

The General Verdict Rule: Appellate Trap or Opportunity?



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The effect on appeal of a general verdict has been a source of confusion to lawyers and judges alike. For example, many trial lawyers shun the use of special verdict interrogatories in favor of a general verdict in the belief that if the jury returns a favorable verdict, it will be upheld on appeal if at least one of the theories supporting it is factually sufficient and free of error. Indeed, a line of court of appeal cases holds precisely that. However, two recent cases from the California Supreme Court, *People v Guiton* (1993) 4 C4th 1116, 17 CR2d 365, and *Tavaglione v Billings* (1993) 4 C4th 1150, 17 CR2d 608, clarify that, although use of a general verdict will protect a judgment from reversal if factual insufficiency is the only ground for attacking an underlying liability theory, the judgment must be reversed if even one such theory is found to have been affected by legal error.

Consider the following two hypotheticals:

Hypothetical 1: Your client, Croak Cola, sues its chief competitor, Pesky Cola, for slander, libel, and unfair competition. Croak Cola's defamation claims are based on untrue accusations by Pesky officials that Croak Cola employees have secretly adulterated cans of Pesky Cola with used hypodermic needles. Although Croak Cola's unfair competition claims are legally and factually supportable, there is no substantial evidence to establish that Pesky officials actually *made* the alleged defamatory statements. All three liability theories are submitted to the jury. Croak Cola prevails, receiving a \$50 million damage award on a general verdict.

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Hypothetical 2: Croak Cola sues Pesky Cola for slander, libel, and unfair competition. Croak Cola's defamation claims are based on Pesky advertisements asserting that Pesky Cola tastes better and is more refreshing than Croak Cola. Croak Cola's unfair competition claims are legally and factually supportable, and there is no dispute that the advertisements in question were in fact aired by Pesky. However, because the statements in Pesky's advertisements were mere opinion, they are not defamatory as a matter of law. Nevertheless, the trial judge submits all three liability theories to the jury, which awards \$50 million on a general verdict.

Pesky appeals in both cases. What result?

Under the general verdict rule as applied by some court of appeal cases, Pesky Cola would lose its appeal in both cases because there is at least one legally and factually sufficient liability theory, the unfair competition claim, supporting the general verdicts. As discussed below, however, the California Supreme Court's decisions in *Guiton* and *Tavaglione* make clear that Pesky Cola should be able to obtain a reversal and remand for a new trial in the second hypothetical case.

The first verdict will be upheld on appeal because the unfair competition theory is free from error and supported by substantial evidence, and the only basis for attacking the other theories is *factual insufficiency*. However, under the general verdict rule as correctly applied, the second verdict will *not* be upheld on appeal because two of the theories supporting the underlying verdict, the slander and libel theories, were tainted by *legal error*: Pesky Cola's statements that its product tastes better and is more refreshing than Croak Cola were mere opinion and not defamatory as a matter of law, and the jury was therefore improperly instructed on those theories.

General Verdict Rule

Why this distinction between *legal error* and *factual insufficiency* for purposes of appellate review? Essentially, an appellate court will presume that a jury is competent to detect an inadequacy of proof, and therefore will presume that the jury rested its general verdict on a theory supported by substantial evidence. By contrast, a jury is presumably *incapable* of detecting *legal error*. Therefore, if one of the theories potentially supporting the general verdict is tainted by error, the appellate court cannot presume that the general verdict rests on another ground, and reversal of the judgment is required.

This distinction, though not clearly articulated, is supported by a long line of California Supreme Court deci-

sions holding that when it is impossible to determine the basis of a jury's verdict, the judgment must be reversed if the trial court committed legal error in connection with any theory. See *Seaman's Direct Buying Serv., Inc. v Standard Oil Co.* (1984) 36 C3d 752, 774, 206 CR 354, quoting *Robinson v Cable* (1961) 55 C2d 425, 428, 11 CR 377 (“[w]here it seems probable that the jury's verdict may have been based on the erroneous instruction prejudice appears and this court ‘should not speculate upon the basis of the verdict’”); *LeMons v Regents of Univ. of Cal.* (1978) 21 C3d 869, 876, 148 CR 355, quoting *Luque v McLean* (1972) 8 C3d 136, 147, 104 CR 443 (when jury is erroneously instructed on inapplicable theory, “court should not speculate upon the basis of the verdict”); *Henderson v Harnischfeger Corp.* (1974) 12 C3d 663, 673, 117 CR 1 (respondent's contention that erroneous instruction was harmless because of ample evidence to support judgment on separate theory was “misconceived and devoid of merit”; court “should not speculate on the basis of the verdict” when erroneous instruction is given); *Cobbs v Grant* (1972) 8 C3d 229, 238, 104 CR 505 (reversal required when one of plaintiffs' theories should not have been submitted to the jury; “[s]ince it is impossible to determine on which theory the jury verdict rested, we conclude it is reasonably probable there has been a miscarriage of justice”); *Vistica v Presbyterian Hosp.* (1967) 67 C2d 465, 471, 62 CR 577 (judgment reversed when “jury might have misunderstood” instruction); *People v Robinson* (1964) 61 C2d 373, 406, 38 CR 890 (“[i]n civil appeals it has been the invariable rule that reversal is required when it is impossible to determine whether the verdict was based on admissible evidence submitted under correct instructions, or on erroneous determination of questions improperly submitted to the jury”); *Robinson v Cable* (1961) 55 C2d 425, 428, 11 CR 377 (judgment reversed where it was not possible to determine if jury's verdict was based on erroneous instruction).

Some confusion has resulted because the distinction between factual insufficiency and legal error in applying the general verdict rule was not clearly articulated in these cases. A number of court of appeal cases have construed the general verdict rule too broadly, holding that appellate courts may ignore not only assertions of factual insufficiency but also legal error as long as at least *one* liability theory, free from error and supported by substantial evidence, supports the general verdict. Such cases generally cite *Posz v Burchell* (1962) 209 CA2d 324, 25 CR 896, that relied on two California Supreme Court cases, *Gillespie v Rawlings* (1957) 49 C2d 359, 317 P2d 601, and *Tucker v Landucci* (1962) 57 C2d 762, 22 CR 10, in justifying a refusal to review asserted legal error because at least one liability theory supported the verdict. *Gillespie*

and *Tucker*, however, do not support this proposition because they involved general verdicts whose underlying theories were attacked because of factual insufficiency, not legal error.

Nevertheless, a significant number of lower court cases have applied the *Posz* version of the general verdict rule to avoid review of claimed error by finding one liability theory supporting the general verdict, and then refusing to consider whether any other theories submitted to the jury were affected by legal error. One egregious example of this approach occurred in *Liberty Transport, Inc. v Harry W. Gorst Co.* (1991) 229 CA3d 417, 435, 280 CR 159, where the court upheld a general verdict because it found “at least one cause of action properly instructed upon, supported by substantial evidence, and free from error,” even though several of the underlying liability theories were *barred as a matter of law* by the applicable statutes of limitation. 229 CA3d at 430. See also *McLain v Great Am. Ins. Cos.* (1989) 208 CA3d 1476, 1483, 256 CR 863 (declining to review arguments based on other causes of action when breach of contract claim supported general verdict); *Palmer v Ted Stevens Honda, Inc.* (1987) 193 CA3d 530, 536, 238 CR 363 (“[r]eversal is required only when an error probably affected *every* theory of recovery” (emphasis added)); *Khanna v Microdata Corp.* (1985) 170 CA3d 250, 258, 215 CR 860 (holding that general verdict rule “greatly simplifies our task on appeal” since “we are merely required to find that one of the four causes of action alleged by respondent is supported by substantial evidence and is unaffected by error”).

Guiton and Tavaglione

The California Supreme Court's recent decisions in *People v Guiton*, *supra*, and *Tavaglione v Billings*, *supra*, confirm that these lower court opinions have misapplied the general verdict rule. In *Guiton*, the supreme court reaffirmed in a criminal case that a general verdict of guilt can be sustained if one underlying theory of conviction is free from error and supported by substantial evidence, as long as the only basis for attacking the alternate theories of conviction is *factual insufficiency*.

However, the court made clear that if one of the other theories is tainted by *legal error*, the general verdict cannot be sustained. The *Guiton* court reasoned that because juries are “fully equipped to detect” purely factual lack of proof, an appellate court must presume that the jury rested its verdict on a theory supported by substantial evidence. 4 C4th at 1129. On the other hand, if one of the theories submitted to the jury is *legally* erroneous, the appellate court may *not* presume that the jury's verdict rested on another ground because “[j]urors are not gener-

ally equipped to determine whether a particular theory . . . submitted to them is contrary to law. . . . When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." 4 C4th at 1125, quoting *Griffin v U.S.* (Dec. 3, 1991) 116 L Ed 2d 371, 382, 112 S Ct 466.

Soon after its decision in *People v Guiton*, the supreme court issued *Tavaglione v Billings*. Surprisingly, the original *Tavaglione* opinion printed in the advance sheets stated the general verdict rule as set forth in the pre-*Guiton* court of appeal cases, *i.e.*, a general verdict of liability will be affirmed if *any* underlying theory is supported by substantial evidence and unaffected by error. Because of the inconsistency between this dicta and the language from *Guiton* and the other supreme court decisions cited above, the court was urged after publication of its opinion to delete or modify the spurious language.

In response, the supreme court issued a modification reconciling *Tavaglione* with *Guiton*. Before modification, the opinion stated: "[t]he 'general verdict rule' . . . provides that where several counts are tried, a general verdict will be sustained if any one count is supported by substantial evidence and is unaffected by error, despite *possible defects in the remaining counts*." The italicized language was changed to "*possible insufficiency of evidence as to the remaining counts*" (4 C4th at 1157), making clear that a judgment must be reversed if any of the theories submitted to the jury is tainted by *legal error*. The supreme court's modification of *Tavaglione* thus clarifies that the general verdict rule as set forth in *Guiton* is applicable to both civil and criminal cases.

Distinguishing Factual Insufficiency and Legal Error

If *Guiton* and *Tavaglione* are subject to criticism, it may be because the distinction between factual insufficiency and legal error—*i.e.*, the presumption that a jury is "equipped" to detect factual insufficiency but not legal error—is insupportable. Obviously, juries often *do* determine liability on factually deficient theories (see, *e.g.*, *Kruse v Bank of Am.* (1988) 202 CA3d 38, 51, 68, 248 CR 217), and to presume otherwise is essentially to eliminate lack of substantial evidence as a ground for appeal. Ironically, *Guiton* itself vividly illustrates this point, because the court of appeal found that one theory of conviction supporting the general verdict of guilt was factually insufficient. Nevertheless, Justice Mosk in his concurring opinion stated that "a rational trier of fact *could* have found defendant guilty" on the theory that the court of appeal found was purportedly not supported by substantial

evidence. 4 C4th at 1132 (emphasis added). Thus, Justice Mosk possibly reached a conclusion that the *Guiton* majority assumed no reasonable jury could have made—finding sufficient evidence to support a conviction where none existed—calling into question the presumption that "[i]f the inadequacy of proof is purely factual [it is] of a kind the jury is fully equipped to detect." 4 C4th at 1129.

As Justice Mosk's concurring opinion demonstrates, the purported bright line between legal and factual insufficiency is illusory. The question of whether there is sufficient evidence to support a liability finding often rests on whether a particular inference may logically and reasonably be drawn from another fact or group of facts established in an action. Whether a particular inference can be drawn from certain evidence is ordinarily a question of law for determination by the court. *California Shoppers, Inc. v Royal Globe Ins. Co.* (1985) 175 CA3d 1, 44, 221 CR 171. Therefore, it is questionable to presume that in such cases the jury is "equipped" to determine whether those inferences are fairly drawn and, consequently, whether there is sufficient evidence to support a liability finding. *Guiton* itself shows that even supreme court justices sometimes cannot agree on the permissible inferences that can be drawn from a set of facts.

Finally, one might directly attack the distinction between factual insufficiency and legal error in applying the general verdict rule by arguing that, when there is no substantial evidence to support a particular liability theory, it *is* legal error to instruct the jury on that theory. In *Guiton*, the court noted that this argument has been addressed and rejected in *Griffin v U.S.* (Dec. 3, 1991) 116 L Ed 2d 371, 382, 112 S Ct 466, as a "purely semantical dispute." For purposes of the general verdict rule, "legal error" means "a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence." 4 C4th at 1125. *Guiton* stressed, nevertheless, that "unsupported theories should not be presented to the jury" and that while reversal is not *required* because of the general verdict rule, presentation of invalid theories is "error nonetheless." 4 C4th at 1131.

Perhaps in recognition of these analytical problems, the California Supreme Court has left open a major exception to the general verdict rule: The presumption that the jury has not rested its verdict on a factually insufficient ground is *rebuttable*. Accordingly, when "review of the entire record affirmatively demonstrates a reasonable probability" that "an unsupported theory" became the "sole basis of the verdict," the judgment should be reversed. 4 C4th at 1130.

Tavaglione effectively illustrates this point. The supreme court held that the lower court's reliance on the general verdict rule to affirm a judgment was "improper"

when, in connection with a general verdict, the jury made "special findings which assigned specific damage amounts to specific theories of recovery." 4 C4th at 1158. Thus, the lower court erred in affirming a judgment in excess of \$2.25 million while limiting its review to issues pertaining to a \$604,787 component of the judgment. Because the special interrogatories confirmed that the general verdict rested on several other liability theories, the lower court was required to review the legal and factual sufficiency of those theories as well.

Application of the General Verdict Rule

Understanding the California Supreme Court's clarification of the law governing appellate review of general verdicts is critical for both appellate and trial lawyers. The failure to request special interrogatories revealing the specific theory on which the verdict is based has been construed as a waiver of any objection on appeal that the jury based the verdict on a legally or factually deficient theory. After *Guiron* and *Tavaglione*, however, a party should be able—even when special interrogatories have not been requested by that party—to assert that a general verdict must be overturned because one of the theories submitted to the jury was legally deficient.

Anticipating at the trial level how the general verdict rule will be applied on appeal is also important. For example, defense counsel should prefer a general verdict whenever there is a possibility that the trial court has incorrectly instructed the jury or legal error has otherwise tainted one of plaintiff's theories of recovery because, if the appellate court agrees, the entire judgment will be overturned. Thus, in the second *Croak v Pesky* hypothetical trial above, Pesky's counsel may not want to object to a general verdict if he or she is reasonably certain that the alleged statements were not defamatory as a matter of law, because the legal error in submitting the libel and slander claims to the jury may provide a basis for overturning any judgment in *Croak's* favor.

By contrast, if plaintiff's counsel believes that a particular liability theory is novel or possibly affected by legal error, he or she should request special interrogatories that specify (1) the basis for the jury's verdict and (2) clarify how the damages are apportioned among various liability theories, so that a portion of the judgment can be preserved if a particular theory is overturned on appeal. Thus, if special interrogatories are used in the second *Croak v Pesky* trial, the appellate court may be able to affirm the judgment if the interrogatories establish that it rests on the unfair competition claim, and not on the legally erroneous liability theories.

Similarly, when legal error has not occurred with respect to any liability theory but defense counsel believes that a particular theory is unsupported by the evidence, he or she may want to request special interrogatories to establish on appeal that both liability and a specific portion of the damage award were actually based on the factually insufficient theory. Otherwise, the appellate court will decline to consider the sufficiency of the evidence on that theory if any other liability theory is factually supportable.

Thus, in the first *Croak v Pesky* trial, Pesky's counsel should request special verdict interrogatories to establish that the judgment rested in whole or in part on the factually unsupported defamation claims rather than the unfair competition claim that was supported by substantial evidence. Conversely, under the same circumstances, *Croak's* counsel should request a general verdict. Pesky will then have to establish on appeal that every theory of liability was unsupported by the evidence before the judgment will be overturned.

Even when special verdict interrogatories are used—so that the jury makes a specific finding on each liability theory—ambiguities may still remain if the jury renders a general verdict on damages. This is particularly true when the jury finds liability on theories that have different measures of damages, for example, when a general damage award rests on both tort and contract theories.

To avoid this problem, special verdict interrogatories should be submitted regarding both liability and damages. However, the jury must be carefully instructed regarding "no double recovery," and should be asked to render both a general verdict on overall damages and respond to special verdict interrogatories apportioning the damages among the various liability theories. This approach will avoid any contention on appeal that the jury awarded duplicative damages among the various theories.

Conclusion

No doubt some lower appellate courts will continue to cite the general verdict rule as enunciated in *Posz v Burchell*, *supra*, to avoid detailed review of asserted legal error when one factually sufficient theory, unaffected by error, supports a general verdict. Nevertheless, the California Supreme Court's most recent discussion of the general verdict rule in *Guiron* and *Tavaglione* make clear that this approach is incorrect, and in conflict with the uninterrupted line of California Supreme Court cases cited above. Whether the court will be required to expressly overrule *Posz* and its progeny to further clarify the correct application of the general verdict rule remains to be seen.