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Civil Procedure—Specific Exceptions to Charge Needed to Raise Points on Appeal

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RECENT CASES

CIVIL PROCEDURE—SPECIFIC EXCEPTIONS TO CHARGE NEEDED TO RAISE POINTS ON APPEAL

In March 1956, a delivery truck driven by plaintiff Lobalzo collided with a tractor-trailer operated by defendants' employee. Lobalzo sued, contending that the employee's negligence caused the collision. A jury trial was commenced before the Court of Common Pleas, Allegheny County, Pennsylvania. At the conclusion of the court's charge, general exceptions were urged by counsel for both litigants. The jury returned a verdict for the defendants, and the plaintiff sought a new trial, alleging error in the charge. His motion was denied and judgment was entered on the verdict. Plaintiff appealed, on the ground that the charge was erroneous in that it (1) failed to define contributory negligence; (2) inadequately defined proximate cause; and (3) misled the jury by inferring that the plaintiff was contributorily negligent. The Pennsylvania Supreme Court *held*, affirmed; the refusal to grant a new trial was not reversible error when only a general exception was taken, unless basic and fundamental errors, incapable of correction at the trial, were committed. *Lobalzo v. Varoli*, 422 Pa. 5, 220 A.2d 634 (1966).

Early Pennsylvania cases permitted a general exception to preserve parts of a charge for appeal.[1] An 1893 case held:

> A general exception to the charge was all that was necessary. This brought [the error] upon the record, and it was then open to correction in any particular. . . . Upon an appeal the appellant may assign error to every ruling upon the admission or rejection of evidence which was excepted to on the trial, and to any instruction appearing in the charge or any answer to points, whether the particular point had been previously made the subject of an exception or not.[2]

In 1918, *Sikorski v. Philadelphia & R. Ry. Co.*[3] modified this holding. The court relied on section 2 of the Pennsylvania Act of May 11, 1911,[4] stating, "In the taking of a general exception, under the act of 1911, supra, the statute does not demand minute particularization, but it does require that reasons be given."[5] The court therefore held that specific exceptions need not be taken, but that general exceptions must state, with some specificity, what constituted

1. See, *e.g.*, Ward v. B.T. Babbitt, Inc., 270 Pa. 370, 113 Atl. 558 (1921); Roberts v. Philadelphia Rapid Transit Co., 253 Pa. 126, 97 Atl. 1028 (1916); Curtis v. Winston, 186 Pa. 492, 40 Atl. 786 (1898); Rosenthal v. Ehrlicher, 154 Pa. 396, 26 Atl. 435 (1893).
2. Rosenthal v. Ehrlicher, *supra* note 1, at 402-3, 25 Atl. at 436-7.
3. 260 Pa. 243, 103 Atl. 618 (1918).
4. Section 2, insofar as here pertinent, provides:
Exceptions may be taken, without allowance by the trial judge, to any part or all of the charge . . . for any reason that may be alleged regarding the same in the hearing of the court, before the jury retires to consider its verdict, or, thereafter, by leave of the court.
5. Sikorski v. Philadelphia & R. Ry. Co., 260 Pa. 243, 249, 103 Atl. 618, 619 (1918); *accord*, Chamberaeti v. Susquehanna Coal Co., 262 Pa. 261, 105 Atl. 277 (1918).

the alleged judicial error. In interpreting this decision, subsequent courts ruled that specific exceptions were essential.[6] At least one case, however, inferentially refrained from so holding, stating that no appeal could be allowed because defendant "took neither specific nor general exception."[7] The result of *Sikorski* and the cases thereafter has been that, in Pennsylvania, specific exceptions are required.[8] The present rule was stated in *Segriff v. Johnston*,[9] which held that "a party may not sit by silent, take his chances on a verdict, and, if it is adverse, then complain of a matter which, if error, could have been eradicated during the trial if brought to the court's attention properly and timely."[10] In the *Segriff* case, no exception was taken.[11] However, the Pennsylvania courts, and courts of other jurisdictions, treat cases in which no exception was taken in the same manner as if a general exception was taken.[12] These courts hold that specific exceptions are needed in either case. Nevertheless, if the appellate court considers the error in the charge to be "basic and fundamental," no specific exception is needed. In these cases, errors in the charge are reviewable when a general exception or no exception is stated in the trial court.[13] A 1955 Pennsylvania case, which is still authoritative, held that "under a general exception to the charge of a trial judge we will consider only such alleged errors as are basic and fundamental, . . . and could not have been corrected at the trial."[14]

Among the states other than Pennsylvania which have the specific exception rule are New York,[15] New Jersey,[16] Maryland,[17] Ohio,[18] Massachusetts,[19] Minnesota,[20] and Oregon.[21] The United States Supreme Court has also upheld this rule, stating:

6. See Roberts v. Vallamont Traction Co., 270 Pa. 19, 112 Atl. 738 (1921); Commonwealth v. Scherer, 266 Pa. 210, 109 Atl. 867 (1920).

7. Brunetto v. Ferrara, 167 Pa. Super. 568, 572, 76 A.2d 448, 450 (1950). In this case, no exception was taken in the trial court.

8. See generally, Ason v. Leonhart, 402 Pa. 312, 165 A.2d 625 (1960); Rohland v. Nagy, 369 Pa. 186, 85 A.2d 88 (1952); McDonald v. Ferrebee, 366 Pa. 543, 79 A.2d 232, (1951); Mazza v. Berlanti Construction Co., 206 Pa. Super. 505, 214 A.2d 257 (1965).

9. 402 Pa. 109, 166 A.2d 496 (1960).

10. *Id.* at 113, 166 A.2d at 499, quoting with approval Keefer v. Byers, 398 Pa. 447, 453, 159 A.2d 477, 480 (1960).

11. *Id.* at 115, 166 A.2d at 499.

12. See, *e.g.*, Ason v. Leonhart, 402 Pa. 312, 165 A.2d 625 (1960); McDonald v. Ferrebee, 366 Pa. 543, 79 A.2d 232 (1951); Farina v. Saratoga Harness Racing Ass'n, Inc. 20 A.D.2d 750, 246 N.Y.S.2d 960 (3d Dep't 1964); Storms v. City of Fulton, 263 App. Div. 927, 32 N.Y.S.2d 395 (4th Dep't 1942) (*semble*).

13. See Ason v. Leonhart, *supra* note 12; Fox v. Mulvaney, 373 Pa. 498, 96 A.2d 138 (1953); Palmer v. Sunshine Family Laundry Serv., 177 Pa. Super. 595, 112 A.2d 449 (1955).

14. Palmer v. Sunshine Family Laundry Serv., *supra* note 13, at 597, 112 A.2d at 450.

15. Fitzpatrick v. International Ry. Co., 252 N.Y. 127, 169 N.E. 112 (1929).

16. *E.g.*, Lertch v. McLean, 18 N.J. 68, 112 A.2d 735 (1955).

17. *E.g.*, Allen Eng'r Corp. v. Lattimore, 235 Md. 182, 201 A.2d 13 (1964).

18. *E.g.*, Burton v. Durkee, 162 Ohio St. 433, 123 N.E.2d 432 (1954).

19. *E.g.*, Joseph v. Tata, 339 Mass. 600, 161 N.E.2d 763 (1959).

20. *E.g.*, Daigle v. Twin City Ready Mix Concrete Co., 268 Minn. 136, 128 N.W.2d 148 (1964).

21. *E.g.*, Leathers v. Snook, 238 Ore. 177, 393 P.2d 764 (1964).

> In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. When a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial.[22]

The New York decisions in this regard have been more consistent throughout the years than the Pennsylvania decisions. New York courts have repeatedly stated that it is fair to require counsel to call to a judge's attention those specific portions of a charge that counsel considers erroneous.[23] This state has, like Pennsylvania, held that where alleged errors in the charge are "basic and fundamental," no exceptions are necessary.[24] In a 1951 case, the Appellate Division explained the rationale of this practice, holding "[T]he main charge as well as the supplementary charge . . . were basically erroneous and presented the case to the jury on fundamentally wrong theories; and in such cases such errors should be considered even without formal or specific exception."[25] In addition to dispensing with the general rule if the error is "basic and fundamental," New York courts will waive the rule if a close case of liability is involved[26] or "the interests of justice" so dictate.[27] The New York judiciary is liberal in allowing review without specific exceptions, if they deem a charge so inadequate as to preclude a fair consideration by the jury.[28]

Justice Cohen, writing the majority opinion in the instant case, applies the specific exception rule. He states that the court will not review a lower court's refusal to grant a new trial, based on a general exception to a charge.[29] The majority contends that a lawyer must be fully aware of all relevant legal aspects involved in cases in which he serves, and that he cannot "sit idly by," making no specific exceptions, and gaining a new trial if the jury decides against

22. Palmer v. Hoffman, 318 U.S. 109, 119 (1943).

23. See Duane Jones Co. v. Burke, 306 N.Y. 172, 192, 117 N.E.2d 237, 247 (1954); Fitzpatrick v. International Ry. Co., 252 N.Y. 127, 141, 169 N.E. 112, 117 (1929).

24. See Peerless Cas. Co. v. Bordi, 6 A.D.2d 21, 174 N.Y.S.2d 489 (3d Dep't 1958); Thoens v. J. A. Kennedy Realty Corp., 279 App. Div. 216, 108 N.Y.S.2d 882 (1st Dep't 1951), *aff'd*, 304 N.Y. 753, 108 N.E.2d 616 (1952); Zeffiro v. Porfido, 265 App. Div. 185, 38 N.Y.S.2d 393 (1st Dep't 1942).

25. Thoens v. J. A. Kennedy Realty Corp., *supra* note 24, at 223, 108 N.Y.S.2d at 888. In this case, the trial court's charge did not mention what is needed for a binding oral agreement. The Appellate Division said the court should have instructed as to the essential elements needed.

26. See Fields v. City of New York, 4 N.Y.2d 334, 151 N.E.2d 188, 175 N.Y.S.2d 27 (1958); Carroll v. Harris, 23 A.D.2d 582, 256 N.Y.S.2d 715 (2d Dep't 1965); Martinez v. Adelphi Hosp., 21 A.D.2d 675, 249 N.Y.S.2d 1001 (2d Dep't 1964).

27. See Carroll v. Harris, *supra* note 26; Arroyo v. Judena Taxi, Inc., 20 A.D.2d 888, 248 N.Y.S.2d 952 (1st Dep't 1964); Farina v. Saratoga Harness Racing Ass'n, Inc., 20 A.D.2d 750, 246 N.Y.S.2d 960 (3d Dep't 1964); Molnar v. Slattery Contracting Co., 8 A.D.2d 95, 185 N.Y.S.2d 449 (1st Dep't 1959); Juskow v. Tow. Ulanow Swintejo Jana Chrziciela (Cavalry Society of St. John the Baptise, Inc.), 4 A.D.2d 1003, 167 N.Y.S.2d 810 (2d Dep't 1957); Nicotra v. John Hancock Mut. Life Ins. Co., 268 App. Div. 1004, 51 N.Y.S.2d 953 (2d Dep't 1944); Storms v. City of Fulton, 263 App. Div. 927, 32 N.Y.S.2d 395 (4th Dep't 1942).

28. Arroyo v. Judena Taxi, Inc., *supra* note 27.

29. Lobalzo v. Varoli, 422 Pa. 5, 6, 220 A.2d 634, 635 (1966) [hereinafter cited instant case].

his client. The opinion, without explanation, rejects plaintiff's contention that the three alleged errors are "basic and fundamental."[30] A concurring opinion, written by Justice Roberts, states that the problems of trial delays are acute, and that a contrary decision in the instant case would result in calendar congestion and force countless numbers of persons "to endure oppressive delay or to settle claims at a fraction of their value . . . ."[31] He also maintains that the principles involved here are ones with which any lawyer of competence should be familiar. In the final paragraph of his opinion, Justice Roberts states:

> [T]he present case does not present the appropriate occasion for defining what would support the grant of a new trial even in the absence of a specific exception to the charge. Such a definition should, and I trust will, be resolved on a case by case analysis of the particular circumstances and legal principles involved. Thus the approach embodied in today's decision does not in any way restrict the right of an appellate court, under appropriate circumstances, to set aside a verdict and to grant a new trial because of fundamental error in the court's instructions.[32]

Justice Musmanno bases his dissenting opinion on social policy grounds, inquiring why a lawyer is declared at fault in failing to note a trial judge's error, while the judge is not declared to be at fault for perpetrating the error in the first place.[33] He contends that the charge was confusing and that the court should reverse, and he concludes by maintaining that the majority adheres to the notion that "a trial is in the nature of a game of chess, and not a serious enterprise dedicated to the ascertainment of truth and the rendition of justice."[34]

The principles involved herein seem settled: a specific exception to an alleged error in a charge is necessary to raise the point on appeal, unless the error committed is a "basic and fundamental" one. In the latter situation, a general exception or lack of any exception is deemed sufficient. These principles form the framework of the law in this area, but their application is uncertain. Justice Roberts, in his concurring opinion in *Lobalzo*, has stated that a case by case analysis should define what would support a new trial in the absence of a specific exception.[35] This type of analysis is definitely necessary. At present, there are no guidelines in either Pennsylvania or New York to determine what is or what is not "basic and fundamental," or, what is meant in New York by "in the interest of justice." One essential quality of the system of legal precedents is predictability. Here, there is no way to determine what types of errors are so basic as to dispense with the necessity for a specific exception; hence, uncertainty reigns. While it is true that a judicial decision can never be forecast with exactness, both bench and bar need some indicators. These are lacking

30. *Id.* at 7, 220 A.2d at 635.
31. *Id.* at 8, 220 A.2d at 636.
32. *Id.* at 9-10, 220 A.2d at 637.
33. *Id.* at 11, 220 A.2d at 637.
34. *Id.* at 13, 220 A.2d at 639.
35. *Id.* at 9-10, 220 A.2d at 637.

here. Once adequate guidelines are established, then the merit of the specific exception rule can be determined; until that time, attempts in this direction would be futile. In setting guidelines, courts should take a liberal view of what is a "basic and fundamental" error. For example, in the instant case, the errors alleged involved an inadequate definition of proximate cause, a failure to define contributory negligence and an improper inference of contributory negligence. These allegations, if proved, should be considered basic, as they relate to vital problems involved in negligence cases.

One possible solution to the exception problem is the use of uniform jury instructions, also known as pattern jury instructions. These are pre-written instructions to be included, when relevant, in the court's charge. In New York, a Committee on Pattern Jury Instructions of the Association of Supreme Court Justices has written a volume containing many different types of instructions to juries, based on various legal elements.[36] There is a comment section following each recommended charge, suggesting when variations from the instruction might be advisable. In Pennsylvania, the President of the State Bar Association has appointed a committee to evaluate the feasibility of such uniform instructions. By use of pattern instructions similar to those of New York, counsel could submit a list of requests for the charge, along with suggestions for variations, if any, from the pattern instructions. The charge could then be given, in writing, to counsel before being read to the jury. If this were done, counsel could only object to the instructions on two grounds: (1) improper inclusion or exclusion of a pattern instruction, or (2) improper variation of a pattern instruction or lack of variation, as applicable. If counsel had a copy of the charge in advance of its reading to the jury, a copy of the pattern instructions, and an opportunity to compare them, he would not be handicapped or inconvenienced by being required to specifically except.

Another possible solution, if uniform jury instructions are not adopted, is to charge the jurors both before and after the actual trial of issues. Before evidence is taken, the judge could instruct as to the general elements of the case, and after counsel had concluded, the jury could be instructed as to the particulars of the case at hand. Relevant parts of the initial charge could be repeated at that time.[37] It should be noted that some judges, at the present time, do instruct at both the beginning and conclusion of trials.[38]

The proposition that justice demands competent counsel affording the trial judge an opportunity to correct his charge[39] is the basis for the prevailing spe-

36. 1 Association of Supreme Court Justices, Committee on Pattern Jury Instructions, New York Pattern Jury Instructions (Civil) (1965). In New York, the Administrative Board of the Judicial Conference has appointed a committee to formulate pattern jury instructions for use in criminal cases; N.Y.L.J., Nov. 7, 1966, p. 1, col. 6.

37. Prettyman, *Jury Instructions—First or Last?*, 46 A.B.A.J. 1066 (1960).

38. *Ibid.*

39. Corby, *Objections to Jury Instructions; Why, When, How*, 47 Ill. B.J. 763, 771 (1959); Pinsky, *Necessity of Excepting to An Erroneous Charge to the Jury*, 11 Syracuse L. Rev. 234, 244 (1960); Wehrli, *Exceptions to the Charge to the Jury*, 28 F.R.D. 37, 256 (1960).

cific exception rule. This rule dispenses with the need for exceptions where the error charged is "basic and fundamental." However, there are no adequate guidelines to determine what errors are "basic and fundamental," which leaves room for uncertainty in the majority rule's application. Thus, the specific exception rule is not readily acceptable. The minority view, maintaining that general exceptions are sufficient, is ably stated by Justice Musmanno's dissent in the instant case. The argument for this position is that a litigant should not be penalized for his attorney's failure to specifically except.[40] The minority holding is unacceptable because it discourages counsel from delineating his reasons for objecting; this makes it difficult for the trial judge to analyze the precise error alleged and if necessary, correct his charge. On balancing the above considerations, the specific exception rule seems preferable. If coupled with uniform jury instructions, an initial charge prior to the introduction of evidence and/or a clarification of the instances where a general exception will suffice, the specific exception rule can be endorsed without reservation.

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CRIMINAL LAW—INSANITY—THE WISCONSIN "EXPERIMENT" WITH THE ALI TEST

Defendant, after entering a plea of not guilty by reason of insanity, was tried and convicted of arson, burglary and armed robbery in the Circuit Court of Milwaukee County. The defense offered several alternative tests for criminal responsibility as instructions to the jury; that of the American Law Institute,[1] the test advocated by the British Royal Commission on Capital Punishment,[2] the *Durham* test[3] and the *Currens* test.[4] The proposed instructions also included an instruction which would inform the jury that if the insanity plea was successful the defendant would be mandatorily hospitalized[5] until an appropriate mental

40. Instant case at 11, 220 A.2d at 637.

1. Model Penal Code § 4.01 (hereinafter refered to as ALI test); Elements in the instruction: "lack of substantial capacity to appreciate criminality of conduct or lack of substantial capacity to conform conduct to the requirements of the law"; State v. Shoffner, 143 N.W.2d at 460 (1966) (hereinafter cited instant case).

2. Royal Commission on Capital Punishment, 1949-53 Report, para. 333, at 116 (Cmnd. No. 8932). Elements in the instruction: "whether accused was suffering from disease of the mind to such a degree that he ought not to be held responsible," instant case at 460.

3. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); Elements in the instruction: "whether the act is the product of mental illness"; instant case at 460.

4. United States v. Currens, 290 F.2d 751 (3d Cir. 1961); Elements in the instruction: "lack of substantial capacity to conform conduct to the requirements of the law"; instant case at 460.

5. Wis. Stat. Ann. § 957.11(3) (1958) which reads in part: "If found not guilty because insane, or not guilty because feeble minded, the defendant shall be committed to the central state hospital or to an institution designated by the Department of Public Welfare, there to be detained, until discharged in accordance with the law." *Cf.* People v. Lally, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966).