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LITIGATION

Why Every Plaintiffs' Lawyer Should Fear the Common Law Release Rule

By Daniel W. Ballesteros

A vestigial remnant of the days of contributory fault, the common law release rule presents a potentially catastrophic trap for the unwary. Before the enactment of Code of Civil Procedure Section 877 in 1957, California courts followed the common law rule that a release by one joint tortfeasor constituted a release of *all* joint tortfeasors. The purpose of the release rule was to avoid the potential for double recovery. The courts reasoned that each joint tortfeasor was responsible for the whole harm, and compensation for that harm should only be given once (i.e., no double recovery). Thus, the receipt of any sum by the plaintiff accepted in satisfaction of the claim against one joint tortfeasor is, logically, satisfaction as to that same claim against all joint tortfeasors.

All of that appeared to have changed with the passage of Section 877. Indeed, no less an authority than Witkin agreed, announcing the “statutory abrogation of (the common law release) rule.” 5 Witkin, Summary of California Law (10th ed. 2005) Torts, Section 70.

Such is the statutory scheme under which all of us who have been practicing fewer than 54 years have been operating. So, what's the catch? On a more careful review, the first sentence of Section 877 states, “where a release... is given in good faith...[i]t shall not discharge any other such party from liability unless its terms so provide...” Unfortunately, Section 877 does not expressly address its impact, if any, on the release rule as it relates to a settlement, which the court fails or refuses to find is entered into in good faith.

The 4th District Court of Appeal in the recent case of *Leung v. Verdugo Hills Hospital* (2011) 193 Cal.App.4th 971, points out this statutory omission and, by inflicting the harshest of results, requests review of the common law release rule by the state Supreme Court — which has been granted.

Infant plaintiff, Aiden Leung, suffered significant and irreversible brain damage caused by a condition that occurs when an infant's bilirubin level (a waste product of red blood cells) becomes toxic. Through his mother, act-

ing as guardian *ad litem*, the plaintiff sued the doctor and hospital for negligence. Plaintiff's damages were extreme. Between future medical care and lost future earnings, the economic damages totaled in excess of \$96 million (with a present value of \$15.154 million). The doctor had insurance, but with policy limits of only \$1 million.

Plaintiff reached a settlement with the doctor for the policy limits and an agreement to participate at trial, in exchange for a release of all claims against the doctor. The plaintiff moved for a determination that the settlement was in good faith pursuant to Section 877. The court denied the motion, but the parties consummated their settlement anyway.

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The case proceeded to trial against the hospital and the jury awarded the above figures, plus more than \$78,000 for the cost of past medical care and the \$250,000 maximum allowable in general damages. Apportioning fault, the jury found the hospital 40 percent at fault, the doctor 55 percent at fault, and the parents each 2.5 percent at fault.

Although typically the hospital would be jointly liable for the entirety of the non-economic damage award (approximately \$96 million), the hospital argued that because there had been a release without a statutory good faith determination, the common law release rule applied. Therefore, the hospital argued, the cause of action against it had been fully released.

The trial court disagreed, but the 4th District ruled in the hospital's favor. Despite the jury's finding of 40 percent fault and a jury award of over \$96 million, the appellate court determined that the common law release rule applied and that the entire cause of action, even as against the hospital, had been released by the

doctor's payment of \$1 million. The plaintiff just lost the millions necessary to provide for his future care.

The appellate court strongly criticized the rule and its consequences, noting: “The rule lacks a creditable heritage. It can create unintended and inequitable results, resulting in the plaintiff receiving an inadequate settlement from a defendant of modest means and unintentionally releasing another culpable tortfeasor with no opportunity to receive additional compensation from that tortfeasor. The rationale of the release rule — preventing a plaintiff's double recovery — has largely been eviscerated by California's modification of the joint and several liability rule to require allocation of non-economic damages based on each tortfeasor's percentage of fault...and by the adoption of the right of partial indemnity on a comparative fault basis among multiple tortfeasors....”

How could this result have been avoided? A strategic tool from Grandpa's tool chest might have been employed. In order to offset the harsh and frequently unintended results of the release rule, pre-1957 common law developed the concomitant rule that a “covenant not to sue” does *not* release non-settling tortfeasors. The pre-1957 case law is clear that recasting the “release” as a “covenant not to sue” is sufficient to preserve claims against non-settling joint tortfeasors. While many practicing lawyers have seen and perhaps even included a covenant not to sue in their settlement agreements, since the passage of Section 877, such provisions have become increasingly rare. At least until the state Supreme Court has reviewed *Leung*, recasting partial settlement agreements as covenants not to sue may be prudent.



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