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Important Changes in Handling Of Instructional Errors on Appeal

Whether the debate concerns the language of a particular instruction or if a particular instruction be given, jury instructions are a subject of intense scrutiny in many trials.

Given the pivotal role that instructions often play in closing argument and in juror deliberations, this scrutiny is understandable. Precisely because of the tactical import of instructions, appellate lawyers take a very careful look at the instructional phase of the trial when looking for grounds for reversal of a judgment. See Martin, "Erroneous Jury Instructions: Trial Counsel Make Your Record," 14 C.E.B. Civ. Litig. Rptr. 329 (Sept. 1992).

First of two parts.

Errors relating to the instructional phase of the trial are, in turn, among the most frequently urged grounds for reversal. This two-part article focuses, first, on certain distinctions counsel could rely on in the past and, second, on the new uniform standard established recently by the California Supreme Court.

Until recently, there was some disparity of treatment with respect to instructional errors, depending on the type of instructional error under review. Where the alleged error concerned the giving of an erroneous instruction, appellate courts insisted on a showing of actual prejudice—involving the weighing of a variety of factors — before pronouncing the error sufficiently prejudicial to warrant reversal. See *Pool v. City of Oakland*, 42 Cal.3d 1051, 1069-70 (1986); *Seaman's Direct Buying Service Inc. v. Standard Oil Co.*, 36 Cal.3d 752, 770-71 (1984).

The typical factors to be weighed are set forth in *LeMons v. Regents of University of California*, 21 Cal.3d 869, 876 (1978), and include: (1) the degree of conflict in the evidence on the critical issues; (2) whether the respondent's argument to the jury may have contributed to the instruction's misleading effect; (3) whether the jury asked for a rereading of the challenged instruction or evidence related to it; (4) the closeness of the jury's verdict; and (5) whether other instructions were given that may have remedied the alleged error.

However, where the error concerned the refusal to give a proper instruction that was supported by the evidence, a more relaxed standard for showing prejudice emerged in California cases. The refusal to give such an instruction was viewed as "prejudicial per se" and, without more, deemed sufficient to warrant reversal. See, for example, *Phillips v. G.L. Truman Excavation Co.*, 55 Cal.2d 801, 808 (1961); *Fish v. Los Angeles Dodgers Baseball Club*, 56 Cal.App.3d 620, 641 (1976).

In *Soule v. General Motors Corp.*, 8 Cal.4th 548 (1994), the Supreme Court looked at these differing standards and dramatically altered the legal landscape for determining prejudice where the refusal to give a requested jury instruction is concerned. *Soule* is significant because it provides for a uniform standard for determining claims of instructional error in civil cases and confirms that all such errors must be evaluated under the prejudicial-error standard that controls the overwhelming majority of errors allegedly occurring at trial.

APPELLATE PROCEDURE: The distinctions of the past have been thrown out.

Under that prevailing standard, the appellant must show that it is reasonably probable a result more favorable to the appealing party would have been reached if the error had not occurred. See, for example, *People v. Watson*, 46 Cal.2d 818, 835 (1956). In the wake of *Soule*, any party urging instructional error of any kind must take cognizance of the factors set forth in *LeMons* and must show, in light of those factors, that the jury would have seen the issues in the case differently in the absence of the instructional error.

The earlier, less rigorous path to reversal for the refusal to give an instruction originally was charted in *Phillips*, where the trial court had refused to give three proper jury instructions covering the defense of contributory negligence. In examining the effect of these errors, the Supreme Court reasoned that if "some evidence of a substantial character" could support the defense, then the refusal to instruct on it was "error of a most serious nature" and "obviously and necessarily prejudicial" as an interference with the right to a jury trial. Therefore the refusal to give the contributory negligence instructions was a miscarriage of justice requiring reversal. 55 Cal.2d at 808.

Given the nature of the instructional error in *Phillips*, there is little doubt that a case for prejudicial error could have been made out had the court required it. At the time, proof of contributory negligence provided an absolute defense in a negligence action, so the alleged error cut off a significant defense that could have — had the jury considered it — materially altered the outcome of the case. But the court did not insist on a showing of prejudice as required by *Watson* and instead labeled the refusal to give the requested instructions prejudicial per se.

The approach of *Phillips* to the evaluation of instructional error — at least with respect to the refusal to give an instruction — provided a potent weapon for appellants. If the appealing party could show that there was some evidence to support a proper instruction that was not given, then the "inherently prejudicial" reasoning of *Phillips* took over and courts of appeal routinely held, in reliance on *Phillips*, that reversal was required.

The appellate court's rejoinder in *Ng v. Hudson*, 75 Cal.App.3d 250 (1977), demonstrates just how compelling a *Phillips*-based argument could be: "Defendant contends that even if it was error to refuse the instruction, it was not shown to be prejudicial under Article VI, section 13 of the California Constitution. This contention must be rejected. As previously stated, it is inherently prejudicial error for a trial court to refuse to give instructions covering each party's theories of the case which are supported by substantial evidence. (*Phillips v. G.L. Truman Excavation Co.*, supra, 55 Cal.2d 801, 808; *Fish v. Los Angeles Dodgers Baseball Club, supra*, 56 Cal.App.3d 620)."

Ng was by no means unique. The list of cases requiring reversal where an

instruction was not given was an impressive one, as the Supreme Court subsequently observed in *Soule*: "Decades old, this principle has been stated, or at least implicitly applied, in a wide variety of situations, ranging from the complete preclusion of a claim or defense (e.g., *Hasson v. Ford Motor Co.*, supra, 19 Cal.3d 530, 548 [contributory negligence]; *Phillips v. G.L. Truman Excavation Co.*, supra, 55 Cal.2d 801, 806 [same]; *Bernal v. Richard Wolf Medical Instruments Corp.* (1990) 221 Cal.App.3d 1326, 1337-1338 [272 Cal.Rptr. 41] [warranty theories in product liability action]; *Paverud v. Niagara Machine & Tool Works* (1987) 189 Cal.App.3d 858, 862-864 [234 Cal.Rptr. 585] [superseding cause]; *White v. Uniroyal Inc.* (1984) 155 Cal.App.3d 1, 29-33 [202 Cal.Rptr. 141] [peculiar risk doctrine]) to mere lack of specificity in relating correct general principles to the particular facts (e.g., *Borenkraut v. Whitten*, *supra*, 56 Cal.2d 538, 544-546 [specific duty of care when priming automobile carburetor]; *Williams v. Carl Karcher Enterprises Inc.* (1986) 182 Cal.App.3d 479, 489-490 [227 Cal.Rptr 465] [affirmative duty to eliminate known dangerous condition in restaurant]; *Ng v. Hudson* (1977) 75 Cal.App.3d 250, 261-262 [142 Cal.Rptr. 69] ["proximate cause" as including aggravation of dormant preexisting condition]; *Self*, supra, 42 Cal.App.3d 1, 10 [defect not "substantial factor" if same injury would have occurred regardless of defect]; see also, e.g., *Lopez v. Ormonde* (1968) 258 Cal.App.2d 176, 180 [65 Cal.Rptr. 513] [refusal of imminent peril instructions; prejudice assumed]; *Edelman v. Zeigler* (1965) 233 Cal.App.2d 871, 883-884 [44 Cal.Rptr. 114] [refusal of res ipsa loquitur instructions; prejudice assumed]). *Soule*, 8 Cal.4th at 574-75."

While *Phillips* itself contained no built-in limits on the reach of its inherent prejudice standard, appellate courts did not follow its holding uniformly. For example, many courts continued to examine the actual prejudice of an alleged instructional error where the jury had been instructed generally on the subject covered by the refused instruction.

In these instances, the appealing party still had to show the probability of a different result in light of the whole record on appeal. *Agarwal v. Johnson*, 25 Cal.3d 932, 951-52 (1979); *Hildebrand v. Los Angeles Ry. Co.*, 53 Cal.2d 826, 831 (1960); *Walbrook Ins. Co. v. Liberty Mutual Ins. Co.*, 5 Cal.App.4th 1445, 1461-62 (1992); *Sesler v. Ghumman*, 219 Cal.App.3d 218, 226 (1990).

In other cases, no such distinction was apparent, with the court of appeal simply applying the *Watson* type of actual prejudice standard used for other issues on appeal when deciding whether the refusal to give an instruction required reversal. See, for example, *Montez v. Ford Motor Co.*, 101 Cal.App.3d 315, 322 (1980); *Wechlo v. Winyard*, 33 Cal.App.3d 990, 996 (1977).

Tuesday: Soule *transforms the landscape: Actual prejudice is now required.*

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