

Comment,
TREATMENT OF PERSONAL INJURY
AWARDS DURING DISSOLUTION OF
MARRIAGE

I. Introduction

When a husband and wife are dissolving their marriage, the court faces the complex problem of characterizing and dividing assets. This can become further complicated when one spouse has been injured during the marriage and has a personal injury cause of action or has already received an award or settlement for the injury. In community property states and most equitable distribution states it is necessary to first classify property as marital or separate in order to divide property upon dissolution of the marriage.¹ Most states do not include personal injury awards specifically in their statutory definitions of marital or separate property, so the courts are left to determine the proper classification. Even those states that have statutes that do classify personal injury awards have carved out exceptions and have required further interpretation and application by the courts. When a personal injury claim has accrued during a marriage, the court can classify the award as a whole, or evaluate each component to determine if they are marital/community or separate property upon divorce.

Jurisdictions have taken three approaches when classifying personal injury awards in marriage dissolution actions.² A majority of courts in both community property and equitable distribution states have now adopted the analytic approach to classification of personal injury awards.³ This approach takes

¹ See, e.g., Dale Joseph Gilsinger, Annotation, *Spouse's Cause of Action for Negligent Personal Injury, or Proceeds therefrom, as Separate or Community Property*, 80 A.L.R. 5TH 533 (2005); Kurtis A. Kemper, Annotation, *Divorce and Separation: Determination of Whether Proceeds from Personal Injury Settlement or Recovery Constitute Marital Property*, 109 A.L.R. 5TH 1 (2005).

² BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 6:54 (3d ed. 2005).

³ See, e.g., Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 MISS. L.J. 115 (1997); Pamela E. George, *Whose Injury? Whose Property? The Char-*

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.⁴ A minority of jurisdictions, however, still apply the mechanistic approach that classifies personal injury awards as entirely marital property because they are not included in the statutory definition of separate property.⁵ A third approach, rarely used by the courts, is the unitary approach that classifies personal injury awards as entirely separate property.⁶

This article will take a closer look at each of these three approaches for classifying personal injury awards at divorce. Part II will first briefly describe the two marital property systems that determine property division upon divorce. Part III will discuss the analytic approach and its implementation by the courts. Part IV will focus on the mechanistic approach. Part V will briefly describe the unitary approach. Part VI will present some of the statutory provisions that states have enacted that specifically include the characterization of personal injury awards. Part VII discusses some of the other issues that arise when courts are classifying personal injury awards.

II. Marital Property Systems

Today the states are divided into two categories of marital property systems, common law and community property.⁷ The community property system is based on the principle that both spouses contribute equally to a marriage so income earned and property acquired during the marriage should be owned jointly.⁸ Property that a spouse owned before the marriage and property

acterization of Personal Injury Settlements Upon Dissolution of Marriage in Community Property States, 32 IDAHO L. REV. 575 (1996); Beth Herstein, *Survey of Developments in North Carolina Law, 1986: VII Domestic Law: Johnson v. Johnson: Personal Injury Awards in Divorce Actions*, 65 N.C. L. REV. 1332; Eric W. Maclure, *Freeman v. Freeman: Adopting the Analytic Approach to Equitable Distribution of Workers' Compensation Awards*, 71 N.C. L. REV. 2065.

⁴ Bell, *supra* note 3, at 169.

⁵ *Id.*

⁶ TURNER, *supra* note 2, at § 6:57.

⁷ Bell, *supra* note 3, at 116.

⁸ *Id.* at 121.

derived by gift or inheritance during the marriage would be the separate property of the individual, however.⁹ These principles apply upon the dissolution of the marriage as well as throughout the term of the marriage.¹⁰ In contrast, the common law states apply a title property system during the marriage and an equitable distribution system for property division at divorce.¹¹

Originally, the common law states applied the title system of marital property in divorce actions. Under this system, the spouse who held the title to the property during the marriage received that property from the courts when the marriage ended.¹² The title system often left wives who were homemakers disadvantaged because most of the property acquired during marriage had been titled in the husband's name.¹³ Because of the criticism and societal changes that began to occur in the 1960's, the common law states began to adopt a new approach to property division.¹⁴ This third system of equitable distribution, applied upon divorce, is similar to the community property system in that it recognizes the contributions and rights of both spouses in income and property acquired during the marriage regardless of the name on the title.¹⁵

While all of the common law states have adopted equitable distribution for property division upon divorce, the states use different approaches.¹⁶ The majority of states are dual classification states which divide property between marital property and separate property based on whether it was a product of marital efforts.¹⁷ Once the marital estate is determined, it is divided fairly based on factors established by the states.¹⁸ The minority of states are all property states that do not classify property as separate or marital but allow all property to be divided equitably.¹⁹ As will become evident, the approach taken by the court in clas-

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 124.

¹² *Id.* at 118.

¹³ *Id.*

¹⁴ *Id.* at 124.

¹⁵ *Id.* at 125.

¹⁶ *Id.*

¹⁷ *Id.* at 126.

¹⁸ *Id.*

¹⁹ *Id.* at 125.

sifying personal injury awards is often influenced by the property system used in that state.

III. Analytic Approach

The analytic approach does not classify the entire personal injury award as a whole as either community, marital or separate property but evaluates the award by looking at the purpose behind each component.²⁰ Using this method, courts will classify the award components based on the type of loss they are compensating.²¹ Some of the personal injury award may be marital property and may be separate property. If a portion of the proceeds are compensation to the marital estate for the loss of wages experienced during the marriage or medical expenses that were paid out of the marital estate, then those proceeds are classified as marital property.²² The jurisdictions that have adopted this approach realize that some portions of a personal injury award are compensation for losses experienced only by the individual and therefore should be separate property.²³ Portions of the award that are compensation for personal pain and suffering, injury, and disfigurement are separate property under the analytic approach.²⁴ While compensation for past economic damages such as past lost wages or medical expenses would be marital property, any payments representing future lost wages or future medical expenses would be considered separate property.²⁵

The analytic approach was first developed and adopted in the community property states.²⁶ All of the community property states except California and a majority of the equitable distribution states have now adopted this approach.²⁷ When personal injury awards first presented themselves in marriage dissolutions in community property states, they were treated as community

²⁰ See, e.g., Kemper, *supra* note 1, at § 2[a].

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See, e.g., ARNOLD H. RUTKIN ET AL., 2 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 23.08.

²⁷ *Id.*

property.²⁸ Courts presumed that they were community property because they were acquired during marriage and did not fall into any of the definitions of separate property.²⁹ Courts realized that the one of the principles behind the community property system was that efforts toward improving the marital estate by either spouse should become community property.³⁰ Personal injury awards, however, are not really acquired by efforts or labor of a spouse but are in exchange for the loss of property.³¹ Because of this exchange, courts reasoned that compensation for the loss of separate property should be separate property and compensation for the loss of community property should be community property.³² So beginning with Nevada, the community property states with the exception of California began to adopt the analytic view.³³ The mechanistic approach was initially the majority view of the equitable distribution states as well.³⁴ Just as the common law states looked to the principles of community property for their equitable distribution system, they also looked to those states for guidance with this issue and began to adopt the analytic approach as well.

A. *Pain and Suffering*

It is not surprising that when courts began to classify personal injury awards according to their purposes, the components compensating the injury and the resulting pain and suffering were decidedly separate property of the injured spouse. Bodily injury and physical pain are truly personal in nature and it seems unfair for the uninjured spouse to share in the damages awarded received due to such injuries.³⁵ *Amato v. Amato*,³⁶ an often-cited case using the analytic approach, reasoned that the only equitable distribution is for the uninjured spouse to share only in those

²⁸ George, *supra* note 3, at 586.

²⁹ *Id.*

³⁰ *Id.* at 587.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See, e.g., Lynn F. Hendon, *Classification of Personal Injury Awards in Divorce Actions*, 27 J. FAM. L. 453 (1988/1989); Herstein, *supra* note 3.

³⁵ TURNER, *supra* note 2, at § 6:55, *citing* *Amato v. Amato*, 434 A.2d 639 (N.J. Super. Ct. App. Div. 1981).

³⁶ 434 A.2d 639 (N.J. Super. Ct. App. Div. 1981).

damages that were experienced by the marital estate.³⁷ Relying on an earlier New Jersey opinion, *Harmon v. Harmon*,³⁸ the court in *Amato* considered each spouse's physical and mental health as an asset that the partner brought into the marriage.³⁹ Based on that reasoning, the compensation an injured spouse received for bodily injury and pain and suffering is a replacement for his or her good health.⁴⁰ As the court in *Harmon* stated, "Under both the common law and community property systems an injured spouse should keep funds which replace assets brought into the marriage."⁴¹ This analogy seems to provide a reasonable justification for the courts to classify the pain and suffering components of personal injury awards as separate property of the injured spouse.⁴²

B. *Loss of Consortium*

Black's Law Dictionary defines loss of consortium as "[a] loss of the benefits that one spouse is entitled to receive from the other, including companionship, cooperation, aid, affection, and sexual relations."⁴³ This type of claim refers to pain and suffering experienced by a spouse as a result of an injury to his or her spouse.⁴⁴ Brett Turner indicates that, "If the uninjured spouse receives an award for loss of consortium, however, that award is also compensation for pain and suffering, and thus the separate property of the uninjured spouse."⁴⁵ In *Landwehr v. Landwehr*,⁴⁶ a husband was injured in a motorcycle accident and was awarded a \$26,000 settlement from the insurance carrier.⁴⁷ Following the accident and a week long hospitalization, he was out of work for three months.⁴⁸ During that time his wife helped him to recover while running the household, taking care of their chil-

³⁷ *Id.*

³⁸ 391A.2d 552 (N.J. Super. Ct. App. Div. 1978).

³⁹ *Amato*, 434 A.2d at 643; TURNER, *supra* note 2, at § 6:55.

⁴⁰ *Amato*, 434 A.2d at 643; TURNER, *supra* note 2, at § 6:55.

⁴¹ *Harmon*, 391 A.2d at 557; TURNER, *supra* note 2, at § 6:55.

⁴² *Amato*, 434 A.2d at 643; TURNER, *supra* note 2, at § 6:55.

⁴³ BLACK'S LAW DICTIONARY (8th ed. 2004).

⁴⁴ TURNER, *supra* note 2 at § 6:55

⁴⁵ *Id.*

⁴⁶ 545 A.2d 738 (N.J. 1988).

⁴⁷ *Id.* at 739.

⁴⁸ *Id.*

dren and working.⁴⁹ The court found that adequate evidence existed that part of the settlement award was compensation for the wife's loss of consortium claim.⁵⁰ Further the court held that the award for the wife's loss of consortium "is just as personal as the pain and suffering at issue in the primary action," so it should be considered her separate property.⁵¹

Loss of consortium awards can also be compensation for the loss of a child and the resulting mental or emotional pain and suffering.⁵² Courts have held that this type of pain and suffering is also separate property of the spouse who suffered the loss.⁵³ The characterization of awards for loss of consortium of a child has been very important in the community property states.⁵⁴ Where a parent has been contributorily negligent in the death of a child there is concern whether the other spouse can make a consortium claim or if it will be reduced due to imputed negligence.⁵⁵ Due to this concern, courts in the community property states have addressed the characterization of loss of consortium claims for the loss of a child.⁵⁶ They have held that damages received by a spouse for the loss of a child are separate property and that negligence by one spouse will only bar or reduce that spouse's own claim and will not be imputed to the other.⁵⁷

C. *Disfigurement*

An injured spouse could also be awarded compensation for disfigurement. This too would be considered separate property in most circumstances.⁵⁸ Many courts have included disfigurement in their holdings of what components are typically separate property of the injured spouse.⁵⁹ The same justifications apply to the classification of disfigurement as the initial injury. The award

⁴⁹ *Id.*

⁵⁰ *Id.* at 743.

⁵¹ *Id.*

⁵² George, *supra* note 3, at 607.

⁵³ *Id.* at 608.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ TURNER, *supra* note 2, at § 6:55

⁵⁹ *Id.*

is compensation for the associated pain and suffering.⁶⁰ However, as the concurring opinion in *Johnson v. Johnson*⁶¹ proposes, a problem could arise where damages for disfigurement also include compensation for lost wages as a result of that disfigurement.⁶² Justice Martin suggests that the disfigurement component should not always be classified as separate property but should be part of the marital estate in those instances where compensation for lost wages is associated with the disfigurement component.⁶³

D. *Lost Wages*

Courts can classify the lost wages component of a personal injury award as either separate or marital property.⁶⁴ This classification depends on whether the compensation is for wages for that would have been earned during the marriage, thus being part of the marital estate, or for wages that would have been received after the divorce, thus being classified as separate property.⁶⁵ In *Ward v. Ward*,⁶⁶ the husband received a personal injury settlement.⁶⁷ He submitted a sworn statement from his attorney that the settlement was only compensation for his injury, lost future wages and future medical expenses.⁶⁸ Because the compensation was for future lost wages and future medical expenses, it was considered the husband's separate property.⁶⁹ The court used a similar exchange reasoning as that used in *Amato*.⁷⁰ The court stated, "A "right to personal security" is owned by an individual and is brought into the marriage by the individual, thus it is his separate right."⁷¹ It then said, "Compensation for a violation of that right, whether or not the injury occurred during the

⁶⁰ *Id.*

⁶¹ 346 S.E.2d 430 (N.C. 1986)

⁶² *Id.* at 441 (Martin, J., concurring).

⁶³ *Id.*

⁶⁴ TURNER, *supra* note 2, at § 6:55.

⁶⁵ *Id.*

⁶⁶ 453 N.W.2d 729 (Minn. Ct. App. 1999).

⁶⁷ *Id.* at 730.

⁶⁸ *Id.* at 732-733.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

marriage, is also separate property.”⁷² Just as spouses bring their good physical and mental health into the marriage they also bring their ability to earn a living into the marriage and expect to leave with those personal assets so compensation for injuries that will affect these after the marriage are separate property.⁷³ However, the marital estate is entitled to that money which is compensation for lost wages during the marriage because it replaces property that would have been acquired during the marriage.⁷⁴

*Edelman v. Edelman*⁷⁵ provides a good example of the classification of the lost wages components of a personal injury claim. In this case, the husband, who had a fishing business in Alaska, had asserted two compensatory claims for damages resulting from the Exxon Valdez oil spill.⁷⁶ First, he was seeking damages for lost wages in 1989 resulting from the oil spill.⁷⁷ The husband also owned a net salmon fishing permit that the court determined was his separate property.⁷⁸ His second claim for damages was for lost revenue from 1989-1991 and for devaluation of his permit.⁷⁹ Because the permit was his separate property, the claim for devaluation was his separate property.⁸⁰ However, the lost wages and revenue would replace income that would have been earned during the marriage so any damages received for those claims would be marital property.⁸¹

E. *Medical Expenses*

Courts that use the analytic approach also look at the purpose behind compensation for medical expenses.⁸² If the compensation is for medical expenses that were paid out of the marital estate, then that part of the award is marital or community property.⁸³ If the injured spouse paid the medical expenses

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 731.

⁷⁵ 3 P.3d 348 (Alaska 2000).

⁷⁶ *Id.* at 355.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² TURNER, *supra* note 2, § 6:55.

⁸³ *Id.*

with separate property or the damages are for future medical expenses occurring after the divorce, then those damages are separate property.⁸⁴ What happens if the medical expenses have been paid by insurance rather than by marital or separate funds? The court in *Russell*⁸⁵ addressed this question. The wife received a personal injury settlement upon the release of Procter and Gamble of all claims.⁸⁶ The court held that the release meant that some of the settlement proceeds were compensation for past medical expenses.⁸⁷ Even though the insurance company had paid nearly all of the past medical expenses, the insurance policy was paid with community property so the insurance proceeds were also community property.⁸⁸ The court held that the portion of the settlement attributable to past medical expenses was indeed compensation for community property and subject to distribution.⁸⁹

Another court, however, determined that where insurance has paid the medical expenses, the marital estate has suffered no injury.⁹⁰ In *Everhardt v. Everhardt*,⁹¹ the wife argued that the portion of the settlement that her injured husband had received for medical expenses, was marital property.⁹² While that would normally be the characterization, the court held that in this case the marital estate had not suffered any loss in need of compensation because the insurance company had paid the medical expenses.⁹³ Because the proceeds were not compensating the marital estate for any loss, they were separate property of the injured husband.⁹⁴

F. *Property Damage*

Sometimes personal injury claims or awards have a component for damages to property as well. This was the case in

⁸⁴ *Id.*

⁸⁵ *Russell v. Russell*, 801 P.2d 93 (Ct. App. 1987).

⁸⁶ *Id.* at 95.

⁸⁷ *Id.* at 96.

⁸⁸ *Id.* at 97.

⁸⁹ *Id.*

⁹⁰ *Everhardt v. Everhardt*, 602 N.E.2d 701 (Ohio Ct. App. 1991).

⁹¹ *Id.* at 704.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

Edelman.⁹⁵ The general rule as stated by Brett R. Turner, in *Equitable Distribution of Property*, is that, "Compensation for damage done to property takes on the same character as property which was damaged."⁹⁶ In *Edelman*, the court held that the husband's fishing permit was separate property.⁹⁷ Thus any compensation for damage to that permit will be compensation for the personal and separate loss of the husband and also become separate property.⁹⁸

IV. Mechanistic Approach

A minority of states still treat personal injury awards as entirely marital property if they are acquired during the marriage.⁹⁹ These states classify the award or settlement based strictly on the statutes and definitions of marital and separate property.¹⁰⁰ Upon divorce in both community property states and equitable distribution states, a presumption exists that any property acquired during the marriage is marital/community property.¹⁰¹ It is a presumption that can be rebutted if the property falls into an exception based on the statute and definition of separate property.¹⁰² Typically, statutes define separate property as property that is acquired by one spouse during the marriage by gift, devise, descent, or bequest.¹⁰³ If the property acquired during the marriage does not fit into any exceptions or the definition for separate property, it must be marital/community property.¹⁰⁴ These jurisdictions do not accept the argument on which the analytic approach is based.¹⁰⁵ They do not consider a spouse's good physical and mental health as separate assets brought into the

⁹⁵ See *Edelman*, 3 P.3d. at 355.

⁹⁶ TURNER, *supra* note 2, at § 6:55.

⁹⁷ *Edelman*, 3 P.3d at 355.

⁹⁸ *Id.*

⁹⁹ See e.g. James T. Baldwin, *Drake v. Drake: The Supreme Court of Pennsylvania Classifies Workers' Compensation Benefits As Marital Property Subject to Equitable Distribution Upon Divorce*, 9 WIDENER J. Pub. L. 803; Bell, *supra* note 3, at 169.

¹⁰⁰ TURNER, *supra* note 2, at 6:56.

¹⁰¹ See, e.g., RUTKIN ET AL., *supra* note 26.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See, TURNER, *supra* note 2, at § 6:56

marriage, so they do not view any portion of the award as an exchange for separate property.¹⁰⁶ In *Equitable Distribution of Property*, Brett Turner provides one court's explanation for this view:

In construing the phrase, "property acquired prior to the marriage . . ." we look to the everyday , popular meaning of those words. . . . Suppose one were to lose a leg in an accident, and, in settlement of the claim, receive \$100,000. One would not in everyday speech say that the \$100,000 was "property acquired in exchange for property [the lost leg] acquired prior to one's marriage."¹⁰⁷

In *Platek v. Platek*,¹⁰⁸ the wife was appealing the court's characterization of her personal injury settlement as marital property and the division of those funds. She argued that the proceeds were acquired in exchange for property acquired before marriage and thus were an exception to marital property under the state statute.¹⁰⁹ The court rejected the argument that a spouse's well-being could be a premarital asset based on state legislative history and the reasoning quoted above and held that the personal injury proceeds were marital property.¹¹⁰

The majority of jurisdictions that still apply the mechanistic approach are in those states that have equitable distribution statutes that allow all property acquired by either spouse before divorce to be equitably distributed, including property acquired before the marriage or by gift.¹¹¹ A 2001 New Hampshire case provides an example of the preference that "all property" states have toward the mechanistic approach. In *In re Preston*,¹¹² the husband was issued an annuity as settlement for an accident.¹¹³ The trial court held that the annuity was marital property and awarded each spouse a half interest in the annuity upon divorce.¹¹⁴ Because New Hampshire allows the division of all property of the spouses that was acquired up until the dissolution of the marriage, the court recognized that a mechanistic ap-

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* quoting *Platek v. Platek*, 454 A.2d 1059 (Pa. Super. Ct. 1982).

¹⁰⁸ *Platek*, 454 A.2d at 1061.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1062.

¹¹¹ *See, e.g.*, TURNER, *supra* note 2, at § 6:56.

¹¹² 780 A.2d 1285 (N.H. 2001).

¹¹³ *Id.* at 1287.

¹¹⁴ *Id.*

proach was the best fit.¹¹⁵ In New Hampshire, the concern is not upon the classification of the property but whether it is equitably distributed.¹¹⁶ The court held that the annuity was properly classified as marital property because it was acquired before the end of the marriage.¹¹⁷

Connecticut is another state with an equitable distribution statute that allows the court to divide all property of either spouse and the estate without reference to how or when the property was acquired.¹¹⁸ In *Lopiano v. Lopiano*,¹¹⁹ the court was reluctant to identify with any of the three approaches to classification of personal injury awards.¹²⁰ The court did conclude that the husband's personal injury award was subject to division based on its characterization as property, because the court had authority to divide all property owned by the spouses whether jointly or separately held.¹²¹ Even though the court tried to adopt its own unique approach to the issue, its reasoning was essentially mechanistic in nature.

As the holding in *Platek* suggests, some courts in the dual classification states do still prefer the mechanistic approach. In an Illinois decision, *In re Marriage of Pace*,¹²² the court held that a personal injury settlement to the husband was marital property and subject to division.¹²³ The court used the mechanistic reasoning that the settlement was presumed marital because it was acquired after marriage and it did not fall into any statutory definitions of separate property.¹²⁴ The husband argued that the court should have used an analytic approach since another Illinois Court of Appeals decision, *In re Marriage of Waggoner*,¹²⁵ had adopted when it classified a husband's workers compensation award.¹²⁶ The court distinguished this case from *Waggoner*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1288.

¹¹⁷ *Id.*

¹¹⁸ *See, e.g.,* Kemper, *supra* note 1, at § 3[b].

¹¹⁹ 752 A.2d 1000 (Conn. 1998)

¹²⁰ *Id.* at 1010.

¹²¹ *Id.* at 1011.

¹²² 664 N.E.2d 320 (Ill. App. Ct. 1996).

¹²³ *Id.* at 323.

¹²⁴ *Id.*

¹²⁵ 634 N.E.2d 1198 (Ill. App. Ct. 1994).

¹²⁶ *Id.* at 321.

because it was a statutory workers compensation award and not a personal injury award.¹²⁷ Even though the court had classified the personal injury settlement as marital property, it awarded the husband 75% of the settlement and the wife 25% upon the distribution of the marital property.¹²⁸ The appellate court concluded that the lower court had taken into account the separate nature of the pain and suffering and personal expense aspects of the settlement when it distributed the property.¹²⁹ This is evidence that many times, even though courts reject an analytical approach to the purpose behind the compensation, they do take a similar approach when distributing the property to the spouses.

Another dual classification state that has opted for a mechanical approach to the classification of property and an analytical approach to the distribution of the marital property is South Carolina.¹³⁰ In *Marsh v. Marsh*¹³¹ the husband received a personal injury settlement for a work related auto accident and the wife received a settlement for a claim of negligence against the attorney for not asserting her loss of consortium claim.¹³² The South Carolina Supreme Court affirmed the lower court's holding that the settlements were marital property and the award to each of 80% of their own settlement and 20% of the other's settlement.¹³³ The court reasoned that the mechanical approach allowed for a more equitable distribution of property.¹³⁴ It does not necessarily follow that a personal injury award will not be distributed equitably just because it is classified as marital property.¹³⁵ First classifying the personal injury awards as marital property allows for more flexibility and equity in the distribution of assets.¹³⁶

¹²⁷ *Id.* at 323.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See RUTKIN ET AL., *supra* note 26, at § 23.08 [1] [c].

¹³¹ 437 S.E.2d 34 (S.C. 1993).

¹³² *Id.*

¹³³ *Id.* at 36..

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

V. Unitary Approach

A few cases have held that proceeds of a personal injury claim are entirely separate property. This treatment of personal injury awards is known as the unitary approach.¹³⁷ Brett Turner speculates whether the unitary approach is really an approach at all.¹³⁸ Turner, however, notes that a few decisions in New York and Iowa in recent years appear to follow this approach.¹³⁹

In the New York decision *Fleitz v. Fleitz*,¹⁴⁰ the court based its finding that the husband's disability income insurance benefits were separate property on the state statutory definition of separate property.¹⁴¹ The statute defines compensation for personal injuries as separate property.¹⁴² In this case the husband was a dentist who lost his thumb and index finger in a hunting accident, leaving him disabled in his profession.¹⁴³ The court held that the insurance benefits were in fact compensation for his personal injury that left him unable to continue his profession, thus they were separate property.¹⁴⁴ While the New York statute does classify compensation for personal injuries as separate property, a recent New York decision held that when the proceeds are deposited into a jointly held account with the other spouse it creates a presumption of marital property.¹⁴⁵

The Iowa case, *In re Marriage of Plasencia*,¹⁴⁶ held that the husband's personal injury claim should be awarded to the husband in its entirety.¹⁴⁷ The court quoted *In re McNerney*,¹⁴⁸ "The proceeds of a personal injury claim are divided according to the circumstances of each case."¹⁴⁹ In this case there was no mention of any components to the claim other than pain and suffering for

¹³⁷ TURNER, *supra* note 2, at § 6:57.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ 200 A.D.2d 874 (N.Y. App. Div. 1994).

¹⁴¹ *Id.*

¹⁴² *Id.* citing N.Y. DOM. REL. LAW § 236(B)(1)(d).

¹⁴³ *Id.* at 874.

¹⁴⁴ *Id.* at 875.

¹⁴⁵ *Garner v. Garner*, 307 A.D.2d 510 (N.Y. App. Div. 2003).

¹⁴⁶ 541 N.W.2d 923 (Iowa Ct. App. 1995).

¹⁴⁷ *Id.* at 926.

¹⁴⁸ 417 N.W.2d 205 (Iowa 1987).

¹⁴⁹ *In re Marriage of Plasencia*, 541 N.W.2d at 926, quoting *In re McNerney*, 417 N.W.2d at 206.

the husband's injuries, so the court held that the proceeds should be awarded to the husband.¹⁵⁰ The court did not actually adopt the unitary approach, but rather applied an analytic approach to the actual distribution of the property.¹⁵¹ The opinion seems to suggest that if there were other components to a personal injury claim, they would have to be analyzed according to their purpose during the distribution stage.¹⁵²

Judging from the cases that are often cited as following the unitary approach, courts rarely, if ever, use the approach in its pure form. In most of the cases where courts held that a personal injury award was separate property they are referring to awards that compensated only for pain and suffering.¹⁵³ This reasoning would be consistent with the logic of the analytic approach. The courts that use the analytic approach also hold that compensation for pain and suffering are separate property.¹⁵⁴ Perhaps rather than applying the unitary approach they were actually applying the analytic approach. The other sets of cases, like *In re Marriage of Plasencia*, have referred to earlier holdings that have held that personal injury claims are entirely marital property and then hold that the entire award should be distributed to the injured spouse.¹⁵⁵ While it appears as if the courts are holding that the entire awards are separate property, they are really holding that they are first classified as marital property and then awarded based on the purpose of compensation, which in these cases was pain and suffering.

VI. Statutory Classification of Personal Injury Awards

Since the community states pioneered the characterization of personal injury claims it is not surprising that five out of the nine community property states have enacted statutes that specifically deal with the classification of personal injury awards. The Texas, Louisiana, Nevada and Wisconsin legislatures have devel-

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *See, e.g., TURNER, supra note 2, at § 6:57.*

¹⁵⁴ *Id.* at § 6:55.

¹⁵⁵ *Id.* at § 6:57.

oped definitions for separate and community property which aid in the court's application of the analytic approach.¹⁵⁶ California's statute on the subject is unique in that it first specifically classifies personal injury awards as community property.¹⁵⁷ The statute does allow for exceptions from this treatment.¹⁵⁸ If the cause of action arose after dissolution of the marriage, during a legal separation or when the spouses were living separately, then the personal injury proceeds are separate property.¹⁵⁹ Regardless of whether any of the foregoing exceptions exist, the community estate is entitled to the reimbursement of any separate or community property that was paid because of one of the spouse's personal injury.¹⁶⁰ In addition, the statute provides that if a spouse receives personal injury compensation for a cause of action against the other spouse during the marriage, those proceeds are the separate property of the injured spouse.¹⁶¹ California's

¹⁵⁶ George, *supra* note 3, at 581-585.

¹⁵⁷ CAL. FAM. CODE § 780 states:

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.

¹⁵⁸ CAL. FAM. CODE § 781(a) states:

(a) Money or 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 those damages, is the separate property of the injured person if the cause of action for the damages arose as follows:

(1) After the entry of a judgment of dissolution of a marriage or legal separation of the parties.

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

¹⁵⁹ *Id.*

¹⁶⁰ CAL. FAM. CODE § 781(b) states:

(b) Notwithstanding subdivision (a), if the spouse of the injured person has paid expenses by reason of the personal injuries from separate property or from the community property, the spouse is entitled to reimbursement of the separate property or the community property for those expenses from the separate property received by the injured person under subdivision (a).

¹⁶¹ (c) Notwithstanding subdivision (a), if one spouse has a cause of action against the other spouse which arose during the marriage of the

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statute as well as the other states' statutes, while taking a different approach, have specifically addressed some of the key issues that face the court when dealing with classification of personal injury awards¹⁶²

The Texas statute concerning the characterization of personal injury awards defines any compensation for personal injuries occurring to a spouse during the marriage as separate property except to the extent it is compensation for lost earnings during the marriage.¹⁶³ Louisiana's statute also provides that personal injuries awards for injuries sustained during the marriage are separate property of the injured spouse.¹⁶⁴ It does carve out exceptions for portions of the proceeds that are community property.¹⁶⁵ Damages that are reimbursement for expenses that were paid out of the community estate and those that are compensation for loss of earnings until the divorce are com-

parties, money or property paid or to be paid by or on behalf of a party to the party's spouse of that marriage in satisfaction of a judgment for damages for personal injuries to that spouse, or pursuant to an agreement for the settlement or compromise of a claim for the damages, is the separate property of the injured spouse.

¹⁶² See e.g. George, *supra* note 3; But see Timothy R. Ault, *Part Five: Marital Property: Problems with "Community Estate Personal Injury Damages" and Their Allocation in California Divorce Proceedings*, 11 J. CONTEMP. LEGAL ISSUES 303.

¹⁶³ TEX. FAM. CODE § 3.001 states:

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.

¹⁶⁴ LA. CIV. CODE ANN. art. 2344 states:

Damages due to personal injuries sustained during the existence of the community by a spouse are separate property.

¹⁶⁵ LA. CIV. CODE ANN. art. 2344 states:

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 regime is the separate property of the injured spouse.

munity property.¹⁶⁶ Any future loss of earnings compensation that extends beyond the dissolution of the marriage is separate property of the injured spouse.¹⁶⁷

Nevada has codified the classification of personal injury awards when the spouses have sued jointly.¹⁶⁸ In that situation, the statute states that compensation for the personal injury and pain and suffering are the injured spouse's separate property.¹⁶⁹ Any damages awarded for a loss of consortium claim are the separate property of the spouse who suffered the loss.¹⁷⁰ To the extent that the compensation is reimbursement for lost services or medical expenses, the award is community property.¹⁷¹ The statute also addresses awards for property damage as well. The award will take on the characterization of the property that was damaged and will be awarded to the spouse who separately owned the property or to the community if the property was owned by the community.¹⁷²

Wisconsin's statute regarding the classification of property upon divorce acknowledges personal injury awards as an exception to marital property as all property acquired during the marriage.¹⁷³ However, personal injury awards are only separate to the extent that they are not compensation for expenses paid out

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ NEV. REV. STAT. ANN. § 123.121 states:

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.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² NEV. REV. STAT. ANN. § 123.121(2) states:

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.

¹⁷³ WIS. STAT. ANN. § 766.31(7)(f) states:

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of the marital estate or loss of income that occurred during the marriage.¹⁷⁴

Three equitable distribution states have also codified statutes that divide personal injury awards into components to classify them as either separate or marital property.¹⁷⁵ Arkansas, by statute, exempts benefits resulting from a personal injury claim if they are compensation for “permanent disability or future medical expenses.”¹⁷⁶ The Ohio legislature includes compensation for a spouse’s personal injury in its definition of separate property.¹⁷⁷ Any compensation that is allocated to the loss of earnings during the marriage or to reimbursement of expenses paid by the marital estate is not separate property.¹⁷⁸ In Virginia courts can look to the statutes for a definition of what is considered a “marital share” of a personal injury award. The Virginia Code provides:

“Marital Share” means that part of the total personal injury or workers’ compensation recovery attributable to lost wages or medical expenses to the extent not covered by health insurance accruing during the marriage and before the last separation of the parties, if at such

(7) Property acquired by a spouse during marriage and after the determination date is individual property if acquired by any of the following means:

(f) As a recovery for personal injury 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.

¹⁷⁴ *Id.*

¹⁷⁵ Kemper, *supra* note 1, at § 5 [b].

¹⁷⁶ ARK. CODE ANN. § 9-12-315(b)(6) states:

(b) For the purpose of this section, “marital property” means all property acquired by either spouse subsequent to the marriage except:

(6) Benefits received or to be received from a workers’ compensation claim, personal injury claim, or social security claim when those benefits are for any degree of permanent disability or future medical expenses.

¹⁷⁷ OHIO REV. CODE ANN. § 3105.171(A)(6)(a)(vi) states:

(6) (a) “Separate property” means all real and personal property and any interest in real or personal property that is found by the court to be any of the following:

(vi) Compensation to a spouse for the spouse’s personal injury, except for loss of marital earnings and compensation for expenses paid from marital assets.

¹⁷⁸ *Id.*

time or thereafter at least one of the parties intended that the separation be permanent.¹⁷⁹

These state statutes help the courts more easily classify personal injury awards by giving them justification for their use of the analytic approach. It is plausible that as more courts are faced with these particular classification issues more legislators will also begin to codify their approaches in state statutes.

VII. Other Issues Affecting Classification

This article has evaluated the approaches courts use to determine the classification of personal injury awards and typically these approaches are used to classify personal injury causes of action as well. However, the question arises, are these causes of action property to begin with? When faced with this question courts have gone both ways.¹⁸⁰ Brett Turner provides a rather succinct discussion of the rationales that courts have relied upon on both sides of the issue.¹⁸¹ Some courts decide that it is too difficult to estimate the amount of an award or settlement the cause of action might bring.¹⁸² The speculative nature of valuing a personal injury claim is enough for some courts to hold that they are not property.¹⁸³ On the other hand, Turner points out that other unvested awards such as unvested pensions are almost always considered marital property.¹⁸⁴ There would also be an incentive for the injured spouse to wait to assert or settle these claims until after divorce if they were uniformly treated as non-property.¹⁸⁵ For these reasons, a majority of courts do consider personal injury claims as property to be classified as either separate or marital.¹⁸⁶

Another question that arises is how the courts should allocate the personal injury award or settlement if it has not already been specified? If a jury awards a lump sum payment for a personal injury claim that asserted several components of damages

¹⁷⁹ VA. CODE ANN. § 20-107.3(H).

¹⁸⁰ TURNER, *supra* note 2, at § 6:53.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ TURNER, *supra* note 2, at § 6:53.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

and the jury did not allocate any specific amounts to those damages, then the court faces an additional step. When the analytical approach is used it is necessary to determine how much of the award or settlement was allocated to compensate the loss of separate property and how much was allocated to compensate loss of marital property.¹⁸⁷ The court in *Parde v. Parde*¹⁸⁸ faced such a problem. The husband received a settlement for a personal injury he sustained during the marriage.¹⁸⁹ Included in the settlement were a cash payment and an annuity for a future payment.¹⁹⁰ The district court held that all of the settlement was marital property.¹⁹¹ On appeal, the husband argued that the annuity represented his separate property.¹⁹² The wife argued that husband had not met the burden of proof.¹⁹³ The spouse who is claiming that property acquired during marriage is separate property has the burden of proof.¹⁹⁴ The settlement did not specifically allocate amounts to compensate specific damages but the husband offered his own testimony and testimony from the employer's claim representative regarding the intended allocation.¹⁹⁵ The court held:

Nevertheless, when, as here, evidence is presented from which reasonable inferences can be drawn that preponderate in favor of an allocation, the fact that a specific allocation has not been made in the settlement documents or the award does not preclude finding that the award was intended to compensate for a particular purpose and the amount thereof.¹⁹⁶

In the cases where no allocation has been made the courts will look at the evidence and make their own decision based upon it.¹⁹⁷ In *Parde*, the evidence presented by the husband was enough to infer that the loss to the marital estate had already been satisfied by the inclusion of the cash payment as marital

¹⁸⁷ *Id.* at § 6:55.

¹⁸⁸ 591 N.W.2d 783 (Neb. Ct. App. 1999).

¹⁸⁹ *Id.* at 785.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 786.

¹⁹³ *Id.* at 787.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 790.

¹⁹⁷ TURNER, *supra* note 2, at § 6:55.

property so the remaining annuity was compensation for pain and suffering and future lost wages.¹⁹⁸

Another factor that can complicate the classification of property is transmutation or commingling of separate property.¹⁹⁹ Some courts have held that even though proceeds of a personal injury award began as separate property they can become transmuted into marital property when they were commingled with other marital assets.²⁰⁰ For example, in *Garner*, a husband transferred proceeds from his personal injury award into a jointly held account with his wife.²⁰¹ Under New York statutory law, the award was separate property, but the court held that the transfer to the jointly held account created a presumption of marital property.²⁰² Several other jurisdictions have also held that depositing proceeds of a personal injury settlement into a joint account where it is commingled with other marital assets transmutes those proceeds into marital property.²⁰³ However, some courts allow the spouse who wishes to exclude property from the marital estate to offer evidence to “trace” the acquired property back to separate property.²⁰⁴

VIII. Conclusion

The cases demonstrate that over the past few decades the views regarding the classification of personal injury awards have begun to change. In the past a majority of the states would have viewed the classification of personal injury awards as entirely marital under the mechanistic approach, but now the majority of courts prefer an analytical approach. As Lynn Hendon indicated in her 1989 article, “[a] slight trend in favor of the analytic approach has begun to emerge.”²⁰⁵ Since that journal article was written several more states have faced this issue for the first time and others have overruled the cases using the mechanistic approach in favor of the analytical approach. One thing is definite,

¹⁹⁸ *Parde*, 591 N.W.2d at 790.

¹⁹⁹ *See, e.g.*, Kemper, *supra* note 1, at § 10 [a].

²⁰⁰ *Id.*

²⁰¹ *Garner*, 307 A.D.2d at 511.

²⁰² *Id.* at 512.

²⁰³ *See, e.g.*, Myrick v. Myrick, 739 So.2d 432 (Miss. Ct. App. 1999).

²⁰⁴ *See, e.g.*, Kemper, *supra* note 1, at § 10 [c].

²⁰⁵ Hendon, *supra* note 34.

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this is an issue that is far from settled and will likely continue to evolve in the courts for many more years.

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