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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

AIDAN MING-HO LEUNG, a Minor, etc., Plaintiff and Appellant, v. VERDUGO HILLS HOSPITAL, Defendant and Appellant.	B204908 (Los Angeles County Super. Ct. No. BC343985)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura A. Matz, Judge. Reversed in part and Affirmed in part.

The Phan Law Group and Luan K. Phan; Esner, Chang & Ellis, Andrew N. Chang and Stuart B. Esner for Plaintiff and Appellant.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts Background, pp. 5-27, and Discussion II-III, pp. 45-64.

Thomas and Thomas, Michael Thomas and Maureen F. Thomas; Greines, Martin, Stein & Richland, Feris M. Greenberger, Jennifer C. Yang and Robert A. Olson for Defendant and Appellant.

Six days after birth, plaintiff Aidan Ming-Ho Leung suffered irreversible brain damage caused by "kernicterus," a condition that results when an infant's level of "bilirubin" (a waste product of red blood cells which causes jaundice) becomes toxic. Through his guardian ad litem (his mother, Nancy Leung), Aidan sued his pediatrician, Dr. Steven Wayne Nishibayashi, and his professional corporation, Dr. Steven Wayne Nishibayashi, M.D., Inc., alleging that Dr. Nishibayashi was negligent in his care and treatment. Aidan also sued the hospital at which he was born, Verdugo Hills Hospital (the Hospital), alleging that the Hospital was negligent for, inter alia, failing to provide his parents with adequate education on neonatal jaundice and kernicterus, and failing to implement policies to reduce the risk of kernicterus in newborns.

Aidan reached a settlement with Dr. Nishibayashi and his corporation, under which Dr. Nishibayashi agreed to pay the limits of his malpractice insurance, $1 million, and to participate at a trial in which the jury would allocate the negligence, if any, of the Hospital and Dr. Nishibayashi and set the amount of damages. In exchange, Aidan would give Dr. Nishibayashi and his corporation a release of liability. The trial court ruled that the settlement did not meet the standard of good faith under Code of Civil Procedure sections 877 and 877.6, because it was grossly disproportionate to Dr. Nishibayashi's potential share of liability and to the total expected recovery. Nonetheless, Aidan and Dr. Nishibayashi chose to proceed with the settlement.

The case was tried to a jury, which found both the Hospital and Dr. Nishibayashi negligent, and awarded damages of $78,375.55 for past medical costs, $250,000 for noneconomic damages, $82,782,000 for future medical care (with a present value of $14 million) and $13.3 million for loss of future earnings (with a present value of $1,154,000). Apportioning fault, the jury found the Hospital 40 percent negligent, Dr. Nishibayashi 55 percent negligent, and plaintiff's parents, Nancy and Kevin Leung, each 2.5 percent negligent.

Ultimately, the court approved a minor's compromise regarding Aidan's settlement with Dr. Nishibayashi, and incorporated the verdict into a periodic payments judgment under Code of Civil Procedure section 667.7, which declared the Hospital jointly and severally liable for 95 percent of all economic damages found by the jury and severally liable for its 40 percent share of noneconomic damages.[1] The Hospital appeals from the judgment.

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[1] The court judgment awarded damages from the Hospital as follows: (1) $1,274,793.52, due immediately, representing noneconomic damages, past medical expenses, and a portion of future lost earnings and future medical expenses; (2) $330,055.63, due December 1, 2007, representing future medical expenses and other items from the date of judgment through October 31, 2008; and (3) monthly periodic payments beginning November 1, 2008, pursuant to an attached schedule, this portion of the judgment to cease upon plaintiff's death or October 1, 2065, whichever occurs first. The court also awarded $1,085,338.86 in prejudgment interest under Civil Code section 3291, and $221,034.93 in costs.

As part of the judgment, the court ordered the Hospital to provide security for the periodic payments within 30 days in the form of a bond from an admitted California surety, or an annuity from an approved list of companies sufficient to fund the periodic payments. The court also ordered that if the Hospital failed to post such security, then plaintiff would recover from the Hospital the sum of $14,893,277.56, representing the present value of the judgment. In *Leung v. Verdugo Hills Hospital* (2008) 168 Cal.App.4th 205, we denied the Hospital's petition for writ of supersedeas seeking to compel the trial court to reduce the amount of the appeal bond.

In the published portion of our opinion, we address the Hospital's contention that common law, rather than Code of Civil Procedure sections 877 and 877.6, governs the effect of Aidan's settlement with and release of Dr. Nishibayashi. Under the common law release rule, a release for consideration of one joint tortfeasor operates as a release of the joint and several liability of the other joint tortfeasors. (See e.g., *Bee v. Cooper* (1932) 217 Cal. 96, 99-100 (*Bee*); *Tompkins v. Clay Street R.R. Co.* (1884) 66 Cal. 163, 166-168 (*Tompkins*).) According to the Hospital, Aidan's release of Dr. Nishibayashi in consideration of his $1 million settlement payment released the Hospital from its joint and several liability for Aidan's economic damages, though not for its proportionate share of Aidan's noneconomic damages (such liability being "several only and . . . not . . . joint" (Civ. Code, § 1431.2, subd. (a)).

As we explain, although the California Supreme Court has criticized the common law release rule as applied to concurrent tortfeasors, the court has not abandoned it. Stare decisis compels us to follow the rule. We therefore reverse that portion of the judgment imposing joint and several liability on the Hospital for Aidan's economic damages. However, we urge the California Supreme Court to grant review, conclusively abandon the release rule, and fashion a new common law rule concerning the effect of a non-good faith settlement on a non-settling tortfeasor's liability.

Because this holding does not affect the Hospital's several liability for Aidan's noneconomic damages, we address, in the unpublished portion of our opinion, two other contentions attacking the judgment. In response to those contentions, we conclude that substantial evidence supports the jury's finding that the Hospital's negligence was a substantial factor in causing Aidan's brain damage, and that comments by the trial court neither improperly instructed the jury

on causation nor influenced two jurors to change their votes on that issue. We therefore affirm that portion of the judgment that requires the Hospital to pay its proportionate share of Aidan's noneconomic damages.[2]

BACKGROUND

I. *Plaintiff's Evidence*

A. *Jaundice, Bilirubin, Hyperbilirubinemia, and Kernicterus*

In infants, jaundice manifests as a yellowish tint first to the skin and later to the whites of the eyes. It is caused by the buildup of bilirubin in the blood, a yellow waste product produced by the breakdown of red blood cells. All infants have rising levels of bilirubin for the first three to five days. The peak is close to the fifth day, unless there are conditions exacerbating the jaundice. Absent such conditions, the level then reduces within a week or so as the infant's liver develops and bilirubin is expelled, primarily in the stool (a yellowish stool indicates expulsion of bilirubin). Ensuring adequate milk intake so as to create sufficient stool to expel bilirubin is the primary way of preventing the infant's bilirubin level from continuing to rise.

If not expelled, bilirubin can reach dangerous levels, called "hyperbilirubinemia," and migrate to the brain where it can cause kernicterus,

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[2] Because we reverse the judgment as to the Hospital's joint and several liability for Aidan's economic damages, we do not address the Hospital's issues related to that portion of the damage award. Those contentions are that the court erred in excluding evidence of future insurance coverage, in awarding and calculating prejudgment interest on future periodic payments, and in requiring the Hospital to provide security for the periodic payments judgment.

Aidan filed a cross-appeal contending that the trial court erred in permitting the Hospital to purchase an annuity payable to the Hospital as security for its future damage payments. Because we reverse the judgment against the Hospital for Aidan's economic damages, Aidan's cross-appeal is moot.

leading to severe brain damage. However, hyperbilirubinemia can easily be treated by phototherapy (using lights called "bililights" to expose the infant to the blue light spectrum) or, in extreme cases, an "exchange transfusion" (a blood transfusion that totally replaces the infant's blood). The first signs that hyperbilirubinemia has led to kernicterus -- that is, the first signs that the level of bilirubin is toxic -- include lethargy and a refusal to feed.

Some infants have a higher risk of kernicterus than others. The clinical risk factors are well-known, and include that the infant is: (1) male, (2) of East Asian descent, (3) born at less than 38 weeks gestation, (4) exclusively breast fed and displays (5) bruising, (6) jaundice within the first 24 hours, and (7) weight loss. According to Dr. Vinod Bhutani, a neonatologist specializing in kernicterus who testified as an expert witness for Aidan, the occurrence of kernicterus is rare. However, there has been a resurgence of the condition, because infants are commonly discharged earlier than 72 hours after birth, and there is insufficient follow-up to assess the level of bilirubin and to give adequate support for breast feeding to ensure the infant is getting enough milk.

B. *Events Leading to Aidan's Brain Damage*

1. *Aidan's Birth and Hospital Stay*

Aidan was born at the Hospital on a Monday (March 24, 2003), at 12:02 p.m. His due date, as calculated based on an ultra sound of the fetus conducted by his mother's obstetrician early in pregnancy, was April 12. He was born early, at 37 weeks, 2 days gestation.

Aidan's mother, Nancy Leung, decided to breast feed exclusively. The day of the birth, she tried to feed Aidan every two hours, five or six times, but he showed little interest, and she could not tell if he was actually feeding. He seemed

to latch on and then come off. Nancy testified that she told two of the attending nurses, Susan McBroom and Margaret McClammy, that she was not sure she was doing it right. At least three times she said that she was concerned Aidan was not getting enough milk. They would watch, "kind of guide [her] a little bit," and say that "he seems like he's getting the hang of it. Just keep trying." Only one nurse, McBroom, instructed her as she brought Aidan to the breast, helped her position him, and observed that he seemed to latch on. The instruction lasted 5 to 10 minutes. Two entries on Aidan's chart (the last at 2:00 a.m. on March 25) reflected poor breast feeding. There were no other entries on the subject.

The next day, Tuesday (March 25), around 7:00 a.m., Dr. Nishibayashi, Aidan's pediatrician, examined Aidan. He told Nancy and her husband, Kevin, that Aidan was healthy. He mentioned two bruises on the side of Aidan's head ("cephalohematomas"), and said that such bruises were common at birth and nothing to worry about. When he asked if Nancy intended to breast feed, she told him that she was going to "give it a try." She asked if it was safe to take Aidan home, and Dr. Nishibayashi said that it was. He told the Leungs to make a follow-up appointment for the next week. He gave no further instructions, and mentioned nothing about Aidan having any risk factors for jaundice or kernicterus.

2. *Aidan's Discharge*

Aidan was discharged at 11:45 a.m. that Tuesday, approximately 24 hours after birth. The Hospital provided the Leungs with a manual, "Caring For Yourself and Your New Baby" (the manual), and the nurses told the Leungs to refer to it if there were any problems. No one at the Hospital mentioned risk factors for jaundice or kernicterus.

When the Leungs arrived at home with Aidan, Nancy made an appointment with Dr. Nishibayashi for the following Monday (March 31). At home, she breast fed Aidan and changed his diapers eight to ten times a day (every two to three hours). Aidan's pattern of soiling diapers was consistent with what Nancy had been taught in prenatal class at the Hospital, and at some point she observed that Aidan's stool had a golden, curdy appearance.

3. *Aidan's Jaundice*

Around noon on Thursday (March 27), Nancy and Kevin noticed that Aidan's eyes appeared yellow (indicative of jaundice) and his lips were chapped. They examined the section of the manual on jaundice, which suggested (in their minds) that the condition was common and posed no danger to Aidan. The manual described jaundice in part as "a common condition in newborn infants" and stated that "[i]n most instances, the jaundice is so mild that it can be ignored [and] usually will disappear without treatment." The manual mentioned that "[w]hen the bilirubin level becomes too high, jaundice can be dangerous to your baby's developing nervous system." However, it described this dangerous condition as occurring "very rarely." In terms of the risk of it developing, the manual stated only that "[t]he level at which jaundice may be dangerous depends on many factors: your baby's age, whether he was full-term or premature, and whether he has any other medical conditions." It also stated that bruises to the baby's head and face after birth "will heal in a few days and [are] not dangerous to your baby." It contained no other information suggesting that Aidan belonged to a class of infants at high risk of jaundice reaching dangerous levels, and suggested that if

parents had questions about their baby's jaundice, they should call the baby's physician.[3]

4. *The Thursday Telephone Call to Dr. Nishibayashi's Office*

Nancy called Dr. Nishibayashi's office. She testified that Dr. Nishibayashi's nurse answered and said that the doctor was with other patients. Nancy said that Aidan appeared yellow. The nurse told her not to worry, and said she would check with the doctor. The nurse returned and asked if Aidan was "feeding," "peeing," and "pooping." Nancy said yes. The nurse said that it sounded as if Aidan was

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[3] The section on jaundice stated in relevant part: "Jaundice is a common condition in newborn infants. . . . [¶] Physiologic or 'normal' jaundice usually appears on the second or third day of life in healthy babies. . . . It often disappears within a week. About 50% of full-term babies get physiologic jaundice. In premature babies, it is even more likely to develop. About 80% of infants born prematurely will have jaundice during the first week of life. It may last longer in these infants, becoming most noticeable between the fourth and seventh days of life. [¶] In most instances, jaundice is so mild that it can be ignored. It will usually disappear without treatment. However, if the condition is more severe, or if the jaundice is present at birth or appears during the first 24 hours of life, treatment most likely will be necessary." The section discussed the major cause of jaundice (the build-up of bilirubin) and the relationship between frequent breast feedings and the expulsion of bilirubin in the stool. In terms of risk factors, it mentioned only that "[t]he level at which jaundice may be dangerous depends on many factors: your baby's age, whether he was full-term or premature, and whether he has other medical conditions. When the bilirubin level becomes too high, jaundice can be dangerous to your baby's developing nervous system. This happens very rarely. If your doctor is concerned that your baby may have serious jaundice, a very small sample of your baby's blood will be taken to measure the bilirubin to see if it is close to a dangerous level." The section discussed treatment (phototherapy and exchange transfusion) and advised: "If your baby has jaundice, you undoubtedly will want additional information about its cause and treatment. The baby's doctor or nurse can answer your questions about your infant's condition."

In another section, the manual advised that jaundice "often appears or gets worse on the third or fourth day. Call your baby's care provider if jaundice doesn't clear up in a few days." It also stated that "[y]our baby's head and face may be bruised or red from the birth. This will heal in a few days and is not dangerous to your baby."

doing all right, and suggested placing him in sunlight to treat the jaundice. Nancy mentioned Aidan's chapped lips. The nurse said that it was probably sucking blisters from breast feeding, and suggested Nancy apply lotion. Nancy asked if she should wait until the scheduled appointment or bring him in now. The nurse advised to wait until the scheduled appointment.

The testimony of the nurse, Julie Donnelly, presented a different version. Donnelly identified a phone message she wrote memorializing the conversation, which stated that Aidan was "slightly yellow but nursing well," and had "good yellow stools and [was] voiding well." The phone message also indicated that Dr. Nishibayashi told her to instruct Nancy Leung to watch for increased sleepiness, decreased appetite or jaundice. Donnelly testified that Nancy Leung did not ask if she should bring Aidan in immediately. If a parent called Dr. Nishibayashi's office, expressed concern about an infant's condition, and asked to have the baby seen at the office, the practice of Dr. Nishibayashi's office was "absolutely" to see the infant, and "more than likely" the infant would be seen. Also, when an infant is brought to the office, the baby is weighed to determine whether weight has been lost or gained.

Nancy, however, denied that she told the nurse that Aidan was feeding, peeing, or pooping "well." She also denied that Donnelly told her to watch for increased sleepiness or decreased appetite.

Dr. Nishibayashi, who had been on the Hospital's medical staff with privileges to admit patients for 26 years, testified that he was aware of the risk factors for jaundice and hyperbilirubinemia in newborns, some of which applied to Aidan.[4] Despite those risk factors, Dr. Nishibayashi was not concerned about

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[4] Dr. Nishibayashi was called as a plaintiff's witness, and was examined by plaintiff's counsel. Dr. Nishibayashi's counsel later interrupted his examination

discharging Aidan within 24 hours of birth. Aidan's symptoms as described by Donnelly indicated to Dr. Nishibayashi that Aidan's jaundiced condition was mild. Without any indication of dehydration, inadequate feeding or voiding, or a change in alertness, Dr. Nishibayashi found no need for Aidan to be brought to the office. Rather, the scheduled appointment for the following Monday was appropriate.

Having read the section of the manual on jaundice (which suggested that Aidan's condition was common and not dangerous) and having received similar information from Dr. Nishibayashi through his nurse, the Leungs had no concern that Aidan was in any danger and no concern that he should be examined immediately. They assumed that his jaundice would subside.

5. *Aidan's Kernicterus*

Over the next two days, Friday and Saturday, Nancy continued to try to breast feed Aidan every two hours. The extent of his feeding varied. He soiled diapers, but she did not know whether the level of stool was normal. She and Kevin placed him in the sun as recommended, and relied on advice contained in the manual, but there was no change in his jaundice.

By Saturday evening, Nancy and Kevin noticed that Aidan appeared lethargic. By early Sunday, he was very sleepy and would not wake for feedings. Nancy called Dr. Nishibayashi's office, and left a message with his answering service. An on-call physician who was covering for Dr. Nishibayashi called back.

(technically, cross-examination) so as to allow plaintiff to take other witnesses out of order, and did not resume until after plaintiff rested. Although some of Dr. Nishibayashi's testimony thus occurred in Dr. Nishibayashi's defense case, our summary does not make that distinction.

Nancy described Aidan's symptoms, and the physician told her to take Aidan to the emergency room at Huntington Memorial Hospital immediately.

They arrived at Huntington Memorial around 8:00 a.m. Aidan was given an exchange transfusion to reduce the level of bilirubin, but it was ineffective. He had already suffered severe brain damage from kernicterus. Further, his chapped lips were caused by dehydration, and he had lost two pounds since discharge.

Child Neurologist Steven Shapiro examined Aidan in April 2007. He described Aidan's condition as a type of cerebral palsy. Aidan is likely to live a normal lifespan, but he cannot move or talk. The portion of his brain that governs thinking was not affected, and he is thus likely to be of normal intelligence. He will need intensive care, medication, and physical and speech therapy for the rest of his life. Although Dr. Shapiro could not pinpoint a time at which Aidan suffered brain damage, the toxicity "probably" began when the Leungs noticed symptoms of kernicterus -- lethargy and refusing to feed -- on late Saturday or early Sunday.

C. *The Hospital's Negligence*

1. *Failure to Implement Sentinel Event Alert No. 18*

The Hospital is accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO).[5] JCAHO issues "Sentinel Event Alerts" to member hospitals that convey information about major healthcare issues.

As explained by Arthur Shorr, an expert in hospital administration, hospitals do not practice medicine. Rather, they provide the environment for physicians to practice medicine. In providing that environment, hospital procedures and the

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[5] JCAHO is now known as the Joint Commission. We refer to the organization as it was referred to at trial.

conduct of the hospital staff must meet certain community standards of care. According to Shorr, JCAHO standards are commonly recognized as the minimum accepted community standards for both member and non-member hospitals. In Shorr's opinion, a Sentinel Event Alert, although not a formal JCAHO standard, carries "equivalent weight," and a hospital is obligated to create its own policies and procedures to deal with the health care issue discussed in the alert.

In April 2001, JCAHO issued Sentinel Event Alert No. 18 (Alert 18) regarding kernicterus.[6] It warned of the reemergence of kernicterus, and advised that "[i]n order to identify these rare newborns [at risk of kernicterus], certain organization systems and processes should be in place." The alert identified risk factors, and listed "root causes" (such as the failure to recognize jaundice and measure bilirubin levels in infants, to provide a continuum of care, to provide appropriate information to parents and respond to their concerns, and to aggressively treat rising bilirubin levels). It also provided "risk reduction strategies" for hospitals to consider, including "[p]olicies for assessing the risk of severe hyperbilirubinemia in all infants by history, clinical evaluation and, if necessary, by laboratory measurement," and "[p]rocedures for follow-up of all newborns within 24 to 48 hours by a physician or pediatric nurse," or, "[if] this cannot be achieved, decisions regarding timing of discharge or other follow-up must be based on risk assessment." The alert "recommend[ed] that organizations (1) take steps to raise awareness among neonatal caregivers of the potential for kernicterus and its risk factors; (2) review their current patient care processes with regard to the identification and management of hyperbilirubinemia in newborns;

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[6] A copy of the alert was introduced into evidence as Plaintiff's Exhibit 3.

and (3) identify strategies from the above list of available risk reduction strategies that could enhance the effectiveness of these processes."

In Shorr's opinion, the issuance of Alert 18 required the Hospital to take appropriate steps to ensure procedures were in place to reduce the risk of kernicterus in newborns. However, the Hospital never responded by implementing any recommendations, a fact confirmed by David Greer, the Hospital's Director of Quality Management, and Margaret McCormick, the Hospital's Director of Perinatal Services. Greer sent a copy of Alert 18 to relevant department heads, including McCormick, but did nothing else to follow-up or to implement any of the recommendations. According to Greer, the Hospital had no policy for assessing the risk of hyperbilirubinemia or kernicterus. McCormick, who supervised the nurses who provided newborn care and were responsible for identifying newborns at risk for hyperbilirubinemia and kernicterus, testified that although her practice was to review Sentinel Event Alerts and assess whether to recommend changes in nursing practices, she had no recollection of receiving Alert 18 or of any change of policy.[7]

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[7] Testimony by two attending nurses also confirmed the absence of any specific procedure to reduce the risk of kernicterus. Cathy Werner, a staff nurse in the Hospital's perinatal unit, assisted in Aidan's delivery and was the first nurse to assess his condition. She testified that she provided some instruction to Nancy Leung on breast feeding the first time she nursed, but Aidan was not interested. She gave no other instruction. She had never seen Alert 18 and was not aware of its content. She was, however, aware of risk factors for hyperbilirubinemia, and had warned parents about those factors and jaundice many times in the past, because she considered it part of her job in providing patient safety as a nurse.

Susan McBroom, one of the nurses who attended to Aidan and Nancy Leung in the newborn nursery department, knew some of the risk factors for severe jaundice -- East Asian descent (among other races), bruising, trouble breast feeding, and premature birth. Although she did not remember Aidan, nothing in his chart suggested that she discussed the risk of jaundice or kernicterus with the Leungs. Part of her job responsibility was to warn of that increased risk and recommend increased vigilance, but

In Shorr's opinion, the Hospital's failure to implement any recommendations in Alert 18 to reduce the risk of a newborn developing kernicterus violated the Hospital's duty of post-delivery care. Implementation of the alert would have created the circumstances under which the nursing staff and Dr. Nishibayashi could be expected to act differently in a material way in responding to the risk factors displayed by Aidan and in dealing with the parents' concern. Shorr could not speculate, however, on what the outcome might have been for Aidan.

2. *Failure to Ensure a Timely Appointment, Properly Assess Aidan's Risk, and Educate the Leungs*

Dr. Vinod Bhutani, Aidan's expert witness on the Hospital's and Dr. Nishibayashi's standards of care, also found that the Hospital breached its duty of care. His opinions were all based on reasonable medical probability. The focus of his testimony was on steps that would have prevented hyperbilirubinemia and kernicterus, rather than on treatment. He identified a series of failures by the Hospital's nursing staff to provide the Leungs with adequate information and instruction. In his opinion, considered together, these failures contributed to Aidan suffering brain damage.

a. *Timely Follow-up Appointment*

First, the nursing staff failed to instruct the Leungs that a follow-up appointment within two to three days after discharge (three to five days of age) was mandatory. The necessity of such a follow-up appointment for an infant who

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Aidan appeared healthy and was not jaundiced at discharge and thus she found no need to give specific advice on jaundice or kernicterus.

is discharged within the first 48 hours after birth is recognized as part of the standard of perinatal care for nurses (as well as doctors) based on guidelines endorsed by various medical and related organizations, including the American Hospital Association and the Neonatal Nurses' Association. The follow-up appointment is important, because various conditions, such as jaundice, may not appear at early discharge, and there should be an assessment of the baby's condition, including whether the infant is feeding properly. For Aidan, such an appointment had special importance, because he was discharged very early, within 24 hours of birth and, as noted below, he was at an increased risk of developing hyperbilirubinemia leading to kernicterus.

According to Dr. Bhutani, although the date of a follow-up appointment is decided by the pediatrician and the parents, the nurses have an independent duty to reinforce the need for a timely follow-up appointment. If in their judgment the pediatrician has suggested an appointment date that is outside the standard of care, the nurses have the duty to advise the parents or the pediatrician of their disagreement.

If Dr. Nishibayashi had seen Aidan within two to three days of discharge (for instance, on the Thursday of Nancy Leung's telephone call to his office), Dr. Bhutani testified that the following steps would have occurred: (1) Aidan would have been weighed (based on his age, he should have been gaining rather than losing weight); (2) Dr. Nishibayashi would have asked Nancy Leung first hand questions relevant to assessing Aidan's level of jaundice (such as whether the stools were changing color and whether Aidan was getting enough to eat); and (3) he would have seen the progression of Aidan's jaundice (it was already apparent in his eyes, and was clearly progressing). Based on this information, administering a bilirubin test would have been "good medical practice," though there was no

requirement that Dr. Nishibayashi do so. The important point was that Aidan should have been examined, so that Dr. Nishibayashi could assess whether Aidan needed to be treated immediately or could be treated at home. Such an "assessment on Thursday would have been a very important step, the last step . . . in preventing the tragedy that Aidan has gone through."

b. *Risk Assessment*

Second, the Hospital failed to perform any risk assessment on Aidan for jaundice and hyperbilirubinemia (such as by testing for bilirubin or by evaluating the applicability to Aidan of the well-known clinical risk factors), failed to inform the Leungs of Aidan's particular risk, and failed to emphasize that, because of that risk, a timely follow-up appointment was even more necessary for Aidan than typical. At discharge, Aidan showed some (not all) of the major risk factors (male, East Asian descent, bruising, breast feeding), as well as the minor risk factor of less than 38 weeks gestation (37 weeks, 2 days, as calculated based on the ultrasound performed by Nancy Leung's obstetrician).[8]

Dr. Bhutani found the information on jaundice that the Hospital provided the Leungs in the manual inadequate to fulfill the Hospital's duty. It was outdated (published in 1996) and failed to reflect the more recent information on the risk of kernicterus provided by Alert 18 in 2001 and other publications. One of the purposes of Alert 18 was to change family education material, and its publication

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[8] Using a standard classification system to assess newborn maturity based on a physical examination, the nursing staff estimated Aidan's gestational age at 39 weeks. However, Dr. Bhutani testified that in assessing the risk of hyperbilirubinemia, standard practice required assuming that Aidan was at the younger gestational age, because "you want to give the benefit of doubt to the baby. . . . [W]e want to be more vigilant than less vigilant."

in 2001 was a major change in the standard of care for newborn jaundice. The manual was also inaccurate in stating that bruising on the baby's head will heal and is not dangerous. Cephalohematoma is a major risk factor for hyperbilirubinemia. Had the Hospital assessed Aidan's risk (which was elevated, given his clinical risk factors) and adequately educated the Leungs on that risk (as well as on breast feeding and detecting jaundice, discussed below), the Leungs would have had the necessary information to accurately assess Aidan's condition and act appropriately.

c. *Detecting Jaundice*

Third, the Hospital staff failed to teach the Leungs how to detect jaundice by examining Aidan's skin. Jaundice in infants appears first in the skin, and only later in the whites of the eyes. To detect its presence, parents should be trained on the proper method of inspecting the infant's skin from head to toe under good lighting. This method (the same one taught to nurses and resident physicians) is straightforward: an index finger is pressed on the forehead of the infant for 30 seconds to a minute to blanch the skin, and is then removed; the blanched spot is observed to see if the skin has a yellowish tinge. Parents should also perform the same test on the infant's sternum so as to detect the possible progression of jaundice down the body. According to Dr. Bhutani, both the physician and the nurses have a duty to give such instruction; however, it is easier for the nurses because of their frequent presence attending to the mother and infant. Parents should be instructed that if they detect jaundice, they should call the doctor.

In Aidan's case, Dr. Bhutani testified that "there most likely would have been" recognizable jaundice for at least two days before Nancy Leung called Dr. Nishibayashi's office. Bilirubin is usually rising for the first three to five days and

reaches its maximum close to the fifth day unless other causes exacerbate the jaundice. Thus, Aidan's jaundice would have been increasing once it appeared.

When the Leungs recognized jaundice in Aidan, Nancy called Dr. Nishibayashi. But because recognizable jaundice likely had been present for at least two days prior to that call, Nancy Leung might have noticed signs of jaundice and called Dr. Nishibayashi earlier, had she been properly educated.

d. *Breast Feeding*

Fourth, the nursing staff failed to provide sufficient coaching to Nancy Leung on breast feeding to ensure that she could recognize when Aidan latched on to the nipple properly and when he received an actual transfer of milk (as by recognizing the particular sound and feel of Aidan swallowing). Such coaching was especially important because of Aidan's very early discharge, because Aidan was not feeding well at discharge, and because of his particular risk of hyperbilirubinemia and kernicterus (to expel bilirubin, it is essential that the infant take in sufficient milk).

Dr. Bhutani found the written instructions that the Hospital provided to Nancy Leung on breast feeding in the manual were accurate, but inadequate. The mother "needs to be coached in this because it's not a manual that you can use to assemble a bicycle. You actually have to be taught this." From the medical records, Dr. Bhutani was aware that Nurse McClammy instructed Nancy Leung on breast feeding (as well as other matters) prior to discharge, but the instruction occurred "for a very short period of time [from] what I can understand." Further, "the net result [was] that the baby . . . had lost two pounds of weight between discharge and admission at Huntington Memorial [Hospital]. So obviously the milk intake had not been adequate. . . . [The] baby [was] dehydrated and not

getting enough to eat." With adequate milk intake, Aidan would not have lost that amount of weight within 24 to 36 hours unless he had diarrhea (and there was no evidence that he did). In Dr. Bhutani's view, Aidan's condition when admitted to Huntington Memorial was "pretty profound evidence" concerning the inadequate feeding.

e. Conclusion as to the Hospital's Negligence

According to Dr. Bhutani, given Aidan's risk for severe hyperbilirubinemia, the Hospital staff should have instructed the Leungs that: (1) a follow-up appointment within two to three days after discharge was mandatory; (2) they must ensure Aidan was "getting enough milk intake, not just pretending to suckle . . . but was actually getting the milk intake"; (3) they must look for sufficient urine and stool output, with the stools changing color so as to reflect the expelling of bilirubin, and (4) they must look for "any signs of [jaundice] infection and [any] change in behavior." In Dr. Bhutani's opinion, if these instructions had been given and followed, Aidan's severe hyperbilirubinemia could have been prevented.

D. *Dr. Nishibayashi's Negligence*[9]

In Dr. Bhutani's opinion, Dr. Nishibayashi's conduct fell below the standard of care in two primary ways. First, he did not adequately educate Nancy Leung on the risks of jaundice and the need for a follow-up appointment because of that risk. Second, based on Nancy's Thursday telephone call, he should have seen Aidan that

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[9] The jury was informed that Dr. Nishibayashi had settled with Aidan, but was instructed to consider that fact only insofar as it might demonstrate a bias in Dr. Nishibayashi's testimony, and not as evidence of his liability.

day, examined him, and obtained information from Nancy. Dr. Nishibayashi could not "assess the weight [or] skin color over the phone."

According to Dr. Bhutani, Aidan probably had hyperbilirubinemia on Thursday. He based that opinion on Aidan's extremely high reading of 41 when admitted to Huntington Memorial Hospital and the normal progression of bilirubin levels of infants in the first three to five days of life. He also believed that Aidan likely had lost weight, based on the fact that he was dehydrated and had significant weight loss (two pounds) when examined at Huntington Memorial Hospital on Sunday.

Asked specifically about severe hyperbilirubinemia, Dr. Bhutani testified that the condition is treatable and that timely treatment "may prevent brain damage . . . more likely than not." He also testified that if Dr. Nishibayashi had seen Aidan on Thursday, "there would have been a recognition of a need for further testing, there would have been a finding that, in fact, he had a high level of bilirubin and he needed treatment."

Brain damage from elevated bilirubin "usually starts off with a series of simple symptoms like excessive sleepiness and refusing to eat." When the Leungs observed those symptoms on late Saturday or early Sunday, it was an indication that Aidan's brain was being affected. "That is when the horse kind of left the barn. . . . I mean, that is what you don't want to see happen[,] . . . getting acute bilirubin encephalopathy so you can always reverse the process."[10]

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[10] At times, Dr. Bhutani's testimony whether treatment as of Thursday would have prevented Aidan's brain damage was confusing. As we read the record, the confusion lay primarily in Dr. Bhutani's frequent failure to respond to the precise question asked, in his insistence that prevention (not treatment) of hyperbilirubinemia is preferred, and in his refusal to state which specific treatment option (continued breast feeding, phototherapy, or exchange transfusion) should have been used because a specific bilirubin reading was not done.

On direct examination, plaintiff's counsel asked if phototherapy on Thursday and Friday would have prevented Aidan's brain damage. Dr. Bhutani answered somewhat non-responsively: "if [Aidan had gotten] enough to eat, that would have been a first step then, if the bilirubin had been measured as an outpatient, if the baby had a progression of jaundice and then on that basis [was] deemed to have needed lights, that would have prevented [his] hyperbilirubin level going to 41."

Later, on cross-examination by the attorneys for Dr. Nishibayashi and the Hospital, he gave the following responses.

Asked whether he believed, if Aidan had been seen on Thursday, "we wouldn't be here today," Dr. Bhutani testified, "[H]opefully not. Depends on what the bilirubin level was on that day." He acknowledged that the level was not known because no test was done.

Later, when asked, "Isn't it true that [on Thursday] it is more probable than not that the child could have been cured?" Dr. Bhutani replied in a lengthy, ultimately non-responsive way: "[T]hat would kind of fly against the data that we have in the bilirubin normalgram that bilirubin values are rising fairly linearly, steadily, progressively, for the first 72 hours and then they flatten out and then they remain elevated unless the liver matures and then starts to get rid of the jaundice. Clearly on Sunday the baby's liver was not mature in getting rid of the jaundice. And so more likely than not the bilirubin was elevated on Thursday, Friday, Saturday and reached the level of 41 on Sunday. The question really is as to what that number is. And without a measurement we can only guess" at the level because no test was done.

Asked whether, if hyperbilirubinemia was present on Thursday, it was still treatable, Dr. Bhutani again answered non-responsively that "on Monday, Tuesday, Wednesday the baby was also probably hyperbilirubinemic. And if one counts as feeding and giving enough milk to the baby as treatment [rather than] prevention, it's a question of what you're preventing and what you're treating. If I'm treating hyperbilirubinemia, then feeding and phototherapy are the treatments. If I'm talking about acute bilirubinencephalopathy or brain damage, then exchange transfer is the treatment. So we need to get our definitions straight because they have different connotations for different parts of the illness."

Asked whether Dr. Nishibayashi would have recognized on Thursday that Aidan needed to be treated, Dr. Bhutani emphasized prevention and not treatment: "Going from the now that we have the hindsight . . . that we know where the baby was with the bilirubinemia value of 41 and working our way back, we came down to Thursday . . . when the [mother] did make the communication with the pediatrician and we came back to Wednesday, so it gets us to the same position and we start prospectively where the baby is being discharged. Since we don't know what the future is going to be, the key part of that is for the baby to be seen on the age three to five days. And if the risk factors [are present], to see the baby earlier rather than later, and may even require more than one visit."

E. *Medical Costs and Life Care Plan*

The parties entered a stipulation that the Leungs had paid and/or incurred reasonable and necessary medical costs of $78,375.55.

Life Care Planner Jan Roughan prepared a life care plan for Aidan, containing certain variable recommendations based on his condition. Forensic economist Robert Johnson, estimated that the future medical costs of this plan, based on a life expectancy of 63 years and, depending on which variables the jury might conclude were necessary, ranged from a present value of $19,360,830 to $18,004,772. He estimated that Aidan's lost earning capacity, depending on his level of education (bachelor's degree to professional degree), ranged from a present value of $2,357,291 to $3,745,762.

Asked if it was his opinion that on Thursday Aidan could have been diagnosed and cured, Dr. Bhutani testified: "Again, I think you're making multiple jumps because it depends on getting the bilirubin value, then reacting to the bilirubin value, and it depends on what the bilirubin value was. If the bilirubin value was already very high, then there would have been a different response to [a] hyperbilirubin value of 17."

Despite these somewhat rambling and non-responsive answers, when he focused on specific questions his testimony became clear that he believed Aidan's hyperbilirubinemia would have been successfully treated at a Thursday examination. When asked to focus on severe hyperbilirubinemia, the condition he believed Aidan had on Thursday when the Leungs called Dr. Nishibayashi's office, he testified that severe hyperbilirubinemia is preventable and treatable, and when timely treated "may prevent brain damage . . . more likely than not." When asked specifically whether, had Aidan been seen on Thursday, "there would have been a recognition of a need for further testing, there would have been a finding that, in fact, he had a high level of bilirubin and he needed treatment," Dr. Bhutani responded that "I already testified to that. . . . That is true."

II. *Hospital's Evidence*[11]

Sylvia Koyer Folland and Sharon Lynn Nelson, two of the nurses who cared for Aidan while he was in the hospital, testified that he showed no signs that he was at risk of jaundice and appeared healthy. Nurse Margaret McClammy testified concerning the instructions on breast feeding, jaundice, and other topics she gave Nancy Leung before discharge.[12] The instruction occurred as McClammy went through a check list of items, a process that took approximately 30 minutes. She instructed that if jaundice occurred within the first 72 hours, then Nancy should call her pediatrician.

Heidi Funk, an expert in nursing care, testified that the Hospital's nursing staff met the standard of care in all respects in caring for Aidan and Nancy. In her opinion: (1) Aidan did not appear at risk for jaundice, and the staff had no duty to advise the Leungs of the risk factors for hyperbilirubinemia; (2) in her interpretation of Aidan's medical records, the breast feeding was going well at the hospital, and the bruises on Aidan's head did not appear related to jaundice; (3) using a standard classification system based on a physical examination of Aidan, he appeared to be at 39 weeks gestation, not premature; (4) the staff had no duty to instruct the Leungs how soon to make a follow-up appointment, and Nurse McClammy's instruction to call the pediatrician if jaundice developed within the first 72 hours was within the standard of care; (5) the 2001 issuance of Alert 18 did not immediately change the standard of care for assessing the risk of kernicterus, and given the lag time required between issuance of new health care information

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[11] Because we review the entire record in the light most favorable to the judgment, we only briefly discuss the Hospital's evidence to the extent it was in conflict with Aidan's evidence.

[12] Her deposition testimony was read to the jury.

and implementation, the Hospital's failure to implement any recommendations of the Alert by the time of Aidan's birth in 2003 was within the standard of care; (6) the instructional material provided to Nancy Leung at discharge was within the standard of care; and (7) the instructions on breast feeding given by Nurse McClammy were adequate.

According to Paul Hofmann, a healthcare consultant, Alert 18 did not have equivalent weight as a JCAHO standard, and did not obligate the Hospital to take any action other than reviewing the alert and considering whether it needed to take any action.

Rebecca Fletcher, an instructor in Family Education at the Hospital, testified that Nancy Leung paid for several classes, including classes on breast feeding, infant care, and parenting. In the parenting classes taught by Fletcher, a 32 minute videotape was played, a two to three minute portion of which covered jaundice, supplemented by three to five minutes of questions and lecture. The information in the video was from 1990. It referred to physiologic jaundice as being so mild it generally does not require treatment. It did not discuss any of the risk factors that applied to Aidan. The lecture's message was that, if the infant is not eating well and is turning yellow, the parent should immediately call the doctor or get the infant to a healthcare facility, because the condition could be serious though treatable. Fletcher also played a short video on breast feeding, in which the subject of how to tell whether there is a transfer of milk is covered.

Stacey Helvin, a life care planner, prepared an alternative life care plan for Aidan, which two expert witnesses (Dr. Glenn Fowler, a pediatric neurologist who examined Aidan, and Dr. Kimberly BeDell, a pediatric "physiatrist" specializing in rehabilitation of special needs children) found suitable.

Forensic economist Ted Vavoulis calculated the present value of Aidan's lost earnings to range (depending on whether he received a bachelors, masters, or professional degree) between $1,154,000 and $1,694,000. He calculated the cost of Stacy Helvin's life care plan in present value, depending on Aidan's life expectancy and whether Aidan resided in a group home after age 22 or resided at home with attendant care, to range between $1,531,050 and $2,627,132. He calculated the cost of Jan Roughan's plan in present value to be $9,950,000.

III. *Dr. Nishibayashi's Evidence*

Dr. Kevin White, a pediatrician, testified that Dr. Nishibayashi's care of Aidan was within the standard of care. As of 2003, the standard of care did not require Dr. Nishibayashi to inform the Leungs of Aidan's risk for hyperbilirubinemia, did not require an appointment earlier than a week after birth, and did not require Dr. Nishibayashi to have Aidan seen in response to Nancy Leung's Thursday phone call.

IV. *Verdict*

In a special verdict, the jury found that the Hospital, Dr. Nishibayashi, and the Leungs were separately negligent in their care of Aidan, and that the negligence of each was a substantial factor in causing Aidan harm.[13] The jury allocated the percentage of negligence as follows: Dr. Nishibayashi, 55 percent; the Hospital, 40 percent; and the Leungs, 5 percent. The jury awarded past medical costs of $78,375.55, future medical costs of $82,782,000, at a present

[13] The jury also found that Dr. Nishibayashi was not an employee of the Hospital.

value of $14 million, lost future earnings of $13.3 million, at a present value of $1,154,000, and emotional distress damages of $250,000.

DISCUSSION

I. Settlement With and Release of Dr. Nishibayashi

The Hospital contends that common law, rather than Code of Civil Procedure sections 877 and 877.6, governs the effect of Aidan's settlement with and release of Dr. Nishibayashi.[14] According to the Hospital, the common law principle, as held in controlling California Supreme Court authority, is that a release for consideration of one joint tortfeasor operates as a release of the joint and several liability of the other joint tortfeasors. (See e.g., *Bee*, *supra,* 217 Cal. at pp. 99-100; *Tompkins, supra,* 66 Cal. at pp. 166-168.) The Hospital argues that under this rule, Aidan's release of Dr. Nishibayashi in consideration of his $1 million settlement payment released the Hospital from its joint and several liability for Aidan's injuries. In other words, while the Hospital remains liable for its proportionate share of Aidan's noneconomic damages (such liability being "several only and . . . not . . . joint" (Civ. Code, § 1431.2, subd. (a)), the Hospital is released from its joint and several liability for Aidan's economic damages.[15]

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[14] All undesignated section references in this section of our opinion are to the Code of Civil Procedure.

[15] Civil Code section 1431.2 provides:

"(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

"(b)(1) For purposes of this section, the term 'economic damages' means objectively verifiable monetary losses including medical expenses, loss of earnings,

As we explain, although the California Supreme Court has been critical of the release rule and limited its application in some circumstances, the court has not abandoned it with respect to concurrent tortfeasors who produce a single injury. Under the doctrine of stare decisis, we conclude that we remain bound by the Supreme Court's decisions applying the rule, and therefore we reverse the judgment against the Hospital to the extent it requires the Hospital to pay economic damages for which it was jointly and severally liable with Dr. Nishibayashi. At the same time, we urge the California Supreme Court to grant review, abandon the release rule, and fashion a new common law rule concerning the effect of a non-good faith settlement on a non-settling tortfeasor's liability.

A. Background

Before trial, Aidan entered a written "Settlement Agreement and Release" with Dr. Nishibayashi, under which Dr. Nishibayashi would pay the limit of his malpractice insurance policy, $1 million, pursuant to a specified payment schedule during Aidan's life, and would participate as a defendant in the trial. In exchange, Aidan would release Dr. Nishibayashi and his professional corporation from all claims. The settlement was conditioned on the court approving a minor's compromise for Aidan, and on the court finding the settlement to be in good faith

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burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

"(2) For the purposes of this section, the term 'non-economic damages' means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation."

under sections 877 and 877.6. It also provided that the release and discharge of Dr. Nishibayashi did not apply to the Hospital.

Dr. Nishibayashi moved for a declaration of good faith settlement. The trial court denied the motion, agreeing with the Hospital that the settlement did not meet the good faith standard of *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488 (*Tech-Bilt*), in that the settlement amount was grossly disproportionate to Dr. Nishibayashi's potential share of liability and to the total expected recovery.[16]

Rather than abandoning the settlement, Aidan and Dr. Nishibayashi elected to pursue it, and amended their agreement to delete the condition requiring the court to declare the settlement to be in good faith, though the condition requiring approval of the minor's compromise remained. On May 9, 2007, Aidan filed a petition to approve the compromise of his claim against Dr. Nishibayashi. On May 22, 2007, shortly before trial, with the consent of Aidan's counsel, the court continued the hearing on the petition in order to have it reviewed by a staff attorney in the probate department. The court stated that a new date for hearing on the petition would be scheduled after the review was complete.

Meanwhile, the trial occurred, and the jury returned its verdict on July 2, 2007, awarding damages and finding Dr. Nishibayashi 55 percent negligent and the Hospital 40 percent. On July 20, 2007, after the court informed Aidan's attorney of recommendations for changes to the proposed special needs trust, Aidan filed a revised petition which was heard on September 21, 2007.

Aidan's counsel argued that the settlement was in Aidan's best interests because although Dr. Nishibayashi was 55 percent liable for the judgment, Aidan's

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[16] We summarily denied Dr. Nishibayashi's petition for writ of mandate challenging the trial court's ruling (B199419).

parents had determined that it was economically unfeasible to try to obtain more from him than the $1 million settlement, and it was in Aidan's interests to receive the settlement funds immediately in order to ensure his continuing care. Further, according to Aidan's attorney, the Hospital remained jointly and severally liable for the entire amount of economic damages in the judgment. Thus, regardless of the settlement, Aidan could collect the full sum of economic damages from the Hospital alone. For his part, Dr. Nishibayashi's counsel argued that the Hospital could seek equitable indemnity from Dr. Nishibayashi for amounts it paid in excess of its percentage share of the judgment.

The Hospital did not oppose the petition, and did not initially argue that the common law release rule would extinguish the Hospital's joint and several liability for Aidan's economic damages. Rather, it argued that if the petition were approved and Aidan settled with Dr. Nishibayashi, then under the terms of the settlement, the Hospital would be relieved of its joint liability for Dr. Nishibayashi's 55 percent share of the economic damages.

After argument, the court granted the petition to approve the minor's compromise, but referred the revised plan for a special needs trust to the probate department for further review. The order approving the minor's compromise was not signed and entered until October 12, 2007.

In the meantime, the parties filed competing versions of the judgment. As part of that debate, the Hospital filed objections to the judgment which invoked the common law release rule and argued that the settlement with and release of Dr. Nishibayashi released the Hospital's joint liability for Aidan's economic damages, leaving only the Hospital's several liability for its proportionate share of the $250,000 in noneconomic damages. Alternatively, the Hospital argued that its liability was reduced (as reflected in the Rest.3d Torts, § 16) to its comparative

share of economic damages -- 40 percent. The court rejected the arguments, finding that the common law release rule was not "the current state of the law," and noting that "it would be nice to have a court of appeal opinion on it and maybe this is the case that is going to do it. And I would urge you to go find out." The court entered judgment on November 2, 2007.

The Hospital then moved to vacate the judgment, reiterating its argument that Aidan's settlement with and release of Dr. Nishibayashi released the Hospital's joint and several liability for Aidan's economic damages. The court denied the motion.

B. Discussion

As here relevant, section 877 applies to a release only if it is "given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort."[17] Under section 877, such a release: (1) does not release the other tortfeasors unless it so provides; (2) reduces the claims against the other tortfeasors in the amount of the consideration paid in the settlement (or in the amount stipulated, if that amount is greater); and (3) bars claims against the released tortfeasor for contribution. Section 877.6, which provides the procedure

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[17] Section 877 provides in relevant part: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:

"(a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater.

"(b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties."

for determining good faith, adds that a determination of good faith also bars any claim for equitable indemnity based on comparative fault.[18] (See *Far West Financial Corp. v. D & S Co.* (1988) 46 Cal.3d 796, 817 [section 877.6 bars all equitable indemnity claims, including total equitable indemnity].)

The California Supreme Court has identified two major goals served by sections 877 and 877.6: "equitable sharing of costs among the parties at fault and the encouragement of settlements." (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 872 (*Abbott Ford*).) Based on these goals, the court adopted a flexible standard for determining good faith, which involves consideration of a number of factors, including whether the settlement amount is "grossly disproportionate" to the settling defendant's liability. (*Tech-Bilt, supra*, 38 Cal.3d at p. 499; see *Abbott Ford, supra,* 43 Cal.3d at pp. 874-875.)

Here, Aidan's settlement with Dr. Nishibayashi does not fall under the provisions of sections 877 and 877.6: the trial court found the settlement was not in good faith, because it was grossly disproportionate to Dr. Nishibayashi's individual liability.[19] Therefore, the effect of Aidan's settlement with Dr. Nishibayashi on the Hospital's liability depends on the common law.

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[18] Section 877.6, subdivision (c) states: "A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault."

[19] We note also that the release contemplated by the settlement was not "given . . . before verdict or by judgment," a requirement interpreted to mean "before liability is established by jury verdict or by judgment." (*Southern Cal. White Trucks v. Teresinski* (1987) 190 Cal.App.3d 1393, 1405; see *Be v. Western Truck Exchange* (1997) 55 Cal.App.4th 1139, 1144.) Although the settlement agreement was entered before trial, it was not binding on Aidan, because without court approval of a minor's compromise, a guardian ad litem has no authority to bind a minor to a settlement and release of the

Before the 1957 enactment of section 877, the California Supreme Court followed the common law rule that a release of one "joint tortfeasor" for consideration constitutes a release of all, thus barring the plaintiff from pursuing the action against the remaining joint tortfeasors. (*Bee, supra,* 217 Cal. at p. 102; *Chetwood v. California National Bank* (1896) 113 Cal. 414, 708; *Tompkins, supra,* 66 Cal. at pp. 166-167; see 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 70, pp. 142-143 [tracing common law rule]; Thaxter, *Joint Tortfeasors; Legislative Changes in the Rules Regarding Releases and Contribution* (1958) 9 Hastings L.J. 180, 182-185 [same].) The term "joint tortfeasor" was used loosely, referring to all tortfeasors who were jointly and severally liable for the plaintiff's harm. As the Supreme Court explained: "The rule that the release of one joint tortfeasor releases all the others is intended to prevent double recovery for the injury and is based on the theory that there can be but one compensation for the joint wrong, that each joint tortfeasor is responsible for the whole damage, that the cause of action is satisfied once the injured party is paid for his injury by one of the joint tortfeasors, and that the receipt by the injured party of any sum, if accepted as payment in satisfaction of the cause of action against one joint tortfeasor, is in law full satisfaction as to all joint tortfeasors." (*Lamoreux v. San Diego etc. Ry. Co.* (1957) 48 Cal.2d 617, 625 (*Lamoreux*); see *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 298 (*Mesler*); see also Rest.2d Torts (appen.) § 885,

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minor's claim. (*Scruton v. Korean Air Lines Co.* (1995) 39 Cal.App.4th 1596, 1606.) Moreover, the settlement agreement itself was expressly contingent on the court approving the minor's compromise. Thus, until the compromise of Aidan's claim against Dr. Nishibayashi was approved by the court, there could be no valid release of that claim. As we have noted, the order approving the minor's compromise was not entered until October 12, 2007, long after the July 2, 2007 jury verdict fixing Dr. Nishibayashi's liability. Therefore, the release of Aidan's claim against Dr. Nishibayashi was not "given . . . before verdict or judgment" under section 877.

reporter's notes, p. 162 [explaining origin of rule in England].) Moreover, the Supreme Court applied the rule even if the release expressly reserved the right to sue the remaining tortfeasors. (*Bee, supra*, 217 Cal. at p. 100 [reservation of plaintiff's rights against other defendants held "nugatory and of no effect," and declared "void as being repugnant to the legal effect and operation of the release itself"].)[20]

Because the release rule could work unintended hardship, the court adopted the concomitant rule that if the plaintiff entered a *covenant not to sue* instead of a release, the other tortfeasors were not released. (*Pellett v. Sonotone Corp.* (1945) 26 Cal.2d 705, 710-711 (*Pellett*); *Kincheloe v. Retail Credit Co., Inc.* (1935) 4 Cal.2d 21, 23.) Such a covenant did not release the other tortfeasors, because its language was not a release but a promise not to prosecute the suit. (*Mesler*, *supra*, 39 Cal.3d at p. 298.)

Although before enactment of section 877 the court chipped away at the release rule, it never fully repudiated it. Its decisions leave the rule in effect as to concurrent tortfeasors, such as Dr. Nishibayashi and the Hospital, whose independent acts concur to produce a single harm.

In *Ash v. Mortensen* (1944) 24 Cal.2d 654 (*Ash*), the court acknowledged the release rule, but refused to apply it to *successive* tortfeasors who produced *separate*, though related, injuries. The court held that the plaintiff's release of the negligent driver in a car accident in which the plaintiff was injured did not bar her

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[20] On this point, *Bee* was arguably inconsistent with *Wallner v. Barry* (1929) 207 Cal. 465, decided three years earlier. In *Wallner*, the court stated that "it is a well-settled rule that before one tortfeasor can be held to be discharged from liability through the release of another, the consideration for such release must have been accepted by the plaintiff in full satisfaction of the injury." (*Id.* at p. 473.)

malpractice suit against the treating doctors who aggravated the injuries she suffered in the accident. (*Id.* at pp. 658-659.) The court reasoned that "[a] release of a cause of action against a wrongdoer is not a release of a separate or distinct cause of action against another independent wrongdoer. . . . We are of the opinion that a release of the original wrongdoer should release an attending doctor from liability for aggravation of the injury 'if there has been full compensation for both injuries, but not otherwise.' [Citations.]" (*Id.* at pp. 658-659.)

But the court did not overrule the release rule as applied to concurrent tortfeasors who produce a single injury: "It has been held in some cases involving unliquidated tort demands that the payment of any sum in consideration of the release of one of several joint or independent concurrent tortfeasors will be presumed to have been made and accepted as full compensation or satisfaction for the alleged injury. [Citations.] There is also authority to the contrary. [Citation.] *But whatever may be the rule with regard to a settlement with joint or independent tortfeasors whose acts concur to produce a single injury*, it does not follow that such presumption should be indulged where, as here, the injured person's claim embraces separate injuries caused by independent successive tortfeasors and is liquidated by a judgment against the original tortfeasor." (*Id.* at pp. 659-660, italics added.) Thus, while the court refused to apply the release rule to successive tortfeasors who produce separate injuries, it did not overrule the release rule as applied to concurrent tortfeasors who produce a single injury.

One year after *Ash*, in *Pellett, supra*, 26 Cal.2d 705, the court refused to apply the release rule to a plaintiff's covenant not to execute on any future judgment that might be obtained against one joint tortfeasor -- a pledge that was "not strictly a release or a covenant not to sue, although it par[took] somewhat of the nature of both." (*Id.* at p. 711.) In its discussion of the relevant law, the court

reiterated "[t]he rule in this state, applied in many cases, . . . that a release of one joint tortfeasor is a release of all [citations], but that a mere covenant not to sue one joint tortfeasor does not release the others." (*Id.* at p. 710.) The court candidly observed, however, that "the distinction between a release and a covenant not to sue is entirely artificial. As between the parties to the agreement, the final result is the same in both cases, namely, that there is no further recovery from the defendant who makes the settlement, and the difference in the effect as to third parties is based mainly, if not entirely, on the fact that in one case there is an immediate release, whereas in the other there is merely an agreement not to prosecute a suit." (*Pellett, supra,* 26 Cal.2d at p. 711.)

Pellett was followed by *Lamoreux, supra*, 48 Cal.2d 617, a wrongful death action in which the court again refused to apply the release rule. The court held that the plaintiff's claim against the railroad whose train struck the decedent's car was not barred by the plaintiff's release of the decedent's employer, who had been sued along with the railroad, but who received a release in a collateral worker's compensation proceeding. The court acknowledged that "[s]ome California decisions which followed the general rule that the release, for a consideration, of one of several asserted joint tortfeasors bars an action against another have stated that it is immaterial whether the person who made the payment for the release was or was not legally liable." (*Id.* at p. 627.) Rather than disapproving such decisions, however, the court distinguished them, "because none of them involved the settlement of a claim based upon a special limited liability such as workmen's compensation, the settlement of which does not, as a matter of law, constitute full payment or satisfaction for all the damage suffered." (*Ibid.*)

In 1957, the same year the court decided *Lamoreux*, the Legislature enacted section 877. As of that date, the state of the common law, never repudiated by the

California Supreme Court, was that a release for consideration of one concurrent tortfeasor who acted with other tortfeasors to cause a single harm barred suit against the others. Section 877 abrogated that rule *only* as to releases given in "good faith" and "before verdict or judgment." (§ 877.) Later, in 1980, responding to the California Supreme Court's decision in *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, the Legislature enacted section 877.6, which, among other things, "codifies the *American Motorcycle* result by providing that a section 877 settlement bars claims for partial or comparative indemnity as well as for contribution." (*Tech-Bilt, supra*, 38 Cal.3d at p. 496.) But the California Supreme Court, to date, has not authoritatively abandoned the release rule. To the contrary, as late as 1985, in *Mesler, supra,* 39 Cal.3d 290, the court implicitly acknowledged that the rule remains part of California common law.

In *Mesler*, the trial court granted the summary judgment motion of the defendant parent corporation. The plaintiff appealed, and while the appeal was pending, settled with and released another defendant that was a subsidiary corporation of the parent. As stated by the Supreme Court, the issue presented was "whether a plaintiff may pursue a tort action against a parent corporation on the theory that it is the alter ego of its subsidiary, the alleged tortfeasor, after entering into a settlement and release agreement with the subsidiary." (*Id.* at p. 294.) Resolution of this issue depended, in part, on whether settlement with an alter ego was covered by section 877 or whether the common law release rule applied. In discussing the release rule, the court noted that "[t]he rule was . . . based on the misconception, as Dean Prosser suggested, that a 'satisfaction' is the equivalent of a 'release.' [Citation.] However, while '[a] satisfaction is an acceptance of full compensation for the injury; a release is a surrender of the cause of action, which

may be gratuitous, or given for inadequate consideration.' [Citation.] Even if it could be said that any sum the plaintiff received in settlement was a compensation for the joint wrong [citation], the rule produced unfair results. For example, a plaintiff who settled with a defendant of modest resources for an amount below the value of his damages did not have his claim fully satisfied; nevertheless, under the common law rule he could not seek further compensation from other defendants." (*Mesler, supra,* 39 Cal.3d at p. 298.)

The court in *Mesler* thus recognized the dubious lineage of the release rule and questioned its wisdom. But the court also acknowledged its continued viability as part of California common law. In summarizing the issue presented in the case and its holding, the court stated: "At issue is the applicability of . . . section 877, which abrogates the common law rule that settlement with one alleged tortfeasor bars action against any others claimed liable for the same injury. We conclude that the statute does apply, *and thus* release of an alleged tortfeasor under these circumstances does not preclude suit against its claimed alter ego." (*Id.* at pp. 294-295, italics added, fn. omitted.) Later in its discussion, the court was even clearer concerning the viability of the release rule: "the alter ego corporation *would be dismissed together with the subsidiary under the common law release rule*, unless section 877 applies." (*Id.* at p. 301, italics added.) It thus appears that the court was acknowledging the continued viability of the release rule in California common law.[21]

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[21] We note that there are comments in other Supreme Court decisions that might be interpreted as questioning the viability of the release rule. In *Tech-Bilt, supra,* 38 Cal.3d at page 493, apparently referring to the effect of *Ash* and *Lamoreux,* and citing to the then-current edition of Witkin's Summary of California Law, the court commented in dicta that "[w]hether [the common law release rule] applied also to concurrent tortfeasors was open to question." (See 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 70, p. 142 [noting that the court rejected the release rule for successive tortfeasors, "leaving

Since enactment of section 877, at least three decisions by courts of appeal have recognized that the common law applies when section 877 does not. (*Thomas v. General Motors Corp.* (1970) 13 Cal.App.3d 81, 86 [acknowledging that "[e]xcept as modified by section 877, the former law still applies, and a release of one joint tortfeasor is a release of all," but applying common law rule that a covenant not to sue does not release joint tortfeasors to a case involving multiple defendants who executed covenant after judgment was entered and an appeal filed]; *Watson v. McEwen* (1964) 225 Cal.App.2d 771, 775 [satisfaction of judgment against negligent lessee barred action against landowner; section 877 held not applicable because it applies to a release before judgment, and therefore release rule applied, because "[e]xcept as modified by that section, the rule is that a release of one joint tortfeasor is a release of all"]; *Apodaca v. Hamilton* (1961) 189 Cal.App.2d 78, 82 [pre-section 877 release of negligent driver of dump truck also released rock company that negligently overloaded the truck; "[w]hatever fault may be found with it, we do not question that, except as it may have been modified

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open the question as to concurrent tortfeasors"].) However, in light of the court's later discussion in *Mesler*, we do not believe this statement constitutes sufficient authority for us to refuse to follow the release rule here.

Similarly, in *Far West Financial Corp. v. D & S Co.*, *supra*, 46 Cal.3d 796, which held that a good faith settlement under sections 877 and 877.6 bars a non-settling defendant from pursuing any claim for total equitable indemnity against the settling defendant, the court discussed the effect of a non-good faith settlement in terms of permitting the non-settling defendant to pursue its equitable indemnity claim. (*Id*. at p. 816 ["If the trial court determines that the proposed settlement is not within the reasonable range of the settling tortfeasor's proportional liability and would leave the less culpable tortfeasor to bear an unfair share of the loss, the trial court may withhold its good faith imprimatur, and the less culpable tortfeasor will be able to proceed with its equitable indemnity claim".]) The court did not mention the common law release rule or its effect of barring the plaintiff's suit against the non-settling concurrent tortfeasor defendant. But that point does not appear to have been raised, and we do not construe the court's brief comment as authority departing from the release rule.

by section 877 . . . , 'The rule in this state, applied to many cases, is that a release of one joint tortfeasor is a release of all'"].)

Our research has disclosed only one decision, *River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986 (*River Garden Farms*), which holds that after the passage of section 877, the common law release rule does not apply to non-good faith settlements. In *River Garden Farms*, the trial court approved minors' compromises for claims against three of four tort defendants, but made no determination whether the settlements were in good faith under section 877, subdivision (a). The case was decided before the 1980 enactment of section 877.6, which specified the procedure for determining good faith. Following the trial court's denial of its motion to dismiss, the fourth defendant petitioned for a writ of mandate, contending that the settlements were not in good faith. (*River Garden Farms, supra*, 26 Cal.App.3d at p. 989.) In a holding later endorsed by the California Supreme Court (see *Tech-Bilt, supra*, 38 Cal.3d at pp. 495-496), the court held that the definition of good faith must be consistent with the purposes of section 877 -- equitable sharing of costs among tortfeasors and encouragement of settlement -- and thus must involve consideration of whether the settlement is within a reasonable range of the settling defendant's share of liability. (*River Garden Farms, supra*, 26 Cal.App.3d at p. 998.)

But in a separate portion of the opinion, the court also held that section 877 abrogated the release rule, even for settlements not in good faith. The court reasoned that section 877's purpose of encouraging settlements "cannot co-exist with the rule releasing all upon the release of one," because "[a]n injured party would have little motivation for settling with one defendant at the possible sacrifice of his claim against the other." (*Id.* at p. 999.) The court declared: "Only its utter demise and its supersession by statutory controls are consistent with the

settlement goal of the contribution law. Section 877 implicitly but firmly dispatched it." (*Id.* at p. 1000.)

We find several problems in this analysis. First, it ignores the express language of section 877, which by its terms applies to a release only when "given in good faith before verdict or judgment." (§ 877.) Given this language, it is difficult to see how section 877 can be read to "implicitly . . . dispatch[]" the release rule for non-good faith settlements occurring after verdict or judgment. Second, it does not accord proper respect for stare decisis, and fails to consider that, although the California Supreme Court certainly appeared to be moving toward abandoning the release rule entirely, it did not do so. Third, as we have noted, in *Mesler* (decided after *River Garden Farms*), the California Supreme Court necessarily acknowledged that the release rule remained part of California common law. For all these reasons, we find *River Garden Farms* unpersuasive.[22]

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[22] Aidan cites two other cases in support of the notion that section 877 abrogated the release rule for non-good faith settlements, *Milicevich v. Sacramento Medical Center* (1984) 155 Cal.App.3d 997, and *General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435. Neither decision is helpful.

Milicevich held "that a satisfaction of a judgment, entered pursuant to Code of Civil Procedure section 998, does not work a discharge of the liability of defendants who are not parties to the agreement." (*Id*. at p. 1000.) Aidan relies on a short portion of the opinion in which the court refers to "the demise of the doctrine that any release is a retraxit." (*Id*. at p. 1003.) But he fails to include the accompanying footnote, which states that "the doctrine has *largely* been supplanted by statute," citing, "e.g., [section] 877." (*Id*. at p. 1003, fn. 8, italics added.) We agree that the doctrine has "largely been supplanted by statute," because the doctrine does not apply to settlements that qualify under section 877. But for settlements that do not qualify, common law controls, and that common law includes the rule, never authoritatively repudiated by the California Supreme Court, that a release for consideration of one concurrent tortfeasor releases all.

In *General Motors Corp. v. Superior Court, supra*, the court held that in giving a release to the negligent driver in a car accident under terms that also released "'any and all person, firms, and corporations,'" the plaintiff forfeited its claim against General Motors. The court applied the rule of section 877, subdivision (a), that "a release given to one tortfeasor shall not discharge any other party from liability unless its *terms so*

Because the California Supreme Court never repudiated the release rule with respect to concurrent tortfeasors, such as Dr. Nishibayashi and the Hospital who act independently to cause a single injury, and because *Mesler* necessarily assumed the continued viability of the release rule as applied to the issue presented in that case, we are unable to hold, as Aidan requests us to do, that the rule is no longer part of California common law. We agree with many of Aidan's arguments. 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 (Civ. Code, § 1431.2, subd. (a); see *Dafonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603), and by the adoption of the right of partial indemnity on a comparative fault basis among multiple tortfeasors (*American Motorcycle, supra*, 20 Cal.3d at p. 598).

But our role as an intermediate appellate court in a case such as this is not to disregard controlling Supreme Court precedent, or to purport to find in sections

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provide." (*Id.* at p. 439.) Because the court did not specifically mention in its opinion that the release was subject to a good faith determination, Aidan suggests that the opinion stands for the proposition that the section 877, subdivision (a), applies to a non-good faith settlement. But the more reasonable assumption is that the release was given in good faith under section 877, subdivision (a), in that the court "reject[ed] the trial court's conclusion that . . . section 877, subdivision (a) requires a release agreement to specifically identify the tortfeasors to be released." (12 Cal.App.4th at p. 439.) In any event, nothing in the opinion intimates that the court purported to hold that the common law release rule had been statutorily abrogated for non-good faith settlements.

877 and 877.6 an implicit abrogation of that precedent with respect to non-good faith settlements in violation of the statutory language. Rather, our role is to "defer[] to [the California Supreme Court] for any reconsideration of the doctrine." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 388.) We do so here, and urge the California Supreme Court to repudiate the release rule once and for all.[23]

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[23] Aidan argues that even if the common law release rule applies, his settlement should be construed to be a covenant not to sue. We disagree. First, the judgment recites that Aidan "released for consideration defendant[] . . . Nishibayashi." Second, Aidan did not raise this issue in the trial court, and has thus forfeited it. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.) Third, in any event, the language of the release simply does not permit such an interpretation. The agreement is entitled, "Settlement Agreement and Release." It provides in relevant part: "In consideration of the payments set forth in Section 2 and the agreement to attend and participate at trial, as set forth in Section 1.7, Plaintiff hereby completely releases and forever discharges the Nishibayashi Defendants and Insurer for any and all past, present or future claims, demands, [etc.] which the Plaintiff now has, which are the subject of the Complaint." The document repeatedly refers to "this release." It is true that the agreement contemplated that Aidan would execute a *separate* covenant not to record or execute any judgment that might be entered against Dr. Nishibayashi, but such a separately-executed covenant did not transmute the "Settlement Agreement and Release" into a covenant not to execute or sue.

Aidan also contends that because the settlement with and release of Dr. Nishibayashi did not become final until the court approved the minor's compromise, which occurred after the jury's verdict, the common law release rule does not apply. According to Aidan, the rule does not apply after a verdict in which the jury has allocated fault, because it can be objectively determined whether the settlement amount paid by one joint tortfeasor is actually received in satisfaction of the jointly caused harm. However, we find no such limitation in the language of the controlling California Supreme Court opinions. Indeed, the rationale of the rule was based not on an objective assessment of whether the settlement paid by one joint tortfeasor actually satisfied the entire harm, but on the artificial presumption that, by law, the plaintiff was deemed to have received the settlement in full satisfaction (see *Mesler, supra,* 39 Cal.3d at p. 298; *Ash, supra,* 24 Cal.2d at pp. 659-660), regardless of whether such a full satisfaction was the intent of the parties to the settlement. (*Bee, supra*, 217 Cal. at pp. 101-102.) Under that rationale, the timing of the settlement (pre- or post-verdict) makes no difference. We

We note, as well, that should the release rule be abandoned, there is an important related issue, namely, the extent of the set off to which the non-settling defendant is entitled after a codefendant enters a settlement that does not qualify under section 877. The Hospital asserts that the rule stated in section 16 of the 3d Restatement of Torts should be adopted as the common law rule applicable to non-good faith settlements. Under that rule, "[t]he plaintiff's recoverable damages from a jointly and severally liable tortfeasor are reduced by the comparative share of damages attributable to a settling tortfeasor who otherwise would have been liable for contribution to jointly and severally liable to defendants who do not settle." On the other hand, Aidan argues that the non-settling tortfeasor should receive only a pro tanto (i.e., dollar for dollar) set off, regardless of whether the settlement was in good faith. We express no opinion on the subject, and leave it to the Supreme Court, should it repudiate the release rule in this case, to determine the proper approach.

Because the release rule applies, we reverse that portion of the judgment imposing joint and several liability on the Hospital for Aidan's economic damages. However, because the Hospital remains liable for its proportionate share of noneconomic damages, we address, in the unpublished portion of our opinion, the Hospital's contentions that substantial evidence fails to prove that the Hospital's negligence was a substantial factor in causing Aidan's brain damage, and that the trial court improperly instructed on causation and influenced two jurors to change their votes.

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agree with Aidan that such an application of the rule makes little sense, but it is for the California Supreme Court to change it.

II. Substantial Evidence of Causation

The Hospital contends that there is insufficient evidence to prove that its negligence was a substantial factor in causing Aidan's brain damage. The substance of its argument is that the proof of causation is speculative, because no evidence proves that, absent the Hospital's negligence in failing to stress the need for a follow-up appointment or to educate the Leungs, Dr. Nishibayashi or the Leungs would have acted differently or Aidan would not have suffered brain damage.

We disagree. The evidence permitted the jury to infer that the Hospital's negligence as a whole -- not implementing Alert 18, not properly assessing Aidan's risk of hyperbilirubinemia, not adequately educating the Leungs on that risk, not adequately educating them on detecting jaundice, and not adequately educating Nancy Leung on breast feeding -- formed a substantial factor that, along with Dr. Nishibayashi's negligence, caused Aidan to suffer kernicterus and resultant brain damage. Of course, in judging the sufficiency of the evidence to prove causation, we review the entire record in the light most favorable to Aidan, drawing all reasonable inferences in support of the judgment. (*612 South LLC v. Laconic Limited Partnership* (2010) 184 Cal.App.4th 1270, 1279.)

"'The substantial factor standard [of causation] is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.' [Citation.] Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor' [citation], but a very minor force that does cause harm is a substantial factor [citation]. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79 (*Bockrath*).)

As here applicable, "the element of causation is satisfied when a plaintiff produces sufficient evidence 'to allow the jury to infer that in the absence of the defendant's negligence, there was a reasonable medical probability the plaintiff would have obtained a better result. [Citations.]' [Citation.]" (*Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1314-1315 (*Espinosa*).) Moreover, "'causation in fact is ultimately a matter of probability and common sense: "[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable [persons] may conclude that it is more probable that the event was caused by the defendant than that it was not. . . . If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case." [Citation.]'" (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029-1030 (*Raven H.*).) Further, the question is not whether each individual strand of the Hospital's negligence, viewed in isolation, was a substantial factor in causing Aidan's injury, but whether the entire fabric of that negligence, viewed as a whole and in conjunction with Dr. Nishibayashi's conduct, was a substantial factor.

We begin with Dr. Nishibayashi's negligence, because it provides essential context for considering the effect of the Hospital's negligence.

Dr. Bhutani concluded that Dr. Nishibayashi's conduct fell below the standard of care because, in part, Dr. Nishibayashi should have examined Aidan on the Thursday of Nancy Leung's telephone call to his office and obtained first-hand information on Aidan's condition. The evidence proved that this negligence constituted a substantial factor in causing Aidan's brain damage.

Based on Aidan's extraordinarily high bilirubin reading when admitted to Huntington Memorial Hospital on the Sunday after his Monday birth, and on the normal progression of bilirubin levels in infants, Dr. Bhutani believed that Aidan probably had hyperbilirubinemia on Thursday. He also believed, based on Aidan's dehydration and loss of two pounds in weight by Sunday, that Aidan had likely lost weight by Thursday. However, as of Thursday, Aidan probably had not suffered brain damage. As testified by Dr. Shapiro (and confirmed by Dr. Bhutani), Aidan's level of bilirubin was probably not toxic until the Leungs noticed symptoms of kernicterus (lethargy and refusing to eat) late Saturday or early Sunday. The evidence was undisputed that hyperbilirubinemia is easily remedied by phototherapy (even the Hospital's nursing expert, Heidi Funk, so testified) or, in advanced cases, by an exchange transfusion. Indeed, the ease of treating the condition is one of the reasons it is so rare. Dr. Bhutani testified that when hyperbilirubinemia is treated, it is probable that the condition will not result in brain damage. Thus, as of Thursday, it is probable Aidan's condition could have been reversed.

The evidence left little doubt that had Dr. Nishibayashi examined Aidan, he would have diagnosed and treated his condition. His lack of concern in response to Nancy Leung's telephone call was based on the description of Aidan's condition relayed by his nurse, Julie Donnelly: that Aidan was "slightly yellow but nursing well" and had "good yellow stools and [was] voiding well." But substantial evidence showed that he was not provided with accurate information. Nancy Leung testified that Donnelly simply asked whether Aidan was "feeding," "pooping," and "peeing," to which Nancy replied yes. Nancy denied that she described that Aidan was doing these things "well," and denied saying that Aidan was "voiding well." Moreover, in Nancy's account, she informed Donnelly of

Aidan's chapped lips (a possible sign of dehydration) *after* Donnelly had already spoken to Dr. Nishibayashi. Donnelly's written message memorializing the conversation with Nancy does not mention chapped lips. Of course, on appeal we resolve all conflicts in the evidence in favor of the judgment, and thus Nancy's version of the conversation prevails and constitutes substantial evidence that Dr. Nishibayashi made his diagnosis on incomplete and inaccurate information.

Had Dr. Nishibayashi actually examined Aidan on Thursday, substantial evidence proved that he would have diagnosed Aidan's hyperbilirubinemia. He reasonably could be expected to have observed Aidan's progression of jaundice (it was already recognizable to the Leungs in Aidan's eyes). He would have observed Aidan's chapped lips (as noted at Huntington Memorial Hospital, that condition was not normal and was related to dehydration). He would have learned that Aidan had lost weight (Julie Donnelly testified that infants are weighed when examined at Dr. Nishibayashi's office, and Dr. Bhutani opined, based on Aidan's weight loss of two pounds when admitted to Huntington Memorial on Sunday, that Aidan had lost weight by Thursday). Such a weight loss was a danger sign suggesting a need for intervention -- according to Dr. Bhutani, by that date Aidan should have been gaining, not losing, weight. It is also reasonable to expect that Dr. Nishibayashi would have inquired of Nancy Leung and obtained accurate first-hand information from her on the topics Julie Donnelly inquired about: whether Aidan was feeding properly and his stools were adequate to expel bilirubin. He also may have done a bilirubin test (according to Dr. Nishibayashi, it would have been "good medical practice," though not required). Thus, it is certainly probable that a pediatrician of 26 years' experience such as Dr. Nishibayashi would have detected Aidan's hyperbilirubinemia and treated it. As Dr. Bhutani testified, if Dr. Nishibayashi had seen Aidan on Thursday, "there would have been a recognition

of a need for further testing [and] there would have been a finding that [Aidan] had a high level of bilirubin and he needed treatment." Had he done so, Aidan's condition would not have progressed to kernicterus.

We now turn to the Hospital's negligence, which worked in combination with Dr. Nishibayashi's negligence to cause Aidan's brain damage.

According to Arthur Shorr, the Hospital was negligent by failing to implement any recommendations of Alert 18 to reduce the risks of a newborn developing kernicterus. Dr. Bhutani found the Hospital negligent in related ways: the nursing staff failed to instruct the Leungs that a follow-up appointment within two to three days after discharge was mandatory, failed to properly assess Aidan's risk for developing hyperbilirubinemia and discuss that risk with the Leungs, and failed to adequately educate the Leungs on detecting jaundice and Nancy Leung on proper breast feeding. Viewing the evidence in the light most favorable to the judgment and drawing reasonable inferences from that evidence, these various components of negligence exacerbated each other and worked with Dr. Nishibayashi's negligence to cause Aidan's brain damage in two ways. First, absent the Hospital's negligence, it is likely that Aidan's condition would not have progressed to hyperbilirubinemia. Second, absent the Hospital's negligence, it is likely that once Aidan's condition did progress to hyperbilirubinemia as of Thursday, Aidan would have been examined and treated by Dr. Nishibayashi.

Aidan was born at the Hospital on a Monday and released Tuesday, approximately 24 hours later. As compared to other infants, he was at an increased risk of developing hyperbilirubinemia and kernicterus: he showed four major clinical risk factors (being male, being of East Asian descent, being breast fed, and having bruises), and one minor risk factor (being less than 38 weeks gestation -- 37 weeks, 2 days -- based on the ultrasound of the fetus taken by Nancy Leung's

obstetrician). According to Dr. Bhutani, the Hospital nursing staff should have recognized Aidan's risk, communicated it to the Leungs, and stressed that a follow-up appointment within two to three days of discharge was mandatory. It may be inferred that knowledge of Aidan's risk -- that he had an elevated danger of developing a condition from unmonitored jaundice that could lead to brain damage -- was information that would have materially changed the way his parents attended to Aidan once he was discharged from the Hospital. Had the Hospital not been negligent in failing to implement Alert 18, had the nursing staff not been negligent in failing to properly assess and inform the Leungs of Aidan's risk, and had the staff also not been negligent in failing to inform the Leungs that a follow-up appointment within two to three days after discharge was mandatory, the likelihood of Aidan's hyperbilirubinemia occurring and going untreated would have been substantially reduced. The Leungs would have understood the heightened need to monitor Aidan's breast feeding and stool, to examine him for jaundice, and to have his risk for hyperbilirubinemia assessed in an appointment no later than Thursday (three days after his Monday discharge).

This negligence was exacerbated by the Hospital's negligent failure to provide sufficient coaching to Nancy Leung on breast feeding. Nancy testified that while in the Hospital, she told two of the attending nurses, Susan McBroom and Margaret McClammy, she was not sure she was breast feeding correctly. At least three times, she told them that she was concerned Aidan was not getting enough milk. The nurses encouraged her to keep trying, but only once did she receive any coaching. For five to ten minutes, as Nancy put Aidan to her breast, Nurse McClammy instructed her, helped her position him, and observed that he seemed to latch on. According to Dr. Bhutani, however, the relevant standard of care required more: the coaching should have ensured that an actual transfer of milk

from mother to infant was taking place, and should have ensured that Nancy knew how to detect that such a transfer was occurring as by the sound of Aidan swallowing and the feel of his body as he did so. Dr. Bhutani testified that specific instructional coaching was essential: "it's not a manual that you can use to assemble a bicycle."

Nancy testified that although she fed Aidan every two to three hours at the Hospital and later at home as recommended, she did not know to what extent Aidan was actually feeding. In reality, he was not getting sufficient milk. By the time he was admitted to Huntington Memorial Hospital the Sunday after his birth, he had lost two pounds and was dehydrated. The jury could reasonably infer that one cause of Aidan not getting enough milk was the Hospital's failure to adequately coach Nancy on ensuring an actual transfer of milk was taking place. In turn, the evidence proved that not getting enough milk was a primary cause of Aidan's brain damage: adequate milk intake prevents hyperbilirubinemia, because it creates sufficient stool to expel bilirubin. Because the Hospital's negligence in failing to adequately coach Nancy on breast feeding was a cause of Aidan's inadequate milk intake, it could also be reasonably inferred that such negligence was a cause of Aidan's hyperbilirubinemia, kernicterus, and brain damage.

Another exacerbating omission by the Hospital identified by Dr. Bhutani was the failure of the nursing staff to teach the Leungs how to detect jaundice in the skin. According to Dr. Bhutani, the nursing staff should have taught the Leungs the same method of detection used by nurses and residents: a simple matter of pressing an index finger on the infant's forehead, and later the sternum, for a short period to blanch the skin, then lifting the finger and examining the whitened skin for any yellowish tinge. This omission was significant because, according to Dr. Bhutani, Aidan's extraordinarily high bilirubin level of 41 when

admitted to Huntington Memorial on Sunday and the normal progression of bilirubin in infants suggested that Aidan likely had recognizable jaundice for at least two days before Nancy Leung's Thursday call to Dr. Nishibayashi's office. The jury could reasonably infer that if the Leungs had been taught to recognize jaundice in the skin by the simple test described by Dr. Bhutani, and if they had been instructed on Aidan's increased risk for hyperbilirubinemia and the imperative of a timely follow-up appointment, they would have tested Aidan and recognized his jaundice sometime before Thursday and requested (or insisted) on an appointment. The evidence showed that such a request (or demand) for an appointment would have been met: according to Julie Donnelly, Dr. Nishibayashi's nurse, the doctor's practice was to see and examine an infant when a parent expressed concern and requested an appointment. At such an appointment, Aidan's condition could easily have been assessed and treated.

Besides being able to infer that Aidan's condition would not have progressed to hyperbilirubinemia absent the Hospital's negligence, the jury could also infer that the Hospital's negligence caused an appointment on the Thursday of Nancy Leung's telephone call to Dr. Nishibayashi not to occur. In this way, too, the Hospital's negligence was a substantial factor in causing Aidan's brain damage.

As applied to Aidan, the information on jaundice that the Hospital provided the Leungs in the manual and other sources was misleadingly incomplete. The manual described jaundice in part as "a common condition in newborn infants" and stated that "[i]n most instances, the jaundice is so mild that it can be ignored [and] usually will disappear without treatment." Of course, given Aidan's risk of developing kernicterus, any sign of jaundice was a cause for concern and could not be ignored. The manual mentioned that "[w]hen the bilirubin level becomes too high, jaundice can be dangerous to your baby's developing nervous system," but it

described this dangerous condition as occurring "very rarely." For Aidan, however, the risk was much higher. In terms of evaluating the risk, the manual stated only that "[t]he level at which jaundice may be dangerous depends on many factors: your baby's age, whether he was full-term or premature, and whether he has any other medical conditions." Although it mentioned the minor risk factor of premature birth, it did not mention the major risk factors displayed by Aidan: male, East Asian descent, breast feeding, and bruising. Indeed, the manual was affirmatively misleading as to the presence of Aidan's bruises: it stated that bruises to the baby's head and face after birth "will heal in a few days and [are] not dangerous to your baby." The manual communicated no information suggesting that Aidan belonged to a small class of infants at high risk of jaundice reaching dangerous levels.

Not knowing of Aidan's increased risk, the Leungs reasonably interpreted the manual as conveying the message that, like most infants, Aidan was in no real danger. Based on that understanding, they did not question the erroneous advice Nancy received from Dr. Nishibayashi's nurse, did not insist on Dr. Nishibayashi seeing Aidan immediately, and acceded to waiting until the scheduled Monday appointment. Had Nancy requested or insisted on an appointment, one would have occurred: as already noted, Julie Donnelly testified that if a concerned parent called and asked for an appointment, Dr. Nishibayashi's practice was to see the child.

Thus, the jury could reasonably infer that the Hospital's negligence in failing to inform the Leungs of Aidan's heightened risk of kernicterus from unmonitored jaundice, exacerbated by its misleadingly incomplete (as to Aidan) instruction on jaundice and its failure to stress the importance of an early follow-up appointment to monitor Aidan's bilirubin level, combined with Dr. Nishibayashi's negligence to

cause the Leungs not to obtain an immediate appointment with Dr. Nishibayashi on Thursday. Indeed, it is difficult to imagine that new and attentive parents such as the Leungs, had they been aware of the heightened risk that their infant might be on track to suffer irreversible brain damage and that his jaundice needed to be assessed, would not have taken Aidan to his pediatrician (or some other health care provider) when the Leungs noticed definite warning signs on Thursday (yellowish eyes indicating jaundice and chapped lips perhaps indicating dehydration).

As we have already noted, substantial evidence proved that, if a Thursday appointment had occurred, Dr. Nishibayashi would have diagnosed and treated Aidan's hyperbilirubinemia. Thus, the Hospital's negligence, which (along with Dr. Nishibayashi's negligence) caused an appointment on Thursday not to occur, also caused Aidan's condition to progress to kernicterus and brain damage.

Causation is a "'matter of probability and common sense'" (*Raven H., supra*, 157 Cal.App.4th at p. 1029), based on "'ordinary human experience as to the probabilities of the case.'" (*Id.* at p. 1030.) Viewing the entire record in the light most favorable to the judgment, drawing all inferences in support, and considering the interrelated nature and exponential effect of the Hospital's negligent omissions as a whole, a rational trier of fact could conclude that such negligence played more than a merely "'negligible or theoretical'" role (*Bockrath, supra*, 21 Cal.4th at p. 79) in the events that led to Aidan's kernicterus. To a reasonable medical probability, absent the Hospital's negligence, Aidan "'would have obtained a better result'" (*Espinosa, supra*, 31 Cal.App.4th at p. 1315), in that his condition would not have progressed to hyperbilirubinemia, or at the very least he would have been seen and treated by Dr. Nishibayashi on Thursday.

The Hospital cites two recent cases to support its argument that the evidence of causation is too speculative and that common sense inferences are inadequate. Neither is helpful.

In the first, *Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, the plaintiffs were injured in a natural gas explosion when they attempted to light a water heater pilot light. The odorant of the natural gas had been absorbed as it traveled through stainless steel pipes, and the plaintiffs were unaware that their attempt to bleed off air from one of the pipes resulted in a dangerous buildup of gas. The issue was whether the gas company's failure to warn of odor fade was a substantial factor in causing plaintiffs' harm. (*Id.* at p. 1596.) The Court of Appeal held that the failure to warn was not a substantial factor, because plaintiffs failed to prove that they would have received any such warning: "Plaintiffs were required to establish a substantial link, or nexus, between the failure to warn and their injuries. Instead of introducing evidence to establish a link between the two, plaintiffs relied on common sense and common experience to convince the jury that if a warning had been issued, the accident would have been avoided. In doing so, the trial court allowed the jury to use hindsight to conclude that plaintiffs would have acted differently if they had *known* of odor fade. As explained above, mere knowledge is not enough to establish causation *because it ignores the lack of evidence that any warning issued would have reached plaintiffs.*" (*Id.* at p. 1602, italics added.)

Of course, here there is no question that the omitted warnings would have reached the Leungs -- the Hospital's negligence was in failing to provide warnings specifically to *them*. And there is little doubt that they, after receiving such warnings, would have acted differently to ensure that Aidan remained healthy. Indeed, it would defy common sense to believe that attentive parents of a newborn

such as the Leungs would not heed a warning that their baby was at risk of suffering irreversible brain damage from unmonitored jaundice, and would not take reasonable steps -- ensuring adequate feeding and stool, testing for jaundice, and insisting on an examination when danger signs appear -- to prevent any harm to the child.

The second decision, *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, is equally inapposite. In *Bowman*, this court found the evidence insufficient to prove that defective brakes on a dump truck were a substantial factor in causing the driver to collide with a motorcyclist, because the record contained no direct or circumstantial evidence indicating that the truck driver applied the brakes before the accident. Rather, the evidence showed simply that the truck driver did not see the motorcyclist. (*Id.* at pp. 312-314.) We find nothing in this decision helpful in resolving the present case. As we have detailed above, a chain of reasonable inferences supports the jury's finding that the Hospital's negligence was a substantial factor in causing Aidan's brain damage.

III. Comment and Verdict Finding on Causation

The Hospital contends that the trial court misinformed the jury on causation and wrongly influenced two jurors (Jurors Nos. 8 and 11) to change their votes from "No" to "Yes" in response to the question of the special verdict form regarding whether the Hospital's negligence was a substantial factor in causing Aidan's injury. The record is to the contrary.

A. Comment on Causation

1. Background

As to the Hospital, Dr. Nishibayashi, Nancy Leung, and Kevin Leung, the special verdict form asked the jury to answer "yes" or "no" to the question whether the named actor was negligent in the care or treatment of Aidan (questions 1, 3, 5, 6 and 8); if so, whether that actor's "negligence [was] a substantial factor in causing harm to [Aidan]" (questions 2, 4, 7, and 9); and, given that "100% represents the total negligence that was the cause of [Aidan's] harm[,] . . . [w]hat percentage of the 100% is due to the negligence [of each named actor], if any" (question 16).

After the jury foreperson announced that the jury had reached a verdict, the court examined the special verdict form at sidebar with the attorneys and noted that there was an inconsistency. As completed, the verdict form answered "yes" to whether the Hospital, Dr. Nishibayashi, and the Leung's were negligent, "yes" to whether Dr. Nishibayashi's negligence was a substantial factor in causing Aidan's injury, and "no" to whether the negligence of the Hospital and the Leungs was a substantial factor. However, despite the "no" answer to whether the Hospital's and the Leungs' negligence was a substantial factor, the verdict inconsistently, in apportioning the "total negligence that was the cause of [Aidan's] harm," specified percentages not only for Dr. Nishibayashi (55 percent), but also for the Hospital (40 percent), Nancy Leung (2.5 percent), and Kevin Leung (2.5 percent).

The court stated: "I'm going to have to explain to them, if [the Hospital and the Leungs are] not a substantial factor, the number [reflecting their percentage of negligence in causing Aidan's harm] should be zero. If they were a substantial factor, they have to answer the prior question yes [which asked whether each individual's negligence was a substantial factor in causing Aidan's harm]."

Counsel for the Hospital responded, "I think you do, too," and the attorneys for Dr. Nishibayashi and Aidan agreed.

The court then instructed the jury as follows: "Okay, ladies and gentlemen, after all that time, I appreciate how hard you've worked, you don't have a verdict yet. It is internally inconsistent. Let me explain to you what the problem is. Although you find in question No. 1 that the hospital was negligent, in question No. 2, you find that negligence was not a substantial factor in causing the harm. In the last question, however, you attribute 40 percent of the negligence to the hospital. If it is not a substantial factor, that number should be zero. If it is a substantial factor, then the answer to question No. 2 should be yes. But it's one or the other, okay. You can't find them not a substantial factor but then 40 percent responsible. So I'm going to ask you to go back and figure out what you really meant or what you really want, and adjust the form accordingly. Okay? All right, thank you, ladies and gentlemen."

Immediately after the jury retired, the Hospital's attorney stated, "Just for the record . . . , and I don't know if the court wants to clarify this, but it was also inconsistent with regards to Mr. and Mrs. Leung [because] they were not found as a substantial factor as well." The court had the jury return, and then instructed: "Let me rephrase. You need to do this not only with respect to the hospital but with respect to Mr. and Mrs. Leung as well. If you have found that a party's negligence was not a substantial factor, then the number -- the responsibility for the negligence should be zero. *If you find, however, that there is some fault to be attributed to them, then you have to find they were a substantial factor in causing the harm*. So with respect to anybody that is inconsistent such as that, and that includes the hospital and I believe Mr. and Mrs. Leung, you need to go back and figure out which of your options you're choosing. If I neglected to say anything

about Mr. and Mrs. Leung, it was a mistake on my part earlier. I thought I'd said it, but the lawyers pointed out I didn't, okay." (Italics added.) The Hospital's attorney did not object to the court's comments. The jury retired and returned with a verdict, the polling of which we discuss below in connection with the contention that the court coerced two jurors into changing their votes on causation.

2. Discussion

Characterizing the italicized statement above as a legally erroneous instruction on causation, the Hospital contends that it was not required to object to preserve the alleged error. According to the Hospital, the challenged comment told the jury that if it found any fault, regardless of whether that fault played any role in causing Aidan's brain damage, it had to find that the responsible party was a substantial factor in causing Aidan's injury. The Hospital's interpretation is, at best, strained.

When the court gives an instruction to the jury that is incorrect on the law, no objection is needed. (*Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1, 7 (*Lund*); see Code Civ. Proc., § 647.) If, however, the instruction is correct on the law, "but is '"too general, lacks clarity, or is incomplete"' [citations], a party may challenge the instruction on appeal only if it had asked the trial court to give a clarifying instruction." (*Lund, supra,* 31 Cal.4th at p. 7; see *Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 520.)

Here, the court's comment was not an instruction on the law, but part of larger directions on how to correct an inconsistency in the verdict form. Construed, as it must be, in light of the specific questions and findings on the verdict form to which it referred, as well as the other relevant jury instructions (*Fuller-Austin Insulation Co. v. Highlands Ins. Co.* (2006) 135 Cal.App.4th 958,

1005 [jury instructions must be construed as a whole]), the challenged statement was correct.

The inconsistency in the verdict was the same for the Hospital and the Leungs -- the verdict reflected findings, in response to specific questions, that the individual negligence of the Hospital and the Leungs was not a substantial factor in causing Aidan's injury, but also, in response to Question No. 16, contained an allocation for each of them of a percentage of the "total negligence that was the cause of Aidan's . . . harm." The court first correctly informed the jury of the inconsistency in the verdict form regarding the Hospital and correctly stated the resolution: if the Hospital's negligence was not a substantial factor in causing Aidan's injury, then the Hospital's allocation of negligence in Question No. 16 should be zero; if the Hospital's negligence was a substantial factor, then the answer to question No. 2, which asked whether the Hospital's "negligence [was] a substantial factor in causing" Aidan's injury, should be yes.

Having neglected to mention the inconsistency in the verdict form as to the Leungs, the court almost immediately sought to clarify by having the jury return and stating that the jury "need[ed] to do this [referring to appropriately correcting the responses in the verdict form on either causation or allocation of negligence] not only with respect to the hospital but with respect to Mr. and Mrs. Leung as well." The court continued: "If you have found that a party's negligence was not a substantial factor, then . . . the responsibility for the negligence [referring to Question No. 16, which asked for an allocation of the total negligence that caused Aidan's injury] should be zero. If you find, however, that there is some fault to be attributed to them [referring to a finding under Question No. 16 that they shared a percentage of the total negligence that caused Aidan's harm], then you have to find they were a substantial factor in causing the harm." The jury had been correctly

instructed at the close of the case pursuant to CACI No. 430 on the definition of substantial-factor causation, and pursuant to CACI No. 406 that it must "assign[] percentages of responsibility to any person listed on the verdict form whose negligence or other fault was a substantial factor in causing Aidan Leung's harm."

Thus, in context, the challenged statement was simply a shorthand way of communicating that before assigning a percentage of the total negligence that caused Aidan's brain damage to an actor listed in Question No. 16 (or, as the court said, "if you find . . . some fault to be attributed to them"), then the jury first had to find the actor's negligence to be a substantial factor in causing Aidan's brain damage (or, as the court said, "then you have to find they were a substantial factor in causing the harm"). The court did not misstate the law on causation, but rather correctly directed the jury on how to resolve the inconsistencies in the completed verdict form. At worst, the court's direction was incomplete or lacked clarity. To preserve any claim of error, the Hospital was obligated to object; its failure to do so forfeits its contention. (*Lund, supra,* 31 Cal.4th at p. 7.)

In any event, on much the same reasoning, even if we were to construe the challenged comment as an incorrect statement of the law, it is not reasonably probable that a different result would have been reached in the absence of the error. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) The Hospital's interpretation of the court's comment -- that if the jury found *any* fault it *must* find substantial-factor causation -- is based on isolating it from the entire record of which it is a part. That the Hospital's counsel did not seek to clarify the point strongly suggests what is otherwise apparent: in light of the entirety of the relevant record (especially the specific questions and findings on the completed verdict form to which the comments were directed), no one, the jury included, would have

reasonably understood the court's comments to eviscerate the concept of substantial-factor causation on which the jury had earlier been instructed.

B. Polling the Jury

1. Background

Following the court's directions on how to correct the inconsistencies in the verdict findings, the jury retired, and then returned again with a verdict. The verdict form contained the same responses as before, except that now it answered "yes" to whether the negligence of the Hospital and the Leungs were substantial factors in causing Aidan harm. The court stated, "Okay. It appears to be correct this time." The clerk then read the verdict.

The Hospital asked that the jury be polled. When the clerk polled the first 10 jurors with respect to the "yes" answer to question 2 (whether the Hospital's negligence was "a substantial factor in causing harm" to Aidan), seven jurors answered "yes," and 3 jurors (including Juror No. 8) answered "no." When it was Juror No. 11's turn to answer, the juror asked, "Is this the Hospital?" Juror No. 4 interjected that it was. Juror No. 11 then responded, "Yes." The court, also attempting to clarify, stated, "Okay. This is substantial factor, question no. 2." Juror No. 11 then said, "No."

At that response, the court stated, "Okay. Then you don't have a verdict, Ladies and Gentlemen." Juror No. 11 then stated, "I'm sorry. Yes."

The court then had the clerk ask the question again, beginning with Juror No. 11, and urged all the jurors to pay attention. When the clerk asked the question again (whether the Hospital's negligence was a substantial factor in causing Aidan's harm), Juror No. 11 answered "Yes," but then Juror No. 12 answered "No." The court noted "[y]ou still don't have a verdict then. There are

still four no's . . . Juror No. 2, Juror No. 3, . . . Juror No. 8 and Juror No. 12." Juror No. 8 then responded, "I was a 'yes.' I apologize for that." On inquiry by the court, the juror stated again, "No. 8 is a 'yes.'"

The court had the entire panel polled again. This time, nine jurors, including Juror Nos. 8 and 11, answered "yes" when asked whether their verdict was that the Hospital's negligence was a substantial factor in causing Aidan's harm. The same nine jurors answered affirmatively on the remaining polling questions, thus confirming the special verdict.

2. Discussion

Pointing to the lengthy and contentious deliberations, the Hospital contends that the court singled out the "No" votes, thus signaling that they were holding up a verdict and coercing Juror Nos. 8 and 11 into changing their votes. The Hospital asserts that the court should have sent the jurors out for further deliberations. (Code Civ. Proc., § 618 ["If upon inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no disagreement is expressed, the verdict is complete and the jury discharged from the case."])

By failing to object to the court's comments and to the polling procedure, the Hospital has forfeited its contention. "Any challenge to the verdict based on the polling must be asserted before the jury is discharged if the purported defect is apparent and could be corrected, or else the challenge is forfeited." (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1130; see *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 262-268; *Henrioulle v. Marin Ventures, Inc.* (1978) 20 Cal.3d 512, 521.) The Hospital contends that the purported error could not have been cured. But even in the Hospital's telling, the court's comments were only inferentially coercive. As we have noted, the court

simply identified the "No" votes by juror number, a fact already apparent to the other jurors from the polling itself. Any suggestion that the court's comment was coercive could have been cured by an objection before any further polling, a clarifying admonition from the court, a reiteration of the duty of each juror to decide the case for him- or herself, and a direction to retire to deliberate so as to confirm how each juror voted on each question. The contentiousness of prior deliberations did not obviate the curative effect of such a course.

In its reply brief, the Hospital contends that further deliberations would have resulted in greater pressure on the dissenting jurors to change their votes. However, further deliberations, as the Hospital noted in its opening brief, was precisely what section 618 provided for: the section states that "[i]f upon inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again." We conclude that the Hospital has forfeited its contention that the verdict is invalid because Juror Nos. 8 and 11 were coerced into changing their votes.

Even if the Hospital had not forfeited the contention, we would find no coercion in the court's comments. The record shows that initial confusion in responding to the polling, not coercion, was at work. Juror No. 11 was confused about the question, asking, "Is this the Hospital?" and answering "Yes," then "No," then apologizing and answering "Yes" again. Similarly, Juror No. 8 explained, "I was a 'yes.' I apologize for that," and on immediate inquiry by the court, stated again, "No. 8 is a 'yes.'" In response to further formal polling, Juror Nos. 8 and 11 reiterated their "Yes" responses. Nothing in this record suggests that the jurors' comments indicating initial confusion and their subsequent confirming of their yes votes in response to renewed polling should not be taken at face value. The Hospital's contention that the jurors were coerced is purely speculative.

DISPOSITION

The judgment is reversed insofar as it imposed joint and several liability on the Hospital for Aidan's economic damages, and affirmed insofar as it imposed several liability on the Hospital for Aidan's noneconomic damages. Otherwise, the judgment is affirmed. Aidan's cross-appeal is dismissed as moot. Each side shall bear its own costs.

CERTIFIED FOR PARTIAL PUBLICATION

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.