

# The New Uniform Standard for Instructional Error on Appeal

In *Soule v. General Motors*, 8 Cal.4th 548 (1994), the conflicting standards for reviewing instructional error, as discussed in Monday's column, were squarely implicated. The court had to confront one claim of error based on the giving of an erroneous instruction and another claim of error on the refusal of a correct instruction that should have been given. In both instances, the court found that error indeed had occurred at trial but held that both errors were not prejudicial.

The erroneous-instruction issue involved instructing the jury on the ordinary consumer expectations standard for judging a product's defectiveness (see *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 418 (1978)) in a case involving an alleged design defect that was not within the ordinary consumer's expectations.

However, after weighing the *LeMons* factors in light of the showing of actual prejudice required by *Watson*, the Court found that the giving of the instruction was non-prejudicial because the consumer expectations theory had received virtually no play during the trial. *Soule*, 8 Cal.4th at 570-71.

The refused instruction related to the causation issue at the heart of the plaintiff's design defect case. General Motors asked for the instruction in order to fully explain the plaintiff's burden of proof. The court found that the instruction was a correct statement of the law, that it was supported by the evidence and that it should have been given. *Soule*, 8 Cal. 4th at 572-73.

Against that backdrop, the result under the *Phillips* line of authority seemed preordained: Reversal would be required because the refusal to instruct would be deemed inherently prejudicial. Indeed, the Supreme Court observed that General Motors had cited "substantial authority" indicating that the refusal to give its causation instruction required a reversal. *Id.* at 573.

Yet, after examining General Motors' authorities and the case law dealing with instructional errors generally, the court expressly disapproved of the inherently prejudicial line of authority engendered by *Phillips*. The court then held that:

■ The alleged prejudice flowing from instructional errors should be weighed under the type of factorial analysis set forth in *LeMons*;

■ Reversal for alleged instructional error could only be had if a *Watson* type of actual prejudice showing was made (that

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Appellate counsel must now show the prejudice from the giving or refusing of an instruction.

is, that it was more probable than not that a different result would have obtained absent the error). *Soule*, 8 Cal.4th at 576-81.

When drawing the line in favor of a uniform standard requiring a showing of actual prejudice, the court looked to its recent decision in *People v. Cahill*, 5 Cal.4th 478 (1993), which had abrogated the traditional rule that admission of an involuntary confession was reversible error per se.

In *Cahill*, the court had determined that the admission of such a confession was not a structural defect in the trial mechanism (such as improper denial to counsel, conflicts of interest, ineffectual waiver of jury trial right or discrimination in voir dire) that would require automatic reversal. Rather, as long as a party can present evidence, cross-examine witnesses and present argument before a jury, then the right to a jury trial is preserved.

In *Soule*, the court reasoned that if the improper admission of evidence against a criminal defendant (even evidence as damning as a confession) was not inherently prejudicial, then the erroneous refusal of a proffered jury instruction in a civil case could not be ruled inherently prejudicial either. Thus, courts may not treat a particular category of civil instructional error as giving rise to reversible error per se. Instead, any allegation of prejudicial error must be supported by specific indications of prejudice appearing in the trial record.

The extent to which *Soule* toughens up the standard of review on the refusal to instruct is perhaps most starkly illustrated by the case itself. The failure to give an instruction on a key causation principle would have required a reversal under the prejudice per se approach evinced by cases such as *Phillips*.

Does this mean that appellate counsel should retreat from arguing instructional errors as a ground for reversal? No. What it means is that counsel who intend to mount an argument for reversible error based on the refusal to give an instruction must make a particularized showing of actual prejudice by looking to the factors in *LeMons*, and must explain why, in light of those factors, the result at trial would have been different if the refused instruc-

tion had been given. If this cannot be done, then counsel should consider jettisoning a claim of instructional error and arguing some other ground for reversal.

Thus, when evaluating the merits of an argument based on the refusal to give a particular instruction, appellate counsel should take note of:

■ The degree of conflict in the evidence as that conflict relates to the subject covered by the instruction;

■ The emphasis given at trial to the subject of the instruction;

■ Any indications that the jury was confused, misled or needed additional guidance on the subject of the instruction;

■ Whether the jury's vote was a close one;

■ How carefully or completely the subject of the instruction was covered by other instructions; and

■ The arguments of counsel to the jury on the subject of the instruction.

The *Soule* case provides an illustration of how these factors will be analyzed by a court to minimize the allegedly prejudicial impact of refusing an instruction. But these same factors can be emphasized to maximize that impact as well.

For example, consider a case where the refused instruction relates to a key liability or damage issue and the jury's vote on liability or damages is close — say, nine to three, where a swing of one juror could have changed the outcome. What if appellate counsel can also show that the instructions given did not adequately cover the liability or damage issue, and, further, that the jury asked for a rereading of the instructions or testimony on the issue covered by the refused instruction? Also, what if the issue covered by the refused instruction was hotly contested at trial and specifically emphasized by counsel for both sides in argument?

With facts like these, counsel can argue that the refused instruction would have played a prominent role in the jurors' deliberations and that there is a reasonable probability that the outcome would have been different. These are the kinds of factors that must be present to meet the reversible error standard set forth in *Soule*.

Under any circumstances, however, appellate counsel in civil cases must now bear in mind that the less rigorous "prejudice per se" standard set forth in *Phillips* is a thing of the past. If the argument for reversal leaves off after showing that the refused instruction was a correct statement of the law and supported by substantial evidence, it will not be sufficient to satisfy the actual-prejudice showing the California Supreme Court has now required.