing liability upon the community and separately upon the nonacting spouse for the torts of the husband or the wife.

Many well-settled principles dealt with in this comment are open to serious question from a public policy and conceptual standpoint. Certain expressions employed by the cases such as "agent of the community," "community benefit," and so forth, have been criticized as inviting and perpetuating faulty analysis. Lack of adverse criticism is not to be construed as approval of these principles or phrases. This comment attempts only to analyze the present state of the law and to

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¹ Under English common law, since the identity of the wife merged into that of her husband, the husband was as fully liable for the torts of his wife as he was for his own torts. Under the Spanish civil law, neither spouse was liable to lose his or her separate property or his or her half of the community property by reason of any criminal offense or civil wrong which the other spouse might commit. DEFUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* § 181 (1943).

² *Werker v. Knox*, 197 Wash. 453, 456-457, 85 P.(2d) 1041, 1042 (1938).

³ Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 328, 58 Sup. Ct. 149, 82 L. Ed. 293 (1937).

⁴ 129 Wash. Dec. 247, 186 P.(2d) 900 (1947).

harmonize the language and results of the cases. In view of this objective, it has been found impracticable to dispense with the use of the very terms used in the cases.

II. HUSBAND AS AGENT

A. Introductory

In reviewing the liability of the community for the torts of the husband, the court phrased the rule presently recognized as follows:⁵

It is now the settled law of this state that, if the tortious act of the husband be committed in the management of community property or for the benefit of the marital community, such community is thereby rendered liable for the act. (Citation of cases omitted.)

But this rule is not based upon the mere fact of marital relationship. It is founded on the doctrine of *respondet superior*. Under this doctrine, unless, in a given instance, it can be said that the husband was acting as the agent of the marital community, the community is not liable.

This rule, it will be noted, placed liability on two bases: (1) acts of management of community property; (2) acts resulting in benefit to the community. These appear to spring from entirely different origins. The first logically follows from the fact that the statute makes the husband the manager of community real⁶ and personal⁷ property.⁸ The second is seemingly based on equitable principles.⁹ Although these origins differ, the court has frequently considered the two rules interchangeably and in a manner making it impossible to ascertain on which of the two rules the decision is based.¹⁰ It is believed that the outside limits of liability could be more readily predicted if the rules were considered separately. They will be so treated here.

B. Acts of Management

Where a husband's tort may be characterized as a direct act of management of community real or personal property, it will fall within the precise language of the statutes cited above and bind the community

⁵ *Bergman v. State*, 187 Wash. 622, 626, 60 P.(2d) 699, 701 (1936).

⁶ REM. REV. STAT. § 6893 [P.P.C. § 434-29].

⁷ REM. REV. STAT. § 6892 [P.P.C. § 434-27].

⁸ *Schramm v. Steele*, 97 Wash. 309, 313, 166 Pac. 634, 636 (1917).

⁹ As the court phrased it in *McGregor v. Johnson*, 58 Wash. 78, 80, 107 Pac. 1049 (1910), "If we were to hold that the obligation he has wrongfully incurred to the respondent is now his separate debt, it would follow that the community, after receiving a financial benefit from his wrongful acts, could retain the same without being called to account or compelled to make restitution. Such a holding could find no support in either law or reason. The community having received the benefit, should now be estopped from denying its liability."

¹⁰ *DePhillips v. Neslin*, 139 Wash. 51, 245 Pac. 749 (1926).

Arguably, the liability of the community for torts involving personalty should be more extensive than for torts involving realty, the husband's powers over the former being less restricted than over the latter. However, this distinction has received scant attention in the cases.¹¹ The court having received its general direction from the statutes, it apparently does not feel compelled to return to them for more detailed instructions.

The typical instance of community liability arises where the husband commits a tort during the course of his day-to-day business. This may consist of either the management of his own enterprise,¹² or compensated employment.¹³ Upon a showing that the business conducted by the husband is his ordinary occupation, the court will presume that it is community business,¹⁴ and of whatever torts he is guilty in the conduct of the community business, he is presumed to act as agent of the community.¹⁵ Liability is clear under these circumstances because the husband's daily occupation falls safely within the scope of the agency contemplated by the statutes cited above.

The tort of a husband could fall outside the scope of his statutory agency in two ways: First, it could be committed in the course of an activity clearly unrelated to management of community property. Thus, where a husband incurred tort liability by alienating the affections of another man's wife,¹⁶ or by committing an assault springing from a purely personal altercation,¹⁷ the court recognized that the husband "stepped outside the scope of the community business to do a wrong on his own account."¹⁸ Second, by virtue of the manner in which the tort was committed, e.g., willfully or maliciously, the court might hold that an act otherwise within the scope of community business, was thereby taken outside the rule of *respondet superior*.¹⁹ Although there

¹¹ See *Schramm v. Steele*, 97 Wash. 309, 312, 166 Pac. 634, 635 (1917).

¹² *Milne v. Kane*, 64 Wash. 254, 116 Pac. 659 (1911), driving negligently on community business; *Woste v. Ruge*, 68 Wash. 90, 122 Pac. 988 (1912), maintenance of open trap door in floor of grocery store; *Meck v. Cavanaugh*, 147 Wash. 153, 265 Pac. 178 (1928), negligent performance of duties as executor and trustee under a will.

¹³ *Local No. 2618 Etc. v. Taylor*, 197 Wash. 515, 85 P.(2d) 1116 (1938), conversion of funds by officer in a labor union.

¹⁴ *Henrickson v. Smith*, 111 Wash. 82, 189 Pac. 550 (1920).

¹⁵ *DePhillips v. Neslin*, 155 Wash. 147, 283 Pac. 691 (1930).

¹⁶ *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634 (1917).

¹⁷ *Newberry v. Remington*, 184 Wash. 665, 52 P.(2d) 312 (1935).

¹⁸ *DePhillips v. Neslin*, 155 Wash. 147, 153, 283 Pac. 691, 693 (1930).

¹⁹ "The fact that the servant intends a crime, especially if the crime is of some magnitude, is to be considered in determining whether or not the act is within the employment, since the master is not responsible for acts which are clearly inappropriate or unforeseeable in the accomplishment of the authorized result." *RESTATEMENT OF AGENCY* § 321, Comment a.

Compare the question of the liability of a partnership for the torts of a partner, a

has been no direct discussion of this question, some of the cases seemed tacitly to recognize the possibility. In most cases involving such willful conduct, the court has leaned heavily upon community benefit to support a holding of community liability. All doubts on this score were resolved by the holding in *McHenry v. Short*.

In the *McHenry* case, action was brought upon an assault committed by defendant husband, Short, upon plaintiff's husband, McHenry. McHenry had been engaged in painting a boat stored at a boathouse when Short approached him and ordered him off the premises. Argument of a personal nature ensued, leading to physical encounter which culminated in the death of McHenry. The evidence could be interpreted to show either that the defendant Short claimed to own the boathouse premises, or that Short was merely engaged in employment as watchman of the premises. Animosity had long existed between the two men. The opinion admits that the assault may actually have been the result of Short's charge that McHenry had been spreading lies about him and McHenry's retort to the charge. It was held, however, that the affair originated either as an attempt to evict McHenry from property claimed by the community, or to eject him in the role of watchman, and in either case he acted as agent of the community; although personal malice may have intervened as the direct cause of the actual assault, Short had not wholly "shed his character as agent of the community," and the community was held liable. Obviously, there was no possibility of finding community benefit in the case, and the holding was placed squarely on the "act of management" rule. It seems safe to conclude from the holding that no degree of willfulness, malice, or other personal motive will remove an act of the husband which otherwise qualifies from the characterization of "act of management."²⁰

close analogy. The partnership is held responsible where the tort is committed "in the ordinary course of business of the partnership." REM. REV. STAT. § 9975-52. Under a similar phrasing of this rule, it was held in *Dulchevsky v. Solomon*, 136 Wash. 645, 241 Pac. 19 (1925) that the partnership is not liable where the partner, though acting within the scope of the business, acted wantonly or maliciously.

²⁰ *Furuheim v. Floe*, 188 Wash. 368, 62 P.(2d) 706 (1936) was somewhat similar to the *McHenry* case, likewise involving an assault by the defendant husband. Although the assault occurred in the office where the husband conducted the community business, the court held that the sole motivation for the assault was a dispute concerning real estate which was the separate property of the husband. The community was exonerated. Were this case to be relitigated today, plaintiff might obtain judgment against the community by characterizing any such language as "Get out of here!" which may perchance have been spoken, as an attempt to eject from community premises, bringing the facts within the reasoning of the *McHenry* case.

C. Community Benefit

The line of demarkation between those cases which speak predominantly in terms of management of community property and those which speak in terms of community benefit is a tenuous one. With few exceptions, the court has placed reliance on community benefit, to a varying degree, when dealing with torts which were willful or involved moral turpitude. But in no instance were the facts such that the court could not have spoken in terms of "act of management" had it so desired.²¹ It would seem that the court felt the necessity for seizing upon community benefit because of the danger that the husband's willfulness might remove otherwise authorized conduct from the scope of his statutory agency. Certainly, if the tort fell safely within the scope of the agency, there would be no need for discussing the matter of benefit.

It is clear that acts resulting in community benefit encompass a much broader scope than do those which may be characterized as "acts of management." Any acquisition by either the husband or the wife after marriage, which is not acquired by gift, will, or intestate succession, becomes community property.²² Thus, a tort which falls outside the scope of the husband's statutory management, but which results in the acquisition of money or other property, will bind the community solely by virtue of the fact that the community has been enriched.

Note that community benefit has no connection with the doctrine of *respondeat superior*, although some of the cases seem to indicate that it has.²³ It follows then, that the rule could be applied with equal logic to torts of the wife resulting in acquisitions, for these inure to the benefit of the community in exactly the same manner as do the acquisitions of the husband. No case discussing this possibility has been found. This argument might also support the result that the community will incur liability for the torts of the wife committed in the course of her occupation (while living with her husband), inasmuch as her salary benefits the community. Certainly the equities underlying the community benefit rule would be present. Further discussion of community

²¹ *McGregor v. Johnson*, 58 Wash. 78, 107 Pac. 1049 (1910) involved a fraudulent real estate transaction by the husband, whose business was that of real estate agent; in *Geissler v. Geissler*, 96 Wash. 150, 164 Pac. 746 (1917) the husband repossessed a community-owned automobile which had been sold on conditional sale; in *DePhillips v. Neslin*, 139 Wash. 51, 245 Pac. 749 (1926) the torts arose from an investigation by defendant husband of his employee's honesty together with a charge of theft of community property.

²² REM. REV. STAT. § 6891 [P.P.C. § 434-9].

²³ The quotation from *Bergman v. State* set out in the text above is an example.

liability for the torts of the wife will be found at a subsequent point in this comment.

Returning to the husband's torts, we have seen that they may fall without the scope of his agency in the two ways indicated. Inasmuch as the *McHenry* case has eliminated the possibility that the manner of commission of a tort otherwise within the scope will relieve the community of liability, it appears there will be little necessity for considering community benefit in torts of this character. However, community benefit still has an important function to perform in the case of torts which are unrelated to management of community property, where it will salvage for the plaintiff a community liability which might otherwise be lost.

Community benefit may, of course, consist of ill-gotten gains,²⁴ but a mere intent to benefit the community through a wrongful act which does not result in monetary gain, is not sufficient.²⁵

D. Official Capacity Cases

An anomalous offshoot from the principles thus far discussed is the rule, long recognized in Washington, that the community will not be bound where the tort of the husband is committed in an official capacity.²⁶ Examples of official capacity are constable,²⁷ sheriff,²⁸ supervisor of a drainage district,²⁹ and drainage commissioner.³⁰ The fact that the official has been appointed rather than elected is immaterial.³¹ The reason for the exception was stated in *Kangley v. Rogers*³² to be that a community may engage in a profession such as the practice of

²⁴ Profit from a fraudulent real estate transaction in *McGregor v. Johnson*, 58 Wash. 78, 107 Pac. 1049 (1910), conversion of rentals resulting in benefit to corporations of which defendant husband was an officer in *Exeter Co. v. Holland Corp.*, 172 Wash. 323, 20 P.(2d) 1 (1933), acquiring of realty for the community as a result or breach of trust in *Van Geest v. Stocks*, 198 Wash. 218, 88 P.(2d) 406 (1939).

²⁵ *Bergman v. State*, 187 Wash. 622, 60 P.(2d) 699 (1936), where no benefit was held to result from the burning of a community-owned building with an intent to collect fire insurance, where no insurance was actually collected.

Compare the creation by the husband of community contract liability. There it is held that intent to benefit the community is sufficient to bind the community. The fact that no profit results in fact is held immaterial. *Henning v. Anderson*, 121 Wash. 53, 207 Pac. 1048 (1922), *O'Malley & Co. v. Lewis*, 176 Wash. 194, 28 P.(2d) 283 (1934). However, benefit is discussed in these cases only for the purpose of defining the scope of the husband's statutory agency in binding the community by contract, an altogether different inquiry. Note that a holding that intent to benefit the community alone would be sufficient would result in removing the equitable basis for the community benefit rule.

²⁶ *Day v. Henry*, 81 Wash. 61, 142 Pac. 439 (1914).

²⁷ *Brotton v. Langert*, 1 Wash. 73, 23 Pac. 688 (1890).

²⁸ *Day v. Henry*, 81 Wash. 61, 142 Pac. 439 (1914).

²⁹ *Bice v. Brown*, 98 Wash. 416, 167 Pac. 1097 (1917).

³⁰ *Kies v. Wilkinson*, 114 Wash. 89, 194 Pac. 582, 12 A.L.R. 833 (1921).

³¹ *Fidelity & Deposit Co. v. Clark*, 144 Wash. 520, 258 Pac. 35 (1927).

³² 85 Wash. 250, 147 Pac. 898 (1915).

law or, as in the *Kangley* case, the calling of notary public, but it cannot be elected to public office or discharge the duties of that office. Both the reasoning and the result of this rule have been vigorously attacked.⁸³ If any logical basis for the rule ever could be found in the diverse expressions used during the formulative period of community tort liability rules,⁸⁴ it can now safely be said that the rule is unsound. As indicated above, it is clear that community liability arises where a tort is committed by the husband while engaged in his ordinary occupation and earning a livelihood for the community. This rule and the official capacity exception cannot logically co-exist. Although previous appeals to the court to repudiate the rule have been unsuccessful,⁸⁵ the tone of the opinion in the *McHenry* case indicates that a renewed attempt might well meet with success.

An inroad on the rule was made in *Beakley v. Bremerton*.⁸⁶ It was there held that when the community receives actual benefit as a result of the commission of the tort (in this case, county funds fraudulently retained) the community is liable. The salary of a public official is community property.⁸⁷ It might be argued, to come within the *Beakley* holding, that since the community derives benefit from the employment of the official, it derives benefit from all acts performed in the course of the employment, which must include the tort. However, a clean break with the entire public official line of cases would be more desirable.

E. *Respondeat Superior* Examined

The use of the doctrine of *respondeat superior* as a basis for solving problems of community liability for torts of the spouses has been questioned.⁸⁸ The fact that the husband is at once agent and part-principal is unorthodox, but analogy exists in the case of a partnership. Important, however, is the distinction that where a partner tortiously

⁸³ MCKAY, *COMMUNITY PROPERTY* (2d Ed. 1925) § 823, Note, 3 WASH. L. REV. 153 (1928).

⁸⁴ See *Brotton v. Langert*, 1 Wash. 73, 81, 23 Pac. 688, 689 (1890), *Milne v. Kane*, 64 Wash. 254, 256, 116 Pac. 659 (1911).

⁸⁵ *Kies v. Willkanson*, 114 Wash. 89, 92, 194 Pac. 582, 583, 12 A.L.R. 833 (1921), where the court responded. "The doctrine of *Brotton v. Langert*, *supra*, has been the law of this state for more than thirty years, and so far as we know has worked no flagrant injustice, nor has the legislature seen fit to change it. We are therefore not inclined at this time to overrule it." Also, *Fidelity & Deposit Co. v. Clark*, 144 Wash. 520, 522, 258 Pac. 35, 36 (1927).

⁸⁶ 5 Wn.(2d) 670, 105 P.(2d) 40 (1940).

⁸⁷ *Coles v. McNamara*, 131 Wash. 691, 231 Pac. 28 (1924).

⁸⁸ Lawrence, *Liability of the Marital Community for Torts of the Husband and Wife*, 16 WASH. L. REV. 203 (1941).

acts outside the ordinary course of business and incurs personal liability, that partner's interest in the partnership assets may be subjected to a charging order by his judgment creditor,³⁹ whereas the husband's one-half interest in community property has been judicially isolated from his personal liability.⁴⁰ That being the case, the policy is obviously in favor of giving the widest possible range to the scope of the husband's agency in tort actions. It is believed that the Washington court's inclination to broadly define the scope of the husband's agency, manifested in the *McHenry* case, is in accordance with sound public policy.

III. FAMILY CAR DOCTRINE

Like the liability of the community for the "management" torts of the husband, the liability imposed under the family car doctrine is based on agency. The former is based upon the statutory rights and duties of the husband, the latter arises from the voluntary furnishing of an automobile for the customary conveyance of the family, rendering anyone who drives the vehicle for that purpose with the principal's express or implied consent, the agent of the principal.⁴¹ The principal upon whom liability falls in the first agency is at all times the community. The principal in the second agency is the one who furnishes the car, and thus it could be the husband in his separate capacity,⁴² the wife in her separate capacity,⁴³ or the community itself.⁴⁴

In defining the scope of the agency under the family car doctrine, the Washington court has gone almost as far as it is possible to go, especially when either the husband or the wife is driving. *King v. Williams*,⁴⁵ determined that a husband who drove to a dance with two male companions was engaged in "normal, legitimate recreational activities" which would "promote and advance the general welfare of the community," thus binding the community.⁴⁶ An even more extreme case was *Moffit v. Kreuger*.⁴⁷ At the time of the accident, the wife, her

³⁹ REM. REV. STAT. § 9975-67 [P.P.C. §768s-57].

⁴⁰ *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634 (1917).

⁴¹ *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L.R.A. (N.S.) 59 (1913).

⁴² *Hart v. Hogan*, 173 Wash. 598, 24 P.(2d) 99 (1933).

⁴³ *Guignon v. Campbell*, 80 Wash. 543, 141 Pac. 1031 (1914).

⁴⁴ *Switzer v. Sherwood*, 80 Wash. 19, 141 Pac. 181 (1914).

Needless to say, the community cannot act for itself. The husband, its statutory agent, acts for it in making a car available for family use. Such act on the part of the husband should not be confused with the situation where the husband furnishes a car which is his separate property.

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

⁴⁶ The same result was reached where the husband, without his wife, went on a fishing trip. *Lloyd v. Mowery*, 158 Wash. 341, 290 Pac. 710 (1930).

⁴⁷ 11 Wn.(2d) 658, 120 P.(2d) 512 (1941).

unrelated escort, and another couple were returning from a picnic. Sizeable quantities of beer had been consumed. The escort, not the wife, was driving. Nevertheless, the court again spoke in terms of legitimate recreational activities and held the community liable. This may not constitute sound domestic relations reasoning; its soundness as to the public policy of tort liability, however, cannot be questioned. As Judge Robinson expressed it in *Werker v. Knox*,⁴⁸

The advent of the automobile, as a common instrument of transportation, with its consequent train of negligent injuries and deaths, raised a number of legal problems, and, among them, the matter of finding adequate remedies. In the community property states, it happened, more often than not, that a married driver had no separate property out of which a recovery could be realized. As a partial solution to the problem, the family car doctrine was originated.

Aiding the plaintiff who claims under the doctrine is a presumption which arises upon proof that the vehicle involved in the tort belonged to the defendant at the time of the injury. The presumption is that whoever was driving was doing so for the owner.⁴⁹ Continued use by the members of a household will be sufficient to show that the car had been "dedicated" to family use.⁵⁰ Proof to the contrary will defeat application of the doctrine.⁵¹

IV WIFE AS AGENT

The wife is given no express statutory power to bind the community either by her contracts or her torts. It was held in *Werker v. Knox*,⁵² however, that REM. REV STAT. § 6906 [P.P.C. § 1431] gives her that power by inference when she contracts for expenses of the family or the education of the children, and, therefore, when she commits a tort while so acting. It was there decided that although the community could not in that case be held liable under the family car doctrine, it could be bound as principal, since the wife was acting as agent for the community in purchasing a sweater.

It is suggested that the reasoning of the *Werker* case will support the conclusion that the community may be held liable for the torts of the wife in all situations where the court would be willing to find that

⁴⁸ 197 Wash. 453, 456, 85 P.(2d) 1041, 1042 (1938).

⁴⁹ *Davis v. Browne*, 20 Wn.(2d) 219, 147 P.(2d) 263 (1944).

⁵⁰ *Hanford v. Goehry*, 24 Wn.(2d) 859, 870, 167 P.(2d) 678, 680 (1946).

⁵¹ *Id.* In this case it was shown that the car was kept for sale, not for family use.

⁵² 197 Wash. 453, 85 P.(2d) 1041 (1938).

the wife could bind the community by her contracts.⁵³ Such power to bind by contract has been found when the wife is proceeding on a venture with either the express or implied consent of the husband,⁵⁴ the husband accepts benefits from or acquiesces in his wife's conduct,⁵⁵ or he allows her to manage a community business.⁵⁶ The possibility of a counter argument based on REM. REV STAT. § 6904 [P.P.C. § 434-13]⁵⁷ was precluded by the interpretation of the *Werker* case that this statute merely establishes the nonliability of the husband in his separate capacity, and does not preclude community liability for the wife's torts.

V ANDERSON V GRANDY JOINT OWNERSHIP

One additional basis for imposing liability exists. The complaint in the case of *Anderson v. Grandy*,⁵⁸ said the court, proceeded not on the theory of community liability, but on the theory of joint ownership of the automobile, there driven by the wife in the interest of both spouses. Viewing the relationship as one analogous to partnership, the court held both spouses separately liable.⁵⁹ Inasmuch as the husband could not have been held separately liable for the wife's negligent operation of a community-owned automobile had the action been pleaded under the family car doctrine,⁶⁰ the course selected by counsel was a wise one if the bulk of defendants' assets was held as the husband's separate property⁶¹

⁵³ Further support for this proposition will be found in *Walker v. Myers*, 166 Wash. 392, 7 P.(2d) 21 (1932), an unlawful detainer action where the wife managed hospital premises which were being leased, also, the following dictum in *Killingsworth v. Keen*, 89 Wash. 597, 598, 154 Pac. 1096 (1916), "The bare and general allegation 'for the benefit of the marital community' does not oblige us to discuss under this statute [REM. REV. STAT. § 6904] the situations in which a husband by acquiescence, authorization, acceptance of profits, or otherwise may be estopped to question *the community's or his own liability.*" (Italics added.)

⁵⁴ *Bowers v. Good*, 52 Wash. 384, 100 Pac. 848 (1909), *Wallace v. Thomas*, 193 Wash. 582, 76 P.(2d) 1032 (1938).

⁵⁵ *Short v. Dolling*, 178 Wash. 467, 35 P.(2d) 82 (1934), see *Balkema v. Grolimund*, 92 Wash. 326, 329, 159 Pac. 127, 128 (1916).

⁵⁶ *Lucci v. Lucci*, 2 Wn.(2d) 624, 99 P.(2d) 393 (1940).

⁵⁷ "For all injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in cases where he would be jointly responsible with her if the marriage did not exist."

⁵⁸ 154 Wash. 547, 283 Pac. 186 (1929).

⁵⁹ The judgment was made to run against "the defendants George C. Grandy and Alma M. Grandy, his wife, and each of them."

⁶⁰ *Perren v. Press*, 196 Wash. 14, 81 P.(2d) 867 (1938).

⁶¹ If the bulk of the assets was community property, the course selected was not so wise. Under *Katz v. Judd*, 108 Wash. 557, 185 Pac. 613 (1919), a judgment against both husband and wife in their separate capacities cannot be collected out of their community property.

VI. LIABILITY OF A SPOUSE SEPARATELY FOR
THE TORTS OF THE OTHER

The court in *Sandgren v. West*,⁶² made the following statement: "This court is committed to the doctrine that the spouse who does not commit the tort cannot be held personally liable therefor." It is submitted that the statement is too broad, and that only upon a proper analysis of the basis for imposing liability in each case can it be determined whether the nonacting spouse should be held personally liable. As was demonstrated by the facts in the *Sandgren* case, the question of the liability of the nonacting spouse may assume paramount importance should the acting spouse die. Under the holding of *Bortle v. Osborne*,⁶³ such death extinguishes with it not only the acting spouse's separate liability but the community liability as well.

When the husband commits a tort in the course of his statutory agency, the resultant liability falls upon the community as his principal. The husband is held separately liable for he acted for himself as well. But the wife is not separately liable as she in her separate capacity is not a party to the agency

Under the agency created by the family car doctrine, the one who furnishes the car for family use is the principal. Thus, where the car is owned by the community and is driven by one of the spouses as agent, the other spouse cannot be held separately because he or she in a separate capacity is not a party to the agency⁶⁴ This would seem to be the true, but unexpressed, rationale of *Perren v. Press*,⁶⁵ upon which case the statement above quoted was based. Here again the spouse who drives tortiously incurs personal liability. Even in a tort involving a family car owned by the community, fact patterns could arise whereby both spouses would incur separate liability. Illustrative situations would occur where the nondriving spouse participated in some way in the negligent operation of the automobile, or where one spouse was driving on the individual business of the owner. These possibilities were voiced in a four-judge dissent written by Judge Steinert in the *Sandgren* case.

Another situation under the family car doctrine where the quoted

⁶² 9 Wn. (2d) 494, 497, 115 P. (2d) 724, 725 (1941).

⁶³ 155 Wash. 585, 285 Pac. 425 (1930).

⁶⁴ Note that where a judgment has been entered in such a situation against the husband alone, it is presumptively a community obligation, and the judgment creditor, without further ado, may proceed to execute upon community property in satisfaction. *Merritt v. Newkirk*, 155 Wash. 517, 285 Pac. 442 (1930).

⁶⁵ 196 Wash. 14, 81 P. (2d) 867 (1938).

statement could not be accurately applied would arise where the family car was the separate property of one spouse and was driven by the other. Here both spouses would incur personal liability, while the community, not being a party to the agency, would remain unaffected. In this instance, if it could be shown that the spouse was acting for the community on some other theory, such as the husband's statutory agency, community benefit, and so forth, the community could still be held liable.

Throughout the above discussion of the family car doctrine, the *owner* of the car has been treated as the only possible principal. This has been felt required by the fact that no Washington family car decision has been found which imposes liability upon one other than the owner.⁶⁶ It should be noted, however, that at least two cases⁶⁷ have recognized the possibility of a broader holding by quoting the following text statement:⁶⁸ "Liability under this [family car] doctrine is not confined to owner or driver. It depends upon control and use." Based on this, an argument could be made, when the automobile is owned by the community and driven by one other than the husband, that the husband should nevertheless incur separate liability as he has the "control and use" of the automobile.⁶⁹ Since this argument was not presented to the court in *Perren v. Press*, the possibility may not be foreclosed by that decision.

In like manner, where the car is owned by one of the spouses, it might be argued that since the community has the "use" of the car, it should be held liable regardless of who drives it. Where a collectible judgment could not otherwise be obtained, these arguments would undoubtedly have strong appeal to the court.

Under the *Werker v. Knox* pattern of liability, the wife is found to be the agent of the community by virtue of REM. REV STAT. § 6904, *supra*. The husband in his separate capacity would not be a party to the agency and should not be held liable. But if it should be held, as

⁶⁶ Although *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L.R.A. (N.S.) 59 (1913) and succeeding cases speak in terms of the father's incurring liability in furnishing a car for family use, the holdings of the cases impose liability upon the community and not upon the husband separately.

⁶⁷ *Hart v. Hogan*, 173 Wash. 598, 605, 24 P.(2d) 99, 102 (1933), *Dillon v. Burnett*, 197 Wash. 371, 375, 85 P.(2d) 656, 658 (1938).

⁶⁸ Huddy, *AUTOMOBILE LAW* (9th Ed. 1931) § 125.

⁶⁹ A counter argument based on agency reasoning could well be made. The husband in this situation controls the use of the car in his role of statutory agent, not in his separate capacity, and should incur no separate liability as a result. This argument was thought controlling by the Arizona court in *Donn v. Kunz*, 52 Ariz. 219, 79 P.(2d) 965 (1938), where the court stated that it was following Washington law.

suggested, that the wife could impose liability upon the community for her torts when acting pursuant to authority delegated to her by her husband, the husband should also be held separately liable. In *Lucci v. Lucci*,⁷⁰ where the husband had authorized his wife to manage the community grocery store, a contract executed by the wife was held to bind the community and both spouses in their separate capacities.⁷¹ The only possible explanation for this result is that a dual agency existed: (1) between the husband as statutory agent and the wife; (2) between the husband in his separate capacity and the wife. It must follow then that, were Mrs. Lucci to commit a tort in the management of the grocery store, Mr. Lucci would be personally liable. Both sets of agency being created by voluntary acts and not existing merely by virtue of the marital relation, REM. REV STAT. § 6904⁷² would interpose no barrier to this result. Dicta in the cases of *Strom v. Toklas*,⁷³ and *Killingsworth v. Keen*⁷⁴ lend support to this analysis.

VII. CONCLUSION

McHenry v. Short is a long step in the direction previously assumed by the Washington court of narrowing sharply those situations in which the tort of a spouse will not result in community liability. This conclusion follows not only from the holding of the case, but from this candid passage from the opinion.

The situation presented by the facts in this case is a good illustration of an instance where the following language from *Werker v. Knox*, 197 Wash. 453, 85 P.(2d) 1041, is applicable

"Of recent years, the trend of the law has not been toward relieving the community from liability for torts of its individual members, but has been quite definitely in the direction of finding ways and means of imposing such liabilities upon the community"⁷⁵

Since the operation of community property law upon tort law forces the alternatives of making available community property for the satisfaction of judgments obtained by injured persons, or, in most cases,

⁷⁰ 2 Wn.(2d) 624, 99 P.(2d) 393 (1940).

⁷¹ More precisely, the court upheld a judgment against the community and the husband, but stated that it could not understand why the trial court had struck the name of the wife from the judgment.

⁷² See note 57 *supra*.

⁷³ 78 Wash. 223, 230, 138 Pac. 880, 882 (1914), "we know of no law which would authorize a judgment against a husband for the fraudulent representations of the wife, in the absence of some evidence tending to show her authority to manage the community affairs." (Italics added.)

⁷⁴ 89 Wash. 597, 598, 154 Pac. 1096 (1916), quoted in note 53, *supra*.

⁷⁵ Such frank statements had in the past been reserved for torts involving automobile accidents.

denying them recovery, it is believed that the trend followed by the Washington Supreme Court is supported by sound public policy. A further step in the same direction (which the tone of the *McHenry* case indicates may soon be taken) will be the overruling of the "official capacity" cases, an offshoot which now exists as an insupportable anomaly. It is suggested that a more careful analysis of the problem of the personal liability of the nonacting spouse for the torts of the other is required.

SUGGESTED CHANGES IN STATE OF WASHINGTON LAWS REGULATING MUNICIPAL ACCOUNTING

ARTHUR N. LORIG*

In connection with a recent interest in improving the accounting for municipalities of the state of Washington, chiefly sponsored by the Association of Washington Cities, there appears to be a growing conviction that some of the state laws regulating such accounting need revision. The interest is directed principally toward the laws dealing with municipal budgeting and it is felt by some that a complete revision of the budget laws is warranted.

On the supposition that, until a thorough revision is made possible, some improvements of a lesser scope might be made, this article suggests desirable changes in the laws. The suggestions arose principally out of a recent study made in connection with preparing a manual of accounting for small cities of Washington. They apply not only to the budget laws but also to other acts dealing with accounting for cities of less than 300,000 inhabitants.

UNIFORM SYSTEM OF ACCOUNTING

The state auditor is required by law to "formulate, prescribe and install a system of accounting and reporting that shall be uniform for every state office and every state educational, benevolent, penal and reformatory institution, public institution and every public office."¹ The law is interpreted as including the accounting of municipalities within its scope. And yet, in so far as it requires uniform accounting, it is not observed, for the accounting varies considerably between the

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¹ REM. REV. STAT. § 9952 [P.P.C. § 945-75].