Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Leung v. Verdugo Hills Hospital

(2012) __ Cal.4th __ (Cal. Supreme)

Who needs to know about this case: All lawyers who litigate cases

Why it's important: Abrogates the common-law rule that a plaintiff's settlement with one tortfeasor operates a release of all tortfeasors; clarifies the rules concerning apportionment of liability among joint tortfeasors where one tortfeasor's settlement is found not to qualify as a "good faith settlement." Adopts the setoff-with-contribution approach in that situation.

Synopsis: At common law, a plaintiff's settlement with, and release from liability of, one joint tortfeasor, operated as a release of all other joint tortfeasors. In 1957, the Legislature partially abrogated this rule when it enacted section 877 of the Code of Civil Procedure, which provides that a "good faith" settlement and release of one tortfeasor does not release the other joint tortfeasors – it merely reduces the amount of the damages that the plaintiff may recover from the non-settling joint tortfeasors, by the amount of the settlement. Under section 877, a good-faith settlement also discharges the settling party from all liability for contribution to other parties.

Here, plaintiffs' newborn baby developed jaundice, which went untreated and caused catastrophic brain damage. They sued their pediatrician and the hospital where he was born. They settled with the pediatrician for his $1 million policy limit. The trial court found that this settlement was not a "good faith" settlement under the Code of Civil Procedure section 877 because it was grossly disproportionate to the pediatrician's share of the potential liability. But the plaintiff and the pediatrician went ahead with the settlement, and the plaintiff went to trial against the hospital. The jury awarded damages for future medical expenses and earning losses of more than $27 million in present value, and apportioned 55 percent of the fault to the pediatrician, 40 percent to the hospital, and five percent to the parents.

On appeal, the Court of Appeal found that because the settlement with the pediatrician had been found not to constitute a "good faith" settlement, section 877 did not apply. It reluctantly applied the common-law release rule, and held that the settlement with the pediatrician operated to release the hospital from all potential liability. It urged the Supreme Court to review the case.

The Supreme Court agreed to hear the case, and abrogated the common-law release rule. The rule assumes that a plaintiff's settlement with one defendant provides full compensation for the plaintiff's harm, and therefore anything recovered from any other defendants necessarily constitutes a double recovery or excess recovery. That assumption, however, is often incorrect. "For a variety of reasons – such as the settling defendant's limited resources or relatively minor role in causing the plaintiff's injury – a plaintiff may be willing to release one tortfeasor for an amount far less than the total necessary to fully compensate the plaintiff for all injuries incurred."

The Court held that, "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."

The Court next determined the effect of the rule's abrogation on the apportionment of liability on joint tortfeasors when, as in this case, one tortfeasor's settlement resulting in a release of liability was found by the trial court not to have been made in "good faith." Generally, there are three methods to apportion liability between a plaintiff, a settling tortfeasor, and a non-settling tortfeasor: (1) funds paid by the settling tortfeasor are credited against any damages assessed against the non-settling tortfeasors, who are allowed to seek contribution from the settling tortfeasor for damages they have paid in excess for their equitable share of liability ("setoff-with-contribution"); (2) non-settling tortfeasors are given a settlement credit, but may not obtain contribution from the non-settling tortfeasor ("setoff-without-contribution"); and (3) the damages assessed against the non-settling tortfeasors are reduced by the settling tortfeasor's proportionate share of liability, rather than the amount paid in settlement ("proportionate-share approach").

Option 2 – setoff-without-contribution – is not an option when the settlement is not made in good faith, because the Legislature has adopted this approach for settlements made in good faith. (Code Civ. Proc., §§ 877, 877.6.) Applying the setoff-without-contribution approach to settlements not made in good faith would nullify these provisions.

The hospital urged the Court to apply the proportionate-share approach, while the plaintiff urged the setoff-with-

contribution approach. The Court adopted the latter system. It held that the proportionate-share approach was not consistent with California's law of joint and several liability. If the settlement turns out to be less than the settling tortfeasor's proportionate share, the plaintiff may not recover the difference from any of the other tortfeasors, and is precluded from obtaining full compensation. The settling tortfeasor's liability is not its actual proportionate share, but only the amount paid in settlement. By contrast, the setoff-with-contribution approach does not change the respective positions of the parties. The plaintiff can recover full compensation and the defendants each pay their relative share of the loss based on their degree of fault (this occurs in two steps; with the settlement with the plaintiff and then in the contribution action when the settling defendant pays the non-settling defendants based on the allocation of fault.)

The Court also determined that the public policy of encouraging good-faith settlements is encouraged by the setoff-with-contribution approach, but not the proportionate-share approach. The former does not change the relative liability of the parties, and therefore contains no incentive to enter into a settlement that is not made in good faith. By contrast, the proportionate-share approach would encourage settlements not made in good faith, by limiting the liability of the settling tortfeasor (to the settlement amount) and the liability of non-settling tortfeasors (who would not be liable for the settling tortfeasor's proportionate share.)

The Court noted that the U.S Supreme Court in *McDermott, Inc. v. AmClyde* (1994) 511 U.S. 202, 211, adopted the proportionate-share approach in federal courts, and that the Restatement Third of Torts, section 16, later adopted this view. The Court noted that in *McDermott*, unlike the case before it, there had been no pretrial determination that the settlement had not been made in good faith. Because there was no federal analogue to the Code of Civil Procedure section 877, the U.S. Supreme Court was not faced with the same constraints in choosing which method to adopt. The absence of this option, in the California Supreme Court's view, "fundamentally changes the analysis." Of the two options available to the California Supreme Court, it chose the setoff-with-contribution rule.

In dealing with the plaintiff's cross-appeal, the Supreme Court also rejected the hospital's argument that because a hospital does not practice medicine, as a matter of public policy its conduct should not be considered a legal cause of plaintiff's injuries. It asserted it should not be required to provide medical advice "beyond directing the patient to call the doctor with concerns." The Court disagreed, noting that, "Although hospitals do not practice medicine in the same sense as physicians, they do provide facilities and services in connection with the practice of medicine, and if they are negligent in doing so they can be held liable." Since the plaintiff's evidence was sufficient to find that the hospital had been negligent, the Court rejected the hospital's causation argument.

Short(er) takes

Injuries to animals and pets, emotional-distress damages *Plotnik v. Meihaus* (2012) __ Cal.App.4th __ (Fourth Dist. Div. 3.)

The Plotniks sued their neighbors, Greg and John Meihaus, III, alleging damages from breach of a prior settlement agreement and tort claims. In part, they sought damages for emotional distress that they suffered when Meihaus struck their miniature pincer, Romeo, with a baseball bat, allegedly in self defense. At trial the jury ruled in favor of the Plotniks. The verdict was reduced in some aspects by the trial court, and was further reduced on appeal, but was affirmed.

The claim for the attack on Romeo went to the jury framed as a claim for trespass to personal property and negligence. On the *trespass* count, the jury awarded the economic damages for the cost of veterinary care, as well as emotional distress to the Plotniks. On the negligence count, the jury awarded additional emotional-distress damages to the Plotniks. The Court of Appeal affirmed the award of economic damages as well as emotional-distress damages. A claim for trespass to chattels is based on a defendant's intentional interference with the plaintiff's personal property. Dogs are considered personal property, and good cause exists to allow for recovery of emotional distress damages resulting from intentional conduct causing the injury or death of a pet. The court reversed the claim for negligence damages, however, finding that a defendant cannot be held liable for causing emotional distress to a pet owner arising out of the defendant's negligent injury to a pet. For this reason the award to damages to the plaintiffs based on negligent infliction of emotional distress arising out of the attack on Romeo was also reversed. The jury's award for intentional infliction of emotional distress based on the attack on Romeo was not improper, but was reversed because it was duplicative of the damages awarded for the trespass to chattels claim.

Editor's Note: We're proud to tell you that this case was argued by appellate specialist Donna Bader, the first editor of this magazine.


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