

## REVIEW OF RECENT CASES

# LEUNG V. VERDUGO HILLS HOSPITAL

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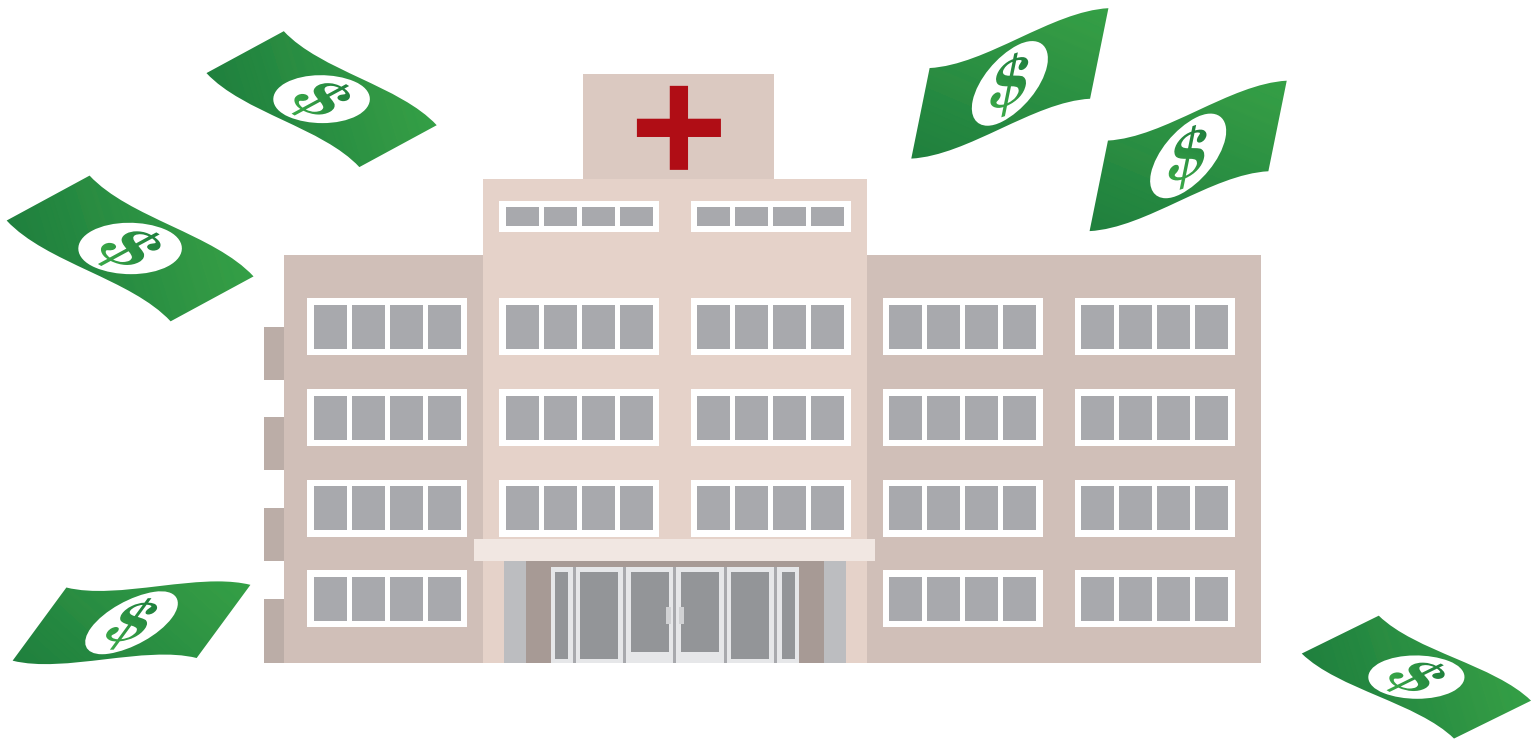
It took an infant's tragedy to change an old and unfair law. Within six days of his birth, Aidan Ming-Ho Leung suffered severe and irreversible brain damage, which could have been avoided. The damage was caused by a condition called kernicterus that occurs in some newborns with severe jaundice.

Although Aidan had several of the risk factors for kernicterus when he was born, including bruises on the side of his head, the condition went undiagnosed. His pediatrician told his parents that he was healthy and that it was safe to take him home twenty-four hours after his birth. Three days after his birth, Aidan showed additional signs of being at risk for kernicterus, including becoming increasingly jaundiced. But when his mother called the pediatrician's office, the nurse said that Aidan did not need to see a doctor until his routine checkup four days later. Six days after his birth, Aidan was so sleepy that he would not wake up to be fed. Aidan's mother again called the pediatrician's office. However this time, the on-call physician said that Aidan should immediately be taken to an emergency room. Aidan received a blood transfusion to reduce his level of bilirubin, but it was too late. Aidan had already suffered brain damage.

Aidan, through his mother, sued the pediatrician and hospital for negligence. Before trial, Aidan settled with the pediatrician. Under the agreement, the pediatrician paid Aidan \$1 million, the limit of his malpractice insurance policy. In exchange, on Aidan's behalf, Aidan's mother released the pediatrician from liability. Despite the agreement, the trial court found that the settlement was not

made in good faith, because the amount the pediatrician paid was grossly disproportionate to his potential share of liability and the total expected recovery. At trial, the jury awarded Aidan more than \$15 million in damages for medical costs and loss of future earnings. The jury found the pediatrician 55 percent at fault, the hospital 40 percent at fault, and Aidan's parents 5 percent at fault. The trial court judgment indicated that the hospital was liable to Aidan for more than \$13 million, which was 95 percent of the total damage award minus the pediatrician's settlement.

The Second District Court of Appeal reversed the trial court's judgment. It held that under the common law release rule, Aidan's settlement and release of the pediatrician also released the nonsettling hospital from liability. Under the rule, if multiple defendants are jointly and severally liable for a single injury, a plaintiff's settlement with and release of liability of one defendant generally releases all defendants. The philosophy behind the rule is that a plaintiff can receive only one (as opposed to double) compensation for an injury. Because each defendant is liable for all damages, any defendant's payment in any amount satisfies the plaintiff's entire claim. Despite the harsh result in Aidan's case, the court explained that its holding was compelled by stare decisis. The court further explained that although the California Supreme Court has criticized the common law release rule, it had not abandoned it. However, the court of appeal urged the California Supreme Court to grant review and conclusively to abandon the release rule.



The California Supreme Court granted review, reversed the court of appeal's judgment, and repudiated the common law release rule in *Leung v. Verdugo Hills Hospital*. ((Aug. 23, 2012) 55 Cal.4th 291, 297, 302, 310.)

## THE RELEASE RULE WILL NO LONGER BE FOLLOWED

In *Leung*, Justice Joyce Kennard, writing for a unanimous California Supreme Court, acknowledged that the common law release rule “can lead to harsh results.” *Id.* at 300. The court found that the rule could result in precluding an innocent plaintiff from recovering most of his damages. For example, a plaintiff might settle with a defendant for a sum far less than the plaintiff's damages because of the defendant's inadequate financial resources, but the plaintiff would be precluded by the rule from recovering damages from the other defendant.

The court further explained that the statutory limitation to the common law release rule, while still the law, is insufficient. Under subdivision (a) of section 877 of the California Code of Civil Procedure, when a plaintiff and a defendant settle in good faith, generally only the settling defendant (as opposed to all defendants) is released

from liability. However, the court found that “because the statute governs only good faith settlements, and the trial court here made a determination that the settlement was not made in good faith, the statute does not apply in this case.” *Id.* at 301.

The court concluded that the release rule would no longer be followed. The court found that under the rule, Aidan, “injured for life through no fault of his own, would be compensated for only a tiny fraction of his total economic damages, a harsh result.” *Id.* at 302. The court consequently repudiated the rule: “In light of the unjust and inequitable results the common law release rule can bring about, as shown in this case, we hold that the rule is no longer to be followed in California.” *Id.*

## A NONSETTLING DEFENDANT MAY BE LIABLE FOR ALL REMAINING DAMAGES

In *Leung*, the California Supreme Court also held that after one defendant settles, the nonsettling defendant may be held liable for all remaining damages. The court held that this is true even if the settlement is found not to have been made in good faith. More specifically, the court held that a plaintiff can generally recover from a nonsettling de-

fendant all damages offset by only the settlement amount. If the settlement was found to be in good faith, the non-settling defendant would not be able to seek contribution for the remaining damages from the settling defendant under subdivision (b) of section 877 of the California Code of Civil Procedure. However, if the settlement was not in good faith, the nonsettling defendant could seek contribution to the extent that he or she paid more than his or her proportionate share of fault.

The court explained that this setoff-with-contribution approach to apportionment of liability in cases with settlements not made in good faith furthered “the public policy of encouraging good faith pretrial settlements.” *Id.* at 306. The court made clear that this “approach does not change the respective liabilities” of defendants and “provides no

and the second part to the nonsettling [defendant] as contribution. *Id.* at 305 (italics in original).

## SIGNIFICANCE

*Leung* encourages defendants to settle their negligence cases and to do so in good faith. *Id.* at 306. In a multiple defendant case, it is still true that if one defendant settles in good faith, the other defendant should consider doing so as well to avoid liability for all remaining damages. This has always been the case under subdivisions (a) and (b) of section 877 of the California Code of Civil Procedure. However, now, if a defendant settles, he or she should only do so in good faith to avoid liability to the nonsettling codefendant for contribution for the remaining damages. Under *Leung*, a settlement that is not found to be in good

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incentive for them to enter into a settlement that is not in good faith.” *Id.* The court found that this approach generally allows a plaintiff to recover his or her damages fully and defendants to allocate payment in proportion to fault:

The net result under the setoff-*with*-contribution approach, is that the plaintiff recovers the total economic damages amount (less an amount attributable to the plaintiff’s own negligence), with the settlement amount providing part of that recovery and the judgment against the nonsettling [defendant] providing the rest. An action for contribution remains available to ensure that the amounts ultimately paid by each [defendant] are, so far as possible, consistent with that party’s proportionate share of fault for the plaintiff’s damages. For the parties, the only practical difference that the settlement makes is that the settling [defendant’s] proportionate share of liability is paid in two parts rather than one, with the first part being paid to the plaintiff in the form of the settlement amount,

faith does nothing to protect the settling defendant from liability to the codefendant. *Id.* at 303–308.

*Leung* also encourages litigants to challenge old laws that are against current public policy. *Id.* at 300–302. Of course, there is still the old axiom that bad facts make bad law. But the converse is true, too. Good facts, or at least sympathetic facts, may make good law. In *Leung*, the California Supreme Court has shown a willingness to repudiate long-standing laws that lead to unjust results. *Id.*

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