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Johnson v. Johnson: Personal Injury Awards in Divorce Actions

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Johnson v. Johnson: Personal Injury Awards in Divorce Actions

The typical personal injury case involves two parties: the injured plaintiff and the defendant who allegedly caused the injury. In these cases the parties argue to determine what, if any, liability should be imposed on the defendant. In a divorce proceeding, however, the nature of a personal injury dispute changes entirely. The husband and wife are attempting to divide the assets of the marital estate. A personal injury award received by one of the spouses may well be one of the more substantial assets held by the parties. It is natural, therefore, that when a personal injury award is involved, there is often a dispute over who gets to keep the award. The injured spouse claims that the award is not a marital asset at all and belongs solely to him or her; the uninjured spouse contends that the personal injury award is marital property and thus subject to distribution.[1]

The North Carolina Supreme Court recently decided a case of first impression involving a personal injury dispute in the divorce context. In *Johnson v. Johnson*[2] the supreme court took the middle ground, holding that the award consists of both marital and separate property. The part of the award that compensates for pain and suffering and disfigurement belongs solely to the injured spouse; the part that replaces lost earnings and expenses incurred by the marital estate belongs to the marital estate; and any portion of the damages that compensates the uninjured spouse for loss of consortium belongs to that spouse alone.[3]

This Note examines the *Johnson* decision in light of North Carolina equitable distribution law. It discusses the policy underlying equitable distribution law and the evolution of property distribution in this state. The Note also explores the various ways that personal injury awards in divorce proceedings have been treated by courts in other jurisdictions. It then analyzes the *Johnson* decision in light of this background and concludes that the decision is a sound one that reconciles conflicting interests and goals present in North Carolina's equitable distribution law.

Robert Lee Johnson, plaintiff, and Doris Wilkie Johnson, defendant, were married in 1957. Plaintiff was involved in a motorcycle accident in February 1981 that left him seriously injured.[4] In August of the same year, the couple separated. After the parties had separated, but before they were actually divorced, plaintiff settled his personal injury claim for ninety-five thousand dollars.[5] Defendant filed a motion for equitable distribution; pursuant to this

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1. In North Carolina the marital property of a couple is subject to distribution, but the separate property of each spouse is not. *See* N.C. GEN. STAT. § 50-20 (1984). North Carolina's system of equitable distribution is discussed *infra* notes 31-45 and accompanying text.

2. 317 N.C. 437, 346 S.E.2d 430 (1986).

3. *Id.* at 446-51, 346 S.E.2d at 435-38.

4. Plaintiff suffered a 50% permanent disability in his right foot. *Id.* at 440, 346 S.E.2d at 432.

5. Defendant-Appellant's New Brief at 8, *Johnson* (No. 471PA85). Plaintiff filed for divorce in August 1982 based on the one-year separation period. He received his settlement at about this

motion, each party filed an affidavit describing the marital property subject to distribution. In most respects, the parties' affidavits were not in conflict. However, they differed in their characterization of the largest asset, the personal injury settlement. Plaintiff listed the award as his separate property, and defendant claimed that it was marital property subject to distribution.[6] The trial judge awarded the asset to plaintiff as separate property.[7] Defendant appealed based solely on the judge's characterization of the personal injury award.

The court of appeals unanimously affirmed the equitable distribution order.[8] However, the appellate court was divided over the correct rationale. Judge Phillips claimed that personal injury awards are clearly separate property in North Carolina. He argued that North Carolina General Statutes section 52-4,[9] which states that damages for the personal injuries of a married person belong to that person alone, mandated this conclusion.[10] Judges Arnold and Cozort disagreed with this rationale. Their concurring opinion stated that personal injury awards are marital property in North Carolina. They explained that marital property is defined in the Equitable Distribution Act as all property not expressly defined as separate property under the Act.[11] Because personal injury awards are not listed as separate property, they reasoned, the awards are necessarily marital property.[12] Judges Arnold and Cozort agreed that there was an apparent conflict between their conclusion and the statement in North Carolina General Statutes section 52-4, but stated that "[w]hen two acts of the legislature . . . are necessarily repugnant, the last one enacted shall prevail."[13] The Equitable Distribution Act was enacted long after section 52-4. Therefore, the judges concluded that the personal injury award was marital rather than separate property. The concurrence stated that this analysis was irrelevant in the case at hand, however. In North Carolina the marital estate is measured on the

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time. *Johnson*, 317 N.C. at 440, 346 S.E.2d at 432. The judgment of divorce did not become final until December 16, 1982. *See* Record at 24, *Johnson*.

6. *Johnson*, 317 N.C. at 440, 346 S.E.2d at 432.

7. *See* Record at 31, *Johnson*. The equitable distribution order stated that personal injury awards were separate property according to North Carolina law. *Id.* The judge cited N.C. GEN. STAT. § 50-20 (1984) for authority. *Id.*

Because the personal injury award was deemed plaintiff's separate property, plaintiff had a larger amount of separate assets than defendant. The judge therefore awarded defendant the majority of the marital estate. *See id.* at 35-36.

8. Johnson v. Johnson, 75 N.C. App. 659, 331 S.E.2d 211, *rev'd*, 317 N.C. 437, 346 S.E.2d 430 (1986).

9. N.C. GEN. STAT. § 52-4 (1984).

10. *Johnson*, 75 N.C. App. at 660, 331 S.E.2d at 212. Judge Phillips further stated that personal injury proceeds should be characterized as separate property based on the Equitable Distribution Act as well as on section 52-4. The Equitable Distribution Act, he explained, does not purport to "require either party to contribute his or her bodily health and powers to the assets for distribution." *Id.* at 661, 331 S.E.2d at 212. Because the personal injury involves harm to the physical condition of a spouse, then, the award belongs to that spouse alone. *See id.*

11. *Id.* at 661-62, 331 S.E.2d at 212 (Arnold and Cozort, JJ., concurring).

12. *Id.* (Arnold and Cozort, JJ., concurring). This method of analyzing the nature of personal injury awards has been called the mechanistic analysis. *See Johnson*, 317 N.C. at 445-46, 346 S.E.2d at 435.

13. *Johnson*, 75 N.C. App. at 662, 331 S.E.2d at 212 (Arnold and Cozort, JJ., concurring) (citing State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967); Nytco Leasing Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979)).

date on which the parties separated;[14] because plaintiff did not settle his claim until after this valuation date, the award was his separate property in this instance.[15]

Defendant then appealed to the North Carolina Supreme Court, which unanimously reversed the court of appeals.[16] The supreme court first disposed of the lower court's contention that there was a conflict among the statutes. According to the supreme court, section 52-4 governs a situation that is entirely different from that involved in section 50-20, the equitable distribution statute. Section 52-4 was enacted to give married women the right to sue on their own behalf;[17] consequently, the statute confers this right on married persons and does not apply to single or divorced individuals.[18] The purpose of section 50-20, on the other hand, is to give North Carolina courts guidelines so they can fairly distribute the assets of divorcing spouses. The system in effect in North Carolina does not purport to regulate or classify property during the course of the marriage itself. In addition, "the fact that legal title to property acquired during the marriage is in one or the other spouse, or in both, is not controlling in the . . . classification of property" for the purpose of equitable distribution.[19] Therefore, the *Johnson* court concluded that the two statutes are not contradictory.[20]

The court proceeded to decide whether personal injury awards constitute marital property subject to distribution or separate property exempt from distribution. First, the court described the various approaches taken in other jurisdictions.[21] The court joined a minority of the equitable distribution states by

14. N.C. GEN. STAT. § 50-20(b)(1) (1984) (" 'Marital property' means all real and personal property acquired by either spouse . . . during the course of the marriage and *before the date of the separation of the parties.*" (emphasis added)).

15. *Johnson*, 75 N.C. App. at 661, 331 S.E.2d at 212 (Arnold and Cozort, JJ., concurring). The concurring opinion thus adopted the view that the personal injury award was acquired at the time of the settlement rather than at the time of the injury itself. Courts in other jurisdictions have ruled both ways on this issue. *See infra* notes 97-102 and accompanying text.

16. *Johnson*, 317 N.C. at 440, 346 S.E.2d at 432.

17. The statute provides:

> The earnings of a married person by virtue of any contract for his or her personal service, and any damages for personal injuries, or other tort sustained by either, can be recovered by such person suing alone, and such earnings or recovery shall be his or her sole and separate property.

N.C. GEN STAT. § 52-4 (1984).

18. *Johnson*, 317 N.C. at 440-43, 346 S.E.2d at 432-33.

19. *Id.* at 444, 346 S.E.2d at 434.

20. *Id.* at 443-45, 346 S.E.2d at 433-34.

21. The majority of the equitable distribution jurisdictions follow the mechanistic approach and label a personal injury award as entirely marital property. *Id.* at 445-46, 346 S.E.2d at 435. This method of classification was embraced in the concurring opinion in the court of appeals. *See supra* note 12 and accompanying text. In the one other North Carolina case to examine the issue, the court of appeals apparently adopted this approach. *See* Little v. Little, 74 N.C. App. 12, 16, 327 S.E.2d 283, 287-88 (1985). *Little* is discussed *infra* notes 59-64 and accompanying text.

Most community property states have adopted the analytic approach. These states view the personal injury award as comprised of several components. Part of the award is the separate property of the injured spouse; another portion is community property; and yet a third segment may be declared the property of the uninjured spouse. *See Johnson*, 317 N.C. at 446-47, 346 S.E.2d at 435-

adopting what is known as the analytic approach.[22] The court explained that personal injury awards are composed of "three potential elements of damages": (1) compensation for pain, suffering, and actual physical harm, which is the property of the injured spouse; (2) compensation for lost income and for medical expenses, which is part of the marital estate; and (3) compensation for loss of consortium, which belongs to the uninjured spouse.[23] The court further stated that the party claiming that the award or any part of it is separate property bears the burden of proof. Accordingly, the court remanded the case to the trial court so that the award could be examined and appropriately classified.[24] Although the court allocated the burden of proof in this manner, it stated that it was not doing so because of a presumption that all property is marital. The court explained that, although several court of appeals cases have held otherwise, the equitable distribution statute does not create a presumption of marital property.[25]

Justice Martin added a brief concurrence. He first stated that the North Carolina equitable distribution statute creates a presumption that a personal injury award is marital property.[26] This presumption exists, he explained, in cases in which the injury itself occurred before the date of separation.[27] According to Justice Martin, the court had looked to the injury rather than the settlement to determine the date on which the property was acquired because it had determined that the cause of action was the property at issue.[28] He believed that the court should have expressly announced its conclusion.[29] In addition, Justice Martin felt that compensation for disfigurement, which the majority classified as separate property, should be divided into components. The portion of the award constituting pain and suffering due to disfigurement should be deemed separate property; however, any part of the damages that represents lost earnings due to disfigurement should be considered marital property.[30]

Prior to 1981 the issue involved in the *Johnson* case would have been resolved much more easily. At that time North Carolina courts took the traditional common-law approach to property division, dividing property according to which spouse was responsible for its acquisition.[31] Under such a system, a

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36. The mechanistic and analytic approaches are discussed *infra* notes 67-96 and accompanying text.

Finally, the court noted that a few states provide that personal injury proceeds are separate property. *Johnson*, 317 N.C. at 446, 346 S.E.2d at 435-36.

22. *Johnson*, 317 N.C. at 450-51, 346 S.E.2d at 438.

23. *Id.* at 447, 346 S.E.2d at 436.

24. *Id.* at 454-55, 346 S.E.2d at 439-40.

25. *See id.* at 454-55 n.4, 346 S.E.2d at 440 n.4.

26. *Id.* at 455, 346 S.E.2d at 440 (Martin, J., concurring).

27. *Id.* at 455, 346 S.E.2d at 440-41 (Martin, J., concurring).

28. *Id.* at 456, 346 S.E.2d at 441 (Martin, J., concurring).

29. *Id.* at 455-56, 346 S.E.2d at 440-41 (Martin, J., concurring). Justice Martin claimed that this conclusion is a "premise which the majority relies on but does not discuss." *Id.* at 455, 346 S.E.2d at 440 (Martin, J., concurring).

30. *Id.* at 456-57, 346 S.E.2d at 441 (Martin, J., concurring).

31. *See* Comment, *The North Carolina Act for Equitable Distribution of Marital Property*, 18 WAKE FOREST L. REV. 735, 735 (1982); *Survey of Developments in North Carolina Law, 1981—The Equitable Distribution Act*, 60 N.C.L. REV. 1396, 1396 (1982).

personal injury award would belong solely to the person who received the settlement. In 1981, however, the North Carolina General Assembly adopted a system that provides for the division of property based on equitable considerations other than title.[32] The statute was enacted because of the realization that the title system often led to unfair results, awarding the working spouse property in recognition of his or her economic contributions to the marriage but ignoring the nonmonetary contributions of the homemaker.[33] The inequities of the title system became apparent in the North Carolina Supreme Court case of *Leatherman v. Leatherman*.[34] The *Leatherman* court denied Ms. Leatherman any rights in her husband's closely held corporation even though she had worked for the corporation full time without salary and had contributed to its growth and development. The court ruled this way because Ms. Leatherman did not possess an enforceable interest in the business.[35] According to some commentators, it was the *Leatherman* decision that awakened the state to the problems inherent in the title system and prompted the general assembly to adopt a property distribution system that recognized factors other than title.[36]

North Carolina General Statutes section 50-20 lays out the current framework for classification and distribution of marital property. First, the court must classify the assets of the parties as either marital or separate property.[37] The court then must proceed to divide the marital assets between the spouses.[38]

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32. Act of July 3, 1981, ch. 815, 1981 N.C. Sess. Laws 1184 (codified as amended at N.C. GEN. STAT. §§ 50-20 to -21 (1984)).

33. *See* White v. White, 312 N.C. 770, 774-75, 324 S.E.2d 829, 831 (1985); Comment, *supra* note 30, at 735. The title system has been widely criticized on these grounds. *See, e.g.*, Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496, 501-02 (1974); L. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY § 1.03, at 4-5 (1983); G. MCLELLAN, EQUITABLE DISTRIBUTION LAW AND PRACTICE § 1.5 (1985).

34. 297 N.C. 618, 256 S.E.2d 793 (1979).

35. *Id.* at 619-22, 256 S.E.2d at 795-96. The wife ultimately received "the maximum she could get under North Carolina law—her half of the marital home in the entireties." Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C.L. REV. 195, 196 n.4 (1987).

36. *See, e.g.*, White v. White, 312 N.C. 770, 774, 324 S.E.2d 829, 831 (1985); Wade v. Wade, 72 N.C. App. 372, 379, 325 S.E.2d 260, 267-68, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

37. *See* N.C. GEN. STAT. § 50-20(b) (1984). The statute defines "marital property" as

> all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section. Marital property includes all vested pension and retirement rights, including military pensions eligible.

Id. Separate property, then, consists of those assets specifically exempted from the pool of distributable property. The scope of separate property under the statute is discussed *infra* notes 56-58 and accompanying text.

38. North Carolina opted for a system in which the court can only distribute the portion of the property that it has labeled marital property. *See* Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV 247, 248-49 (1983). An alternative system, currently in effect in several states, gives courts the discretion to divide all of the property owned by the spouses. These states are commonly referred to as all-property states. *See* L. GOLDEN, *supra* note 33, § 2.02; G. MCLELLAN, *supra* note 33, §§ 6.8-6.9; Sharp, *supra*, at 248-49. The Uniform Marriage and Divorce Act presents both alternatives, but recommends the all-property method. *See* UNIFORM MARRIAGE AND DIVORCE ACT § 307 (1979).

The alternative adopted by North Carolina resembles the community property system in some respects. Community property states also make the distinction between marital property—or community property, as it is called in those states—and separate property, and divide the former between

The court must divide the assets equally unless, in its discretion, it determines that fairness calls for an unequal distribution.[39] The statutorily mandated presumption of equal division is a strong one that can be overcome only if the court specifies " 'some reason[s] compelling a contrary result.' "[40] This presumption reflects the concept that marriage is a partnership to which each partner contributes equally.[41]

The partnership ideal has played an important role in shaping North Carolina's equitable distribution law. In interpreting this statute, North Carolina courts have kept this principle in mind.[42] Prior to the decision in *Johnson*, state courts held that all property was presumed marital property.[43] The spouse contending that a particular asset was separate property bore the burden of proof; he or she had to establish that the asset was separate with "clear, cogent and convincing evidence."[44] The chance of overcoming this presumption was admit-

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the spouses at divorce. *See* L. GOLDEN, *supra* note 33, § 1.04; G. MCLELLAN, *supra* note 33, §§ 6.3-6.6. In community property systems, however, half of the title vests in each spouse immediately at the time of acquisition. Therefore, each party owns half of the marital estate at divorce and is entitled as a matter of law to 50% of the assets. Under the North Carolina system, on the other hand, the property is not divided into marital and separate assets until divorce; prior to that point, the common-law title system prevails. Because of this distinction, North Carolina has been referred to as a deferred community property state. *See* Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71, 87 (1979); Sharp, *supra*, at 249; Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269, 1283 (1981). Another distinction between the two systems is that in the deferred community property system the court can make an unequal division based on equitable considerations. *See* N.C. GEN. STAT. § 50-20(c) (1984).

39. N.C. GEN. STAT. § 50-20(c) (1984).

40. Loeb v. Loeb, 72 N.C. App. 205, 215, 324 S.E.2d. 33, 41 (quoting Alexander v. Alexander, 68 N.C. App. 548, 552, 315 S.E.2d 772, 775 (1984)), *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985)). The statute allows the court to consider several factors in determining whether to make an unequal division. *See* N.C. GEN STAT. § 50-20(c) (1984); *see also* Smith v. Smith, 314 N.C. 80, 88, 331 S.E.2d 682, 687 (1985) (requiring courts to consider all factors in making this determination). In addition to such factors as the assets, liabilities, health, financial obligations, and earning capacity of the parties, the statute contains a provision allowing courts to consider "any other factor which the court finds to be just and proper." N.C. GEN. STAT. § 50-20(c)(12) (1984).

41. *See* Sharp, *supra* note 35, at 198-99.

42. *See, e.g.*, Smith v. Smith, 314 N.C. 80, 85-86, 331 S.E.2d 682, 686 (1985); White v. White, 312 N.C. 770, 775, 324 S.E.2d 829, 832 (1985); Loeb v. Loeb, 72 N.C. App. 205, 209, 324 S.E.2d 33, 37, *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985); *see also* Sharp, *supra* note 35, at 198-201 (discussing the importance of the partnership ideal in North Carolina).

43. *See* McLeod v. McLeod, 74 N.C. App. 144, 157, 327 S.E.2d 910, 918, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985); Loeb v. Loeb, 72 N.C. App. 205, 209, 324 S.E.2d 33, 38, *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985).

44. Loeb v. Loeb, 72 N.C. App. 205, 210, 324 S.E.2d 33, 38, *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985). In *Loeb* the court of appeals found that the wife had failed to substantiate adequately her claim that various pieces of property given to the couple by her mother were her separate property. *Id.* at 211, 324 S.E.2d at 39.

The standard of proof adopted by the court in *Loeb* first surfaced in another context in Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 (1982). *Mims* involved the purchase of real estate with the husband's separate funds. Title to the property was in both parties' names. The trial court granted summary judgment in favor of the wife in the face of the husband's contention that the property belonged to him alone. *Id.* at 43-45, 286 S.E.2d at 783. The court of appeals reversed, and the supreme court upheld the reversal. *Id.* at 45-46, 286 S.E.2d at 783. Nevertheless, the supreme court found that a summary judgment was inappropriate because the presumption could be rebutted by " 'clear, cogent, and convincing proof.' " *Id.* at 57-58, 286 S.E.2d at 790 (quoting Bass v. Bass, 229 N.C. 171, 172, 48 S.E.2d 48, 49 (1948)).

tedly small.[45]

Balanced against the partnership ideal is the desire to preserve the rights and identities of the individuals involved in a marriage.[46] This goal predates the advent of equitable distribution law by many years. Long before the Equitable Distribution Act was passed, the North Carolina General Assembly had enacted a series of statutes that recognized the ability of each marital partner to manage his or her own affairs without the joinder of the other spouse.[47] One such statute, section 52-4,[48] confers on married persons the right to sue and to earn income, and further provides that any damages recovered or income earned constitutes the separate property of the spouse.[49] This statute changed the common-law rule that denied a wife the right to sue in her own name for injury to her person.[50]

For a while it was unclear what effect the ability of each spouse to sue independently to recover damages for personal injuries would have on the right of the other spouse to sue for loss of consortium—the loss of whatever rights one spouse has to a partner free from injury. *Hinnant v. Tidewater Power Co.*[51] established that, largely because the cause of action for loss of consortium consists of compensation for the economic losses covered in the injured spouse's suit, the uninjured spouse had no cause of action for loss of consortium.[52] *Hinnant* was later overruled by *Nicholson v. Hugh Chatham Memorial Hospital.*[53] The *Nicholson* court ruled that consortium includes society, companionship, sexual grati-

45. *Loeb*, 72 N.C. App. at 211, 324 S.E.2d at 39.

46. *See* White v. White, 312 N.C. 770, 773-75, 324 S.E.2d 829, 831-32 (1985) (discussing the movement in North Carolina to grant women greater rights as individuals). For a discussion of the potential effect these individualistic concepts have on the marital sharing principles that have emerged in recent years, and an argument that sharing principles should prevail, see Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977).

47. *See* N.C. GEN. STAT. §§ 39-7 to -13.1, 52-1 to -12 (1984). The statutes were originally enacted to guarantee these rights to women. Men, already having these powers, had no need of the protection of the statutes. *See White*, 312 N.C. at 773-74, 324 S.E.2d at 831; Johnson v. Lewis, 251 N.C. 797, 803, 112 S.E.2d 512, 516 (1960).

48. N.C. GEN. STAT. § 52-4 (1984).

49. *See supra* note 17 (full text of § 52-4).

50. Before the statute's enactment,

> an injury to the person of the wife gave rise to two causes of action: (1) that of the wife individually for personal loss and injuries, enforced through the husband; and, (2) that of the husband for damages to his marital interests . . . ; or for damages by reason of his being put to expense. The wife had no corresponding right to sue for injury to her husband.

Note, *Domestic Relations—Loss of Consortium from Injury to Spouse*, 29 N.C.L. REV. 178, 179-80 (1951); *see also* Price v. Charlotte Elec. Ry. Co., 160 N.C. 450, 76 S.E. 502 (1912) (husband is a necessary party to the wife's personal injury suits). The statute by giving title to the wife, effectively enabled her to sue for damages in her own name. *See* Helmstetler v. Duke Power Co., 224 N.C. 821, 824, 32 S.E.2d 611, 613 (1945), *overruled on other grounds by* Nicholson v. Hugh Chatham Memorial Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980).

51. 189 N.C. 120, 126 S.E. 307 (1925), *overruled by* Nicholson v. Hugh Chatham Memorial Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980).

52. *Id.* at 124-26, 128, 126 S.E. at 309-10, 312. North Carolina still recognized a cause of action when a third party intentionally deprived one spouse of consortium by alienating the affections of the marital partner. *See* Nicholson v. Hugh Chatham Memorial Hosp., 300 N.C. 295, 301, 266 S.E.2d 818, 821 (1980); Note, Cannon v. Miller: *The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina*, 63 N.C.L. REV. 1317 (1985).

53. 300 N.C. 295, 266 S.E.2d 818 (1980).

fication, and affection as well as services.[54] Because these were all rights peculiar to the uninjured spouse, that spouse could maintain an action for loss of consortium so long as that action was joined with all other suits against the defendant for the injury.[55] The holding in *Nicholson* constituted an acknowledgment that individuals maintain peculiarly personal rights within the context of marital relationships.

North Carolina's equitable distribution law incorporates this desire to recognize the rights of individual spouses within a marriage. The statute contains a detailed listing of instances in which a spouse can establish that certain property is separate.[56] In addition, property acquired by a spouse during the course of the marriage remains the separate property of that spouse.[57] The statute offers even further protection to separate property by providing that an increase in the value of such property is separate property as well.[58]

The equitable distribution statute does not expressly address the status of personal injury awards. Before the *Johnson* decision, only one other case had dealt with the issue. *Little v. Little*[59] involved a dispute over the proper disposition of insurance proceeds received by the husband.[60] The court of appeals agreed with the trial court that the proceeds constituted marital property.[61] The court's apparent rationale for this holding was that such awards are marital

54. *Id.* at 302, 266 S.E.2d at 822.

55. *Id.* at 304, 266 S.E.2d at 823. The joinder requirement exists to prevent double recovery for loss of services. *See id.* at 303-04, 266 S.E.2d at 822-23.

56. The spouse can establish that property is separate property if it was acquired before marriage or was acquired during marriage by bequest, devise, gift, or descent. Professional and business licenses, the expectation of nonvested deferred compensation rights, and property or value that can be traced to separate property are also considered separate property. N.C. GEN. STAT. § 50-20(b)(2) (1984). This section is unusually extensive and detailed, and has been criticized for "creat[ing] . . . a smaller pool of assets subject to division than any other state in the union." Sharp, *supra* note 38, at 253.

57. N.C. GEN. STAT. § 50-20(b)(2) (1984).

58. *Id.* The North Carolina courts, cognizant of both policies underlying equitable distribution law, have interpreted this last provision to mean that only passive increases in property value remain separate. That part of the appreciation that can be traced to the active efforts of one or both of the spouses, on the other hand, belongs to the marital estate. *See* Wade v. Wade, 72 N.C. App. 372, 379, 325 S.E.2d 260, 268, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). In *Wade* the husband purchased a lot shortly before marrying; during the course of the marriage, the couple made many improvements to the property. The court found that the appreciation in value resulting from the improvements were distinguishable from mere passive appreciation in property. The former can be viewed as a distinct asset acquired during the marriage.

The *Wade* court thus took the position that the acquisition of property was an ongoing, dynamic process. *Id.* at 380, 325 S.E.2d at 268-69. The court expressly rejected the alternative theory, known as the "transmutation through commingling," which views the commingling of separate and marital assets as sufficient to transform the separate property into marital property. The court stated that such a rule would run directly contrary to the words of the statute and, therefore, the intent of the general assembly. *Id.* at 381, 325 S.E.2d at 269.

The approach the court adopted, the source of funds theory, looks to the source of the funds used to acquire an asset. The *Wade* court explicitly recognized that this system can lead to the dual classification of some property as part marital and part separate. *Id.* at 381-82, 325 S.E.2d at 269. Thus, *Johnson* was not the first decision in North Carolina to adopt a dual classification system.

59. 74 N.C. App. 12, 327 S.E.2d 283 (1985).

60. The husband was partially paralyzed in a motorcycle accident. *Id.* at 14, 327 S.E.2d at 286. The *Johnson* court did not distinguish life insurance proceeds from other personal injury settlements for the purpose of this issue. *See Johnson*, 317 N.C. at 449-50, 346 S.E.2d at 437.

61. *Little*, 74 N.C. App. at 16, 327 S.E.2d at 287.

property because they are not specifically defined as separate property by statute.[62] The court also noted that "some courts distinguish between money realized as compensation for pain and suffering . . . and that portion of an award representing lost wages and medical expenses . . . ."[63] The trial court, however, had found that the proceeds of the policy compensated the husband for his lost wages and medical expenses. Lost wages and medical expenses are both marital properties even under this alternative approach. Thus, the court avoided choosing either theory of classification, and held that the award was marital property under both approaches.[64]

The North Carolina Supreme Court had little precedent to which it could look for guidance in the resolution of the issue in *Johnson*. The statute, on its face, is silent concerning the proper classification of personal injury awards. The two court of appeals decisions dealing with the subject had produced an array of different views with no real consensus. Consequently, the *Johnson* court looked outside the jurisdiction for guidance and evaluated the case law and statutes of other states.

The court considered the laws in existence in both community property and equitable distribution states.[65] A few states have declared that recoveries for personal injuries are entirely separate property;[66] most of the states that have dealt with the issue, however, have taken one of two approaches. The majority of the community property states have adopted the analytic approach, and divide the recovery into components of both separate and marital property. In contrast, most equitable distribution states have classified the award as solely marital property pursuant to a mechanistic approach.[67]

Originally, most community property states viewed personal injury awards as entirely community property.[68] In more recent years they have changed their

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62. *See id.*

63. *Id.* at 17, 327 S.E.2d at 288.

64. *Id.* This approach does not recognize that some of the lost earnings represent post-separation income. The *Johnson* court, in discussing *Little*, failed to criticize or even mention this fact. *See Johnson*, 317 N.C. at 449-50, 346 S.E.2d at 437.

65. Almost all states fall under one of these labels. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin are community property states. Most of the other states practice some form of equitable distribution. *See* Freed & Walker, *Family Law in the Fifty States: An Overview*, 19 FAM. L.Q. 331, 354-55 (1986) (table IV).

66. *See* CAL. CIV. CODE § 4800(c) (West 1983) ("[C]ommunity property personal injury damages shall be assigned to the party who suffered the injuries unless the court . . . determines that the interests of justice require another disposition."); N.Y. DOM. REL. LAW § 236(d)(2) (McKinney 1986) ("The term separate property shall mean . . . compensation for personal injuries."). Even in these states, however, the statutory law is not absolute. In California a court has some limited ability to alter the disposition. CAL. CIVIL CODE § 4800(c) (West 1983). In New York most courts have interpreted the statutory language quite literally. *See, e.g.*, Ettinger v. Ettinger, 107 Misc. 2d 675, 682, 435 N.Y.S.2d 916, 920-21 (Sup. Ct. 1981). One court, however, interpreted the statute to characterize the noneconomic loss sustained by the injured party as separate property. The economic loss suffered would presumably be considered marital property. *See* Rich v. Rich, 126 Misc. 2d 536, 536, 483 N.Y.S.2d 150, 150 (Sup. Ct. 1984).

67. *See Johnson*, 317 N.C. at 446-47, 346 S.E.2d at 435-36.

68. *See, e.g.*, Pacific Constr. Co. v. Cochran, 29 Ariz. 554, 243 P. 405 (1926), *overruled by* Jurek v. Jurek, 124 Ariz. 596, 606 P.2d 812 (1980); Hawkins v. Front St. Cable Ry. Co., 3 Wash. 592, 28 P. 1021 (1892), *overruled by* Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984).

laws.[69] These states became dissatisfied with the former system because it failed to consider fully the "true principles of community property."[70] For example, the earlier system overlooked a distinction that is fundamental in community property law: The difference between onerous and lucrative title.[71]

The concepts of onerous title and lucrative title first emerged under the community property system of Spain, and provided the basis for distinguishing between community and separate property.[72] Title acquired by either spouse during the course of the marriage vested in both spouses at the time of acquisition under the theory that both spouses should share equally in the fruits of their labor, industry, or other valuable consideration.[73] Property acquired by these methods was said to be acquired by onerous title.[74]

In cases in which the property was not acquired by onerous title, the justification for vesting the title equally in both spouses vanished. Accordingly, when a spouse either owned property prior to marriage or acquired property by lucrative title—that is, by gift, succession, or inheritance—it was his or her own property.[75] Community property states in this country statutorily recognize this distinction by defining property acquired by these methods as separate property.[76] Initially, these states conducted a purely statutory analysis of personal injury awards and concluded that because the damages were not specifically provided for by statute, they fell within the catch-all category of community property.[77]

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69. Today, eight of the nine community property states take the analytic approach. *See* Jurek v. Jurek, 124 Ariz. 596, 606 P.2d 812 (1980); Cook v. Cook, 102 Idaho 651, 637 P.2d 799 (1981); Guy v. Guy, 98 Idaho 205, 560 P.2d 876 (1977); Luxton v. Luxton, 98 N.M. 276, 648 P.2d 315 (1982); Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952); Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984); LA. CIV. CODE ANN. art. 2344 (West 1985); NEV. REV. STAT. § 123.121(1) (1979) (dividing damages awarded jointly into components based on pain and suffering, loss of consortium, and lost earnings and expenses); NEV. REV. STAT. § 123.130 (1979) (personal injury award acquired by each spouse constitutes separate property); TEX. FAM. CODE ANN. § 5.01(a)(3) (Vernon 1975); WIS. STAT. ANN. § 766.31(7)(f) (West Supp. 1986).

Courts in the other state, California, generally hold that personal injury awards are separate property. *See supra* note 66 (discussing the California statute).

70. W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 82, at 201 (2d ed. 1971).

71. *See id.* § 62; Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis*, 33 UCLA L. REV. 1250, 1253 n.9 (1986); Note, *Personal Injury Recoveries as Community Property*, 23 ARIZ. L. REV. 384, 386 (1981) [hereinafter Note, *Personal Injury*]; Note, *Worker's Compensation—Marital Property*, 10 N. KY. L. REV. 531, 546 (1983) (analogizing the distinction to that between separate and marital property).

72. W. DE FUNIAK & M. VAUGHN, *supra* note 70, § 62.

73. W. DE FUNIAK & M. VAUGHN, *supra* note 70, § 62.

74. *See* W. DE FUNIAK & M. VAUGHN, *supra* note 70, § 62; Note, *Personal Injury*, *supra* note 71, at 386.

75. W. DE FUNIAK & M. VAUGHN, *supra* note 70, § 62.

76. *See, e.g.*, LA. CIV. CODE ANN. art. 2341 (West 1985); TEX. FAM. CODE ANN. § 5.01 (Vernon 1975).

77. *See* W. DE FUNIAK & M. VAUGHN, *supra* note 70, § 82; Note, *Dissolution of Marriage—Personal Injury Damages as Marital Property in Missouri*: Nixon v. Nixon, 41 MO. L. REV. 603, 606 (1976). Another rationale for the rule was that the personal injury itself diminished the capacity of the community to attain property. W. DE FUNIAK & M. VAUGHN, *supra* note 70, § 82. This latter justification serves as the basis for allowing the community to claim a portion of the award under the analytic approach. *See infra* note 78 and accompanying text. Finally, the approach reflects the

Critics of this early approach to characterizing personal injury proceeds originally suggested the analytic approach. These commentators claimed that the earlier system was overly simplistic and failed to examine the nature of the personal injury award itself:

> Except for gifts clearly made to the marital community, community property only consists of that which is acquired by onerous title . . . . It must be plainly evident that a right of action for injuries to person . . . or the compensation received therefor, is not property acquired by onerous title. . . . [T]he compensation partakes of the same character as that which has been injured . . . . [W]hat or who has been injured? Is it the marital community or is it the separate individuality of the spouse? In actuality, both. The physical injury to the spouse, the pain and suffering of the spouse therefrom is an injury to the spouse as an individual. . . . But . . . if the injury deprives the marital community of the earnings or services of the spouse, that is an injury to the marital community; likewise there is loss to the community where the community funds are expended for hospital and medical expenses . . . .[78]

The development of the analytic method of characterizing personal injury proceeds in community property states is also inextricably connected to the right to sue.[79] The two early cases that pioneered the analytic approach focused primarily on this right. In *Fredrickson & Watson Construction Co. v. Boyd*[80] the

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general policy in community property law favoring community over separate ownership. *See* Comment, *Selected Problems in the Equal Management of Community Property*, 60 TUL. L. REV. 821, 822 (1986).

This early method of dealing with personal injury proceeds mirrors the mechanistic analysis employed by many equitable distribution states today. *See, e.g.*, Liles v. Liles, 289 Ark. 159, 169, 711 S.W.2d 447, 452 (1986); *In re* Marriage of Fjeldheim, 676 P.2d 1234, 1236 (Colo. Ct. App. 1983); Gan v. Gan, 83 Ill. App. 3d 265, 268-69, 404 N.E.2d 306, 309 (1980); Nixon v. Nixon, 525 S.W.2d 835, 839 (Mo. Ct. App. 1975).

In Bero v. Bero, 134 Vt. 533, 367 A.2d 165 (1976), a case cited by the *Johnson* court as following this approach, the Vermont Supreme Court refused to subdivide a personal injury award and recognize future earnings as separate property. *Id.* at 535, 367 A.2d at 165. The court did not discuss its reasons for assuming that the settlement was marital property. At the time of the *Bero* case, however, Vermont adhered to the title system of property distribution. *See* VT. STAT. ANN. tit. 15, § 751 (1974). Actual distribution of assets was handled pursuant to an alimony award. Under the system in effect at that time, a lump sum alimony award, or the award of real property, was possible. *See id.* § 754.

Today, the *Bero* court's statement that personal injury awards are marital property has no significance in Vermont. Vermont amended its statute in 1981, and it is now an all-property equitable distribution state. *See id.* § 751. All-property states allow their courts to distribute all the property owned by either or both spouses. *See id.* These states theoretically vest a great deal more discretion in their courts than do the equitable distribution states that limit the pool of distributable assets to those statutorily labeled marital property. *See* Sharp, *supra* note 38, at 248-49 (arguing that some "all property" states have statutes mandating that the court consider several factors in making the distributions and that practically, this mandate can often be almost as restrictive as the title property system).

78. W. DE FUNIAK & M. VAUGHN, *supra* note 70, § 82, at 201-03 (footnotes omitted); *see also* Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 773-74 (1974) (damages for pain and suffering "more appropriately" classified as separate property); Green, *The Texas Death Act*, 26 TEX. L. REV. 461 (1948) (discussing and criticizing the original system).

79. In North Carolina, an equitable distribution state, personal injury awards were characterized as separate property to give women the right to sue for recovery. *See* N.C. GEN. STAT. § 52-4 (1984); Note, *supra* note 50, at 181-82. The issue is discussed *supra* notes 46-50 and accompanying text.

80. 60 Nev. 117, 102 P.2d 627 (1940).

Nevada Supreme Court considered whether the contributory negligence of the husband could be imputed to the injured wife, thus barring her personal injury claim against a third party.[81] The resolution of this issue, in turn, depended on whether the cause of action belonged to the injured spouse or the community. If the cause of action belonged to the community, any negligence on the part of the community constituted contributory negligence and barred recovery. If, on the other hand, the right belonged solely to the injured spouse, then the uninjured spouse's negligence was distinct and did not bar recovery.[82]

Relying heavily on the reasoning of commentators, the *Fredrickson* court concluded that " 'a cause of action for a personal injury is based on the violation of a separate right, namely, the right to personal security.' "[83] The court therefore held that the wife could maintain her cause of action despite her husband's contributory negligence.[84] The court criticized the then-prevalent rule that the damages belong to the community as " 'in conflict with the fundamental principles of compensation.' "[85] The uninjured spouse, the court stated, only shares in the right to compensation for the property in which he or she originally possessed rights: " '[his or] her services, and . . . the expense of . . . care and cure.' "[86]

The New Mexico Supreme Court dealt with this issue in *Soto v. Vandeventer*.[87] In *Soto* the court drew the same distinction between injury to the person and injury to the economic well-being of the community.[88] As did the court in *Fredrickson*, the court allowed the wife to sue a third party for injuries without the joinder of the husband.[89] The court concluded the rule that the cause of action belongs to the community rather than the individual was "utter nonsense."[90]

Soto and *Fredrickson* paved the way for other community property states, which often relied on the reasoning of these courts in adopting the analytic model.[91] Because community property states determine title at the time of acquisition, and at divorce merely divide the proceeds accordingly, the resolution of the personal injury issue in the right to sue context also settled the problem of how to divide personal injury damages at divorce.[92]

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81. *Id.* at 119, 102 P.2d at 628.

82. *See* Akers, *Blood and Money—Separate or Community Character of Personal Injury Recovery*, 9 TEX. TECH L. REV. 1, 34 (1977); Green, *supra* note 78, at 464.

83. *Fredrickson*, 60 Nev. at 122, 102 P.2d at 629 (quoting MCKAY ON COMMUNITY PROPERTY § 398 (2d ed.)).

84. *Id.* at 123, 102 P.2d at 629.

85. *Id.* at 122, 102 P.2d at 629 (quoting MCKAY ON COMMUNITY PROPERTY § 398 (2d ed.)).

86. *Id.* (quoting MCKAY ON COMMUNITY PROPERTY § 398 (2d ed.)).

87. 56 N.M. 483, 245 P.2d 826 (1952). In *Soto* the wife attempted to sue in her own name to recover damages for injuries caused by the negligence of an employee of defendant. *Id.* at 484-85, 245 P.2d at 826.

88. *Id.* at 494, 245 P.2d at 832-33.

89. *Id.* at 494, 245 P.2d at 833. The injured party's husband was able to sue to recover for damages to the community. *See id.* at 485, 245 P.2d at 832.

90. *Id.* at 489, 245 P.2d at 829.

91. *See* cases and statutes cited *supra* note 69.

92. *See, e.g.*, Luxton v. Luxton, 98 N.M. 276, 278, 648 P.2d 315, 317 (1982) (relying on *Soto* in divorce context).

Many equitable distribution states do not follow the example of the community property states in this area of the law.[93] There are many conceptual and practical differences between the two systems that explain this fact. The primary distinction is that, in equitable distribution states, title does not determine the manner of distribution at divorce. Therefore, equitable distribution states could make personal injury awards separate property during the course of the marriage to give each spouse the right to sue without resolving the question of characterization for the purpose of equitable distribution.[94] In addition, equitable distribution jurisdictions do not define property based on whether it is attained through onerous or lucrative title. Instead, courts in these states divide those assets that their statutes enable them to distribute based on equitable considerations that are often enumerated in the statute.

This system readily lends itself to a mechanical analysis. Consequently, a majority of the equitable distribution states mechanically evaluate personal injury awards, find the awards are not specifically set forth as separate property, and classify the proceeds as marital property.[95] Not all of the equitable distribution states hold that personal injury damages are marital property, however. Some courts find the reasoning of the community property states persuasive and follow the same basic approach.[96]

Many states adhering to the analytic model have declared that because an analysis of the nature of the award determines the classification of its various components, it is unnecessary to ask either when the injury occurred or when the award was received.[97] A settlement received before valuation that consisted completely of compensation for pain and suffering is entirely separate property. A post-separation settlement that only compensates for medical expenses and lost earnings, on the other hand, is wholly marital property although the award

93. *See, e.g.*, Liles v. Liles, 289 Ark. 159, 711 S.W.2d 447 (1986); Nixon v. Nixon, 525 S.W.2d 835 (Mo. Ct. App. 1975).

94. *See Johnson*, 317 N.C. at 444, 346 S.E.2d at 434; Green, *supra* note 78, at 487.

95. *See* Liles v. Liles, 289 Ark. 159, 169, 711 S.W.2d 447, 452 (1986); *In re* Marriage of Fjeldheim, 676 P.2d 1234, 1236 (Colo. Ct. App. 1983); Gan v. Gan, 83 Ill. App. 3d 265, 268-69, 404 N.E.2d 306, 309 (1980); Nixon v. Nixon, 525 S.W.2d 835, 839 (Mo. Ct. App. 1975). New Jersey appears to fall into this group, but the actual status of personal injury proceeds in that state is unclear. In the 1974 case of Di Tolvo v. Di Tolvo, 131 N.J. Super. 72, 328 A.2d 625 (App. Div. 1974), the superior court adopted this approach and, a few years later, the state supreme court expressly approved it in dicta. *See* Kruger v. Kruger, 73 N.J. 464, 472, 375 A.2d 659, 664 (1977). Later cases have followed the *Di Tolvo* approach. *See* Landwehr v. Landwehr, 200 N.J. Super. 56, 490 A.2d 342 (App. Div. 1985). In Amato v. Amato, 180 N.J. Super. 210, 434 A.2d 639 (App. Div. 1981), however, the New Jersey superior court argued that *Di Tolvo* should be limited to cases in which the settlement was received prior to divorce; when an inchoate right to recovery is involved, the marital estate should only be compensated for lost earnings and expenses during the marriage. The court apparently adopted an analytic approach instead of the mechanistic one implicitly endorsed by the state supreme court in *Kruger*. *See id.*; *see also* Harmon v. Harmon, 161 N.J. Super. 206, 212-18, 391 A.2d 552, 555-58 (App. Div. 1978) (Botter, J., concurring) (urging the state to adopt the analytic approach and claiming that it was not precluded by *Kruger*).

96. *See* Campbell v. Campbell, 255 Ga. 461, 462, 339 S.E.2d 591, 593 (1986); *In re* Marriage of Gerlich, 379 N.W.2d 689, 691 (Minn. Ct. App. 1986); Van de Loo v. Van de Loo, 346 N.W.2d 173, 176-77 (Minn. Ct. App. 1984); *see also* Gloria B.S. v. Richard G.S., 458 A.2d 707, 708 (Del. Fam. Ct. 1982) (determining that the award is entirely the separate property of the injured spouse even if an injury occurs during the course of the marriage).

97. *See* Jurek v. Jurek, 124 Ariz. 596, 598, 606 P.2d 812, 813-14 (1980); Brown v. Brown, 100 Wash. 2d 729, 738, 675 P.2d 1207, 1212 (1984).

was not actually received until after the valuation date. An award received before the marriage and compensating for an injury that occurred before the marriage might still be considered partly marital property; that part of the award compensating for lost wages and medical expenses during the marriage would belong to the marital estate.[98] Finally, an award compensating for an injury that occurred after the valuation date would never compensate for losses suffered by the marital estate. An analysis of the award itself therefore renders a determination of the timing issue unnecessary; for, in the course of evaluating the damages, courts answer timing questions to the degree to which they are relevant.

The states that hold this view, consistent with this general framework for analysis, do not merely divide the award into economic and noneconomic losses. The economic loss is further broken down into damages occurring before the marriage and those occurring after the marriage.[99] Compensation for post-marital medical expenses belongs to the injured spouse. In addition, because future earnings are the separate property of the spouse, the compensation for post-divorce lost earnings is also the separate property of the injured spouse.[100]

As some courts and commentators have pointed out, there is a sharp distinction between vested personal injury awards and an inchoate right to sue to recover damages for personal injury. One court noted that

> an inchoate personal injury claim, unlike some other right to sue, is not a property right. . . . The right has none of the attributes of property. . . . [T]he right cannot be sold or assigned prior to judgment and cannot be transferred from an injured debtor to his trustee in bankruptcy. . . .
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> . . . [A] personal injury claim is not a property right . . . in our common law.[101]

Because there is no property in existence at the time of separation, then, there is no marital asset to divide at the time of separation. It is not until the damages are recouped from the tortfeasor that the recovery is divided between the spouses.[102]

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98. Blumberg, *supra* note 71, at 1284; *see* Akers, *supra* note 82, at 32-33.

99. *See, e.g., In re* Marriage of Blankenship, 682 P.2d 1354, 1357 (Mont. 1984) (equitable distribution); LA. CIV. CODE ANN. art. 2344 (West 1985) (community property); TEXAS FAM. CODE ANN. § 5.01(a)(3) (Vernon 1975) (community property).

100. *See In re* Marriage of Kosko, 125 Ariz. 517, 518, 611 P.2d 104, 105 (Ariz. Ct. App. 1980) (in community property jurisdiction, court of appeals interpreting *Jurek* to hold "any portion of a recovery which represents compensation for post-dissolution earnings of the injured spouse is the separate property of that spouse"); Campbell v. Campbell, 255 Ga. 461, 462, 339 S.E.2d 591, 593 (1986) (in equitable distribution jurisdiction, wages lost *during* the marriage included in distributable pool of assets); Van de Loo v. Van de Loo, 346 N.W.2d 173, 176-77 (Minn. Ct. App. 1984) (equitable distribution); Brown v. Brown, 100 Wash. 2d 729, 738, 675 P.2d 1207, 1212-13 (1984) (community property); LA. CIV. CODE ANN. art. 2344 (West 1985) (community property).

101. Amato v. Amato, 180 N.J. Super. 210, 216-18, 434 A.2d 639, 642-43 (1981).

102. *Id.* As the court explained,

> [t]he fact that no settlement has been achieved presents no insurmountable procedural problem. The husband can join the wife's suit to assert his right of action if it seems worthwhile. If he does not, the wife's suit can present the lost past wages and medical expenses. . . . Special jury interrogatories may be utilized to delineate the separate factors

The *Johnson* court compiled its version of the analytic approach from a wide array of choices. The court declared the approach it adopted to be "consistent with the letter and spirit of our Equitable Distribution Act."[103] The discussion of the issue reveals that the court attempted to balance the conflicting interests at stake, recognizing and giving credence to the partnership ideal without ignoring the rights of the individual spouses. As the supreme court noted, the Equitable Distribution Act attempts to make divorcing spouses share their property equitably.[104] By declaring that the part of a recovery representing property acquired during the marriage is marital property, the court recognized this fundamental principle. At the same time the court acknowledged that certain portions of personal injury awards represent damages personal to one of the spouses.[105] Use of the analytic framework thus enabled the court to recognize all of these aspects of any recovery.

The court identified three potential recipients of the award: the marital estate, the injured spouse, and the uninjured spouse.[106] Marital property should properly include damages to the marital estate itself. Because wages earned during the marriage constitute marital property,[107] compensation for wages lost during the marriage constitutes marital property. In addition, medical expenses and other costs borne by the marital estate are expenses of the estate rather than of a particular spouse.[108] Therefore, compensation for those economic losses should also be considered marital property.

The court further noted that part of a personal injury award often compensates the injured spouse for the pain and suffering that results from the injury and any resulting physical deformity. North Carolina courts, the *Johnson* court stated, have long recognized the "uniquely personal" nature of pain and suffering.[109] Accordingly, the court held that the part of the award compensating for pain and suffering belonged wholly to the injured spouse.[110]

This aspect of the *Johnson* decision indicates the importance accorded to the individual in North Carolina.[111] It is somewhat ironic that this same principle led the court to distinguish painstakingly the right-to-sue statute from the

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> of recovery. . . . Thereafter, if the divorced spouses cannot agree to a reasonable allocation of the distributable items recovered, application to a matrimonial judge will resolve the dispute including a determination of a *pro rata* responsibility for attorneys' fees and suit expense. The same procedures can be employed should the matter be settled.

Id. at 219-20, 434 A.2d at 644.

103. *Johnson*, 317 N.C. at 451, 346 S.E.2d at 438.

104. *Id.* at 450, 346 S.E.2d at 437.

105. *Id.* at 450, 346 S.E.2d at 438.

106. *Id.* at 454, 346 S.E.2d at 439-40.

107. *See* N.C. GEN. STAT. § 50-20 (1984).

108. Of course, if the couple paid these expenses with funds that were traceable to separate property of either spouse, that spouse could claim that portion of the award as separate property. For a discussion of tracing principles, see Sharp, *supra* note 35, at 220-21. For a discussion of the burdens of proof involved in establishing that separate property was involved, and the confusion in which the *Johnson* decision leaves this area, see *infra* notes 138-53 and accompanying text.

109. *Johnson*, 317 N.C. at 450, 346 S.E.2d at 438.

110. *Id.* at 454, 346 S.E.2d at 439-40.

111. *See supra* notes 46-58 and accompanying text.

equitable distribution statute earlier in the opinion.[112] The court, however, was correct in its assessment of both issues.

First, the characterization of personal injury proceeds in section 52-4 has no bearing on the decision of how to divide the award at divorce. Section 52-4 grants *title* of these awards to the injured spouse during marriage for the sole purpose of ensuring that the wife has the right to sue without the joinder of the other spouse.[113] As the supreme court noted in *Johnson*, the initial determination of title in this context as well as others is not binding on the courts' classification of property at divorce.[114]

The justification for characterizing personal injury awards as separate property, then, must lie elsewhere. In its discussion of the issue, the *Johnson* court implicitly accepted the injured spouse's argument that the equitable distribution statute mandates this result. Plaintiff, echoing the view of many states, explained that the physical well-being of an individual is his or her personal property. Money received to compensate for an injury to that well-being should, therefore, be considered "[p]roperty acquired in exchange for separate property,"[115] which, under the statute, is also separate property.[116] The court adopted this view with an important qualification: recovery for economic losses is analyzed distinctly and belongs to the marital estate.[117] This approach is analytically sound; failure to distinguish between the personal and marital losses incurred would lead to a superficial and incomplete breakdown of the personal injury award.

The final potential component of the award belongs to the uninjured spouse. The court found that part of a personal injury award may compensate for loss of consortium. If the uninjured spouse can establish this loss, then he or she is entitled to that portion of the award as separate property.[118]

This part of the court's analysis is somewhat problematic. Each spouse does have a cause of action in his or her own name for loss of consortium. However, this action is no more determinative of the way the award should be distributed than section 52-4, regarding personal injury awards.[119] Simply awarding this part of the recovery to the uninjured spouse could potentially lead to unfair results.

To avoid unfairness, the court should apply its analytical system to divide the award appropriately. Such an analysis reveals that consortium consists of "services, society, companionship, sexual gratification, and affection . . . ."[120]

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112. *See Johnson*, 317 N.C. at 440-45, 346 S.E.2d at 432-34.

113. *See Nicholson*, 300 N.C. at 298, 266 S.E.2d at 823. The statute later was expanded to grant the right to sue to both spouses. *See* N.C. GEN. STAT. § 52-4 (1984).

114. *Johnson*, 317 N.C. at 443-44, 346 S.E.2d at 434.

115. N.C. GEN. STAT. § 50-20(b)(2) (1984).

116. *Johnson*, 317 N.C. at 447, 346 S.E.2d at 436.

117. *See id.* at 447-48, 346 S.E.2d at 436 (defining economic loss to include "loss of earning capacity *during the marriage*" (emphasis added)).

118. *See id.* at 450, 346 S.E.2d at 440.

119. *See supra* text accompanying notes 113-114.

120. *Nicholson*, 300 N.C. at 302, 266 S.E.2d at 822.

Although most of these losses are personal to the uninjured spouse,[121] the loss of services is not and should therefore be distributed to the marital estate. This component may well be absent from the award in many cases; to avoid double recovery for economic loss, the state requires that all suits against a party for the injury be joined.[122] In most cases the damages will include a separate part representing economic losses. The consortium award then will be limited to cover noneconomic loss and will belong solely to the uninjured spouse. Thus, in the majority of cases, the supreme court's treatment of loss of consortium will yield the correct result. However, because the court has adopted an incorrect analysis, when the loss of consortium award includes economic recovery[123] the court's approach will yield results inconsistent with the analytic model.

Justice Martin made a similar argument regarding the court's treatment of disfigurement. North Carolina worker's compensation law has recognized that "[d]isfigurement . . . may affect the earning capacity of a marital partner . . . ."[124] Therefore, Justice Martin contended that the court should have considered as marital property the portion of the award constituting lost earning capacity resulting from the disfigurement.[125]

In the case of disfigurement, however, this further breakdown is unnecessary. Worker's compensation awards, which do not include a component for pain and suffering,[126] would always be labeled marital property to the extent they compensate for lost earnings prior to separation.[127] In these cases the further analysis would be completely unnecessary. In other types of personal injury awards, the category of lost earnings prior to separation will necessarily include any loss of earning capacity that results from disfigurement. This type of case is distinguishable from the consortium situation because damages for loss of consortium have been defined as including loss of services. A jury could easily award damages for lost services as part of its award for loss of consortium. Because the *Johnson* court declared that entire sum the separate property of the uninjured spouse, it is quite possible that economic damages properly considered part of the marital estate will go to the uninjured spouse alone. There is no similar preexisting definition that sweeps economic damages into the category of disfigurement. The *Johnson* court's labels in the areas of loss of earning capacity and disfigurement simply provide guidelines that courts can employ in analyzing personal injury awards. If, for example, a performer was disfigured in an accident and this disfigurement prevented him or her from obtaining employment, a

121. *Cf. Johnson*, 317 N.C. at 447, 346 S.E.2d at 436 (noting the elements of pain and suffering and their uniquely personal character).

122. *See Nicholson*, 300 N.C. at 303-04, 266 S.E.2d at 823.

123. Inclusion of economic recovery in the award probably would occur only in cases in which the consortium action was not joined with a suit for the injury itself. In these instances, the consortium action would necessarily be the only action brought. *See supra* note 55 and accompanying text.

124. *Johnson*, 317 N.C. at 456, 346 S.E.2d at 441 (Martin, J., concurring).

125. *Id.* at 456-57, 346 S.E.2d at 441 (Martin, J., concurring).

126. *See* 1 A. LARSON, LAW OF WORKMEN'S COMPENSATION § 2.40, at 11 (1952) ("There is no place in compensation law for damages on account of pain and suffering, however dreadful they may be.").

127. *See Johnson*, 317 N.C. at 454, 346 S.E.2d at 439-40 (distinguishing between wages lost prior to separation and those lost subsequent to separation).

proper analysis under *Johnson* would mandate the conclusion that compensation for the earnings lost constituted marital property. This would be true even though the reason for the diminished capacity of the injured spouse was his or her disfigurement. A further breakdown of the disfigurement category, then, would be superfluous.

The *Johnson* court *did* choose to subdivide the economic loss portion of the settlement. Although in parts of its discussion the court appears to divide the award generally into its economic and noneconomic components,[128] the case taken as a whole makes clear the court anticipated loss of future earnings will be deemed the separate property of the injured spouse.[129] This result is correct under North Carolina law. The future earnings of the spouse are not considered in determining the size of the marital estate.[130] Instead, future earnings come into play in determining alimony.[131] Therefore, it would be inconsistent with other North Carolina law if future earnings were not distinguished from economic loss in general. Similarly, because medical and other expenses subsequent to separation will be paid by the injured spouse alone, compensation for those future costs should go to the injured spouse. Accordingly, the *Johnson* decision provides that this amount be treated as separate property as well.[132]

Justice Martin attempted to clarify further the court's approach in his concurring opinion. He contended that "it is the cause of action, and not its proceeds, which is the property at issue [in these cases]."[133] If the settlement itself were being evaluated, he argued, then the court would simply declare the property entirely separate because it was received after separation. Instead, the court focused on the cause of action and consequently analyzed its various parts.[134]

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128. *See id.* at 447-48, 346 S.E.2d at 436 (breaking award down into loss of consortium; pain, suffering, disability, disfigurement, and lost limbs; and lost wages, lost earning capacity, and medical expenses; and describing "economic" and "non-economic" losses).

129. *See, e.g., id.* at 454, 346 S.E.2d at 439-40 (describing as injured spouse's separate property compensation for lost earning capacity subsequent to separation, lost wages subsequent to separation, and expenses arising after separation).

130. *See* N.C. GEN. STAT. § 50-20(a), (b) (1984). The future ability or inability of either spouse to earn income may come into play when the marital property is distributed. The court may decide that the inability of the injured spouse to earn income in the future entitles him or her to a larger share of the assets. Conversely, the court may award a greater portion of the marital estate to the uninjured spouse if the injured spouse has been able to establish that a large portion of the personal injury award is his or her separate property. *See id.* § 50-20(c) (listing factors the court may consider in determining whether to distribute the marital property unequally). This issue, however, is distinct from the determination of what is marital property and what is separate property. *See supra* notes 37-40 and accompanying text.

131. *See* N.C. GEN. STAT. § 50-16.5 (1984) ("Alimony shall be in such amount as the circumstances render necessary, having due regard to . . . earning capacity. . . ."). An award of alimony may later be modified if the earning capacity of the supporting spouse diminishes. *See* Rowe v. Rowe, 52 N.C. App. 646, 654, 280 S.E.2d 182, 187 (1981) (changes in factors listed in N.C. GEN. STAT. § 50-16.5 (1984) can warrant an order modifying alimony award), *aff'd in part and rev'd in part on other grounds*, 305 N.C. 177, 287 S.E.2d 840 (1982), *overruled on other grounds by* Walter v. Walter, 307 N.C. 381, 298 S.E.2d 338 (1983); N.C. GEN. STAT. § 50-16.9 (1984) (providing for modification of alimony order).

132. *See Johnson*, 317 N.C. at 454, 346 S.E.2d at 439-40. This approach also has been widely approved by commentators. *See, e.g.*, Akers, *supra* note 82, at 31-33; Blumberg, *supra* note 71, at 1282-84.

133. *Johnson*, 317 N.C. at 456, 346 S.E.2d at 441 (Martin, J., concurring).

134. *Id.* at 455-56, 346 S.E.2d at 440-41 (Martin, J., concurring).

Justice Martin's argument is both ambiguous and incorrect.[135] What the court actually held was that neither the cause of action nor the settlement is the property at issue in these personal injury disputes. The settlement is viewed as property received in exchange for other property, and the focus is on the original property replaced. Each component of the personal injury award is characterized as either marital or separate property depending on the nature of the property it replaces. Thus, in a case in which both the cause of action and the settlement took place before the marriage, a portion of the award may still be considered marital property.[136] Justice Martin's argument, on the other hand, would yield a contrary result.

In addition, Justice Martin asserted that "the mandate of the statute create[d] a presumption that a settlement award representing the value of a cause of action which arose during the marriage of the parties and before separation is marital property."[137] He based this conclusion on the statement in the statute that all property acquired during the marriage and not defined as separate property is marital property. Apparently, Justice Martin interprets this to mean that if a cause of action is acquired during the marriage, it is property acquired during the marriage. This interpretation is sufficient to create a presumption of marital property, which must be rebutted before the property can be labeled separate.

This contention is consistent with the general view, expressed in several court of appeals decisions, that the statute creates a presumption that all property acquired during the marriage is marital property.[138] However, it was unequivocally rejected by the *Johnson* court: "The North Carolina General Assembly . . . did not choose to provide such a presumption by statute, and this Court will not infer one by judicial decision."[139] The court further found that the presumption was unnecessary under North Carolina's statutory scheme. Because the statute specifically defines certain items as separate property and declares that everything else is marital property, courts should be able to evaluate the proof presented and characterize the property accordingly. This process, the court contended, does not necessitate the use of presumptions.[140]

As the *Johnson* court pointed out, the general assembly did not include a provision mandating a presumption of marital property.[141] Consequently, it was initially unclear whether such a presumption existed. Nonetheless, a majority of North Carolina courts reaching the issue have held that, pursuant to the Equitable Distribution Act, all property is presumed marital.[142] The signifi-

135. Justice Martin's ambiguity, perhaps, reflects the ambiguity of the majority opinion itself. Although an examination of the opinion reveals that the North Carolina Supreme Court expects courts to distinguish between economic losses accruing before and after the marriage, the *Johnson* decision never actually discusses the theoretical basis for this result.

136. *See supra* text accompanying note 98.

137. *Johnson*, 317 N.C. at 455, 346 S.E.2d at 440 (Martin, J., concurring).

138. *See supra* notes 43-45 and accompanying text.

139. *Johnson*, 317 N.C. at 454 n.4, 346 S.E.2d at 440 n.4.

140. *Id.*

141. *See* N.C. GEN. STAT. § 50-20 (1984).

142. *See* Loeb v. Loeb, 72 N.C. App. 205, 209, 324 S.E.2d 33, 38, *cert. denied*, 313 N.C. 508, 329

cance of this presumption is two fold: It places the burden of proof on spouses claiming separate property, and it symbolizes the importance of the partnership ideal in North Carolina.[143] The supreme court's pronouncement, then, will have both practical and theoretical repercussions.

The practical effect of the court's decision should not be too great.[144] With or without the existence of a presumption, if property is acquired during the course of the marriage and does not fall into one of the excepted categories, it will be considered marital property. Before property is declared the separate property of the spouse, the spouse must assert that the property qualifies as separate property under the statute. The party making an assertion generally has the burden of producing evidence to establish the claim;[145] therefore, the spouse who made this argument will bear the burden of producing evidence sufficient to warrant consideration of the claim.

By refusing to impose a presumption of marital property, the *Johnson* court removed the burden of persuasion from parties claiming separate property.[146] Prior to the decision claimants had to present a preponderance of the evidence to prevent having the issue decided against them.[147] The *Johnson* decision has changed this burden; now, if claimants can produce evidence on the issue of separate property, they have satisfied their responsibility. Thereafter, the factfinder can evaluate the issue and determine whether property is marital or separate based solely on a weighing and balancing of the evidence.

Because the claimant still bears the burden of producing evidence, the *Johnson* court's determination will not have a tremendous practical effect. Generally, once a claimant has asserted the property is separate and has presented evidence to support the assertion, the presumption will be overcome. In some cases, however, testimony that has not been well-substantiated has been deemed insufficient to rebut the presumption.[148] In these cases, the removal of the presumption will have an effect. The decision will also make it easier for claimants to obtain a favorable ruling in cases in which the allegedly separate property has been commingled with marital property. Prior to *Johnson*, claimants had the burden of tracing the separate property to its current form.[149] The removal of the presumption also removes the burden of establishing that particular property was

S.E.2d 393 (1985); McLeod v. McLeod, 74 N.C. App. 144, 157, 327 S.E.2d 910, 918, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985). *But see* Wade v. Wade, 72 N.C. App. 372, 381, 325 S.E.2d 260, 269 (instead of finding that the general assembly intended to create such a presumption, the court found that the general assembly intended that separate property brought into the marriage remains separate property at divorce), *disc. rev. denied*, 313 N.C 612, 330 S.E.2d 616 (1985).

143. Sharp, *supra* note 35, at 203.

144. *See* Sharp, *supra* note 35, at 203 ("there have been relatively few cases in which the effect of this presumption has been critical.").

145. *See* McCORMICK ON EVIDENCE § 336 (E. Cleary 3d ed. 1984).

146. *See id.*

147. *See* McManus v. McManus, 76 N.C. App. 588, 591-92, 334 S.E.2d 270, 273 (1985).

148. *Id.* at 592, 334 S.E.2d at 273 (although testimony supported the claim of separate property, trial court determination that evidence was not strong enough to overcome the presumption would not be overturned as a matter of law).

149. *See, e.g.*, Loeb v. Loeb, 72 N.C. App. 205, 212, 324 S.E.2d 33, 39 (1985) (wife's separate property would have remained separate property "if she had been able to trace the proceeds"); *see also* Brown v. Brown, 72 N.C. App. 332, 335-36, 324 S.E.2d 287, 289 (1985) (court found that funds

acquired with separate funds or assets from the claimant. Consequently, a claimant's task will be less complicated.[150]

The *Johnson* court's refusal to infer the presumption from the statute may also signify a move away from the state's adherence to the partnership ideal. The court's discussion of the reason for adopting the analytic approach in characterizing personal injury awards suggests that such a move is not the case: " 'The obvious purpose of the Equitable Distribution Act is to require married persons to share their maritally acquired property with each other . . . .' "[151] Instead of making a symbolic departure from the defense of sharing principles, the court simply refused to take what it viewed as unwarranted liberty and infer a presumption it deemed unjustified by the statute.[152] This conclusion, however, is not necessarily correct; other states with similar statutes have found that such a presumption was intended by their legislatures.[153] Although the effect of removing the presumption will not be too significant, it would have been more consistent with the frequently expressed goals of the Act to find there was a presumption of marital property.

As Justice Martin correctly noted, the court apparently chose to retain the presumption of marital property in the case of personal injury awards. The *Johnson* court has required the party claiming that part of the award is separate property to carry the burden of proving so by a preponderance of the evidence.[154] The court did not elaborate further; it neither explained its reasons for establishing the burden of proof nor set forth the relevant standards for proving part of the award is separate property. Presumably, the injured spouse will be in the best position to present evidence regarding medical expenses and lost earnings. Once those are separated from the award, it should be relatively easy to determine what part of the recovery compensates for pain and suffering and other "separate" aspects of the award.

Despite its minor flaws and ambiguities, *Johnson* is a good decision. It recognizes that the essence of a personal injury award is not merely the lump sum awarded; instead, the award is comprised of many components. A correct allocation of the award at divorce necessarily entails an analysis of those various components. Although the court's decision not to find a presumption of marital property in the statute is of questionable merit, its implicit decision to retain the presumption in the context of personal injury proceeds properly acknowledges

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deposited in joint savings account were separate property because claimant established, by "uncontradicted evidence," that the money was traceable to his separate property).

150. For a discussion of tracing methods, see Sharp, *supra* note 35, at 220-21.

151. *Johnson*, 317 N.C. at 450, 346 S.E.2d at 437 (quoting *Johnson*, 75 N.C. App. at 661, 331 S.E.2d at 212).

152. Nevertheless, the court's abandonment of the presumption may be criticized. One commentator has argued that the "preoccupation with equal rights concerns may dangerously skew our vision of marital property questions . . . ." *See* Prager, *supra* note 46, at 5. This emphasis, Prager warned, may shift the focus from the sharing principles so important in the marital relationship to individualistic principles inappropriate in this context. *Id.* at 2-6. Although the *Johnson* court appeared to keep the sharing principles in mind, this criticism—and the danger that North Carolina courts may begin to emphasize concepts of equality more than concepts of sharing—is worth noting.

153. *See* Sharp, *supra* note 35, at 202-03.

154. *Johnson*, 317 N.C. at 454, 346 S.E.2d at 439-40.

that the spouse claiming part of the award as separate usually will be in the best position to substantiate the claim. In general, then, *Johnson* is consistent with the two fundamental principles guiding North Carolina divorce law: the rights of the parties to a marriage and the partnership ideal.

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