Reforming Jury Instructions

BY CHARLES M. CORK, III

1. The Problem and Possible Systematic Solutions

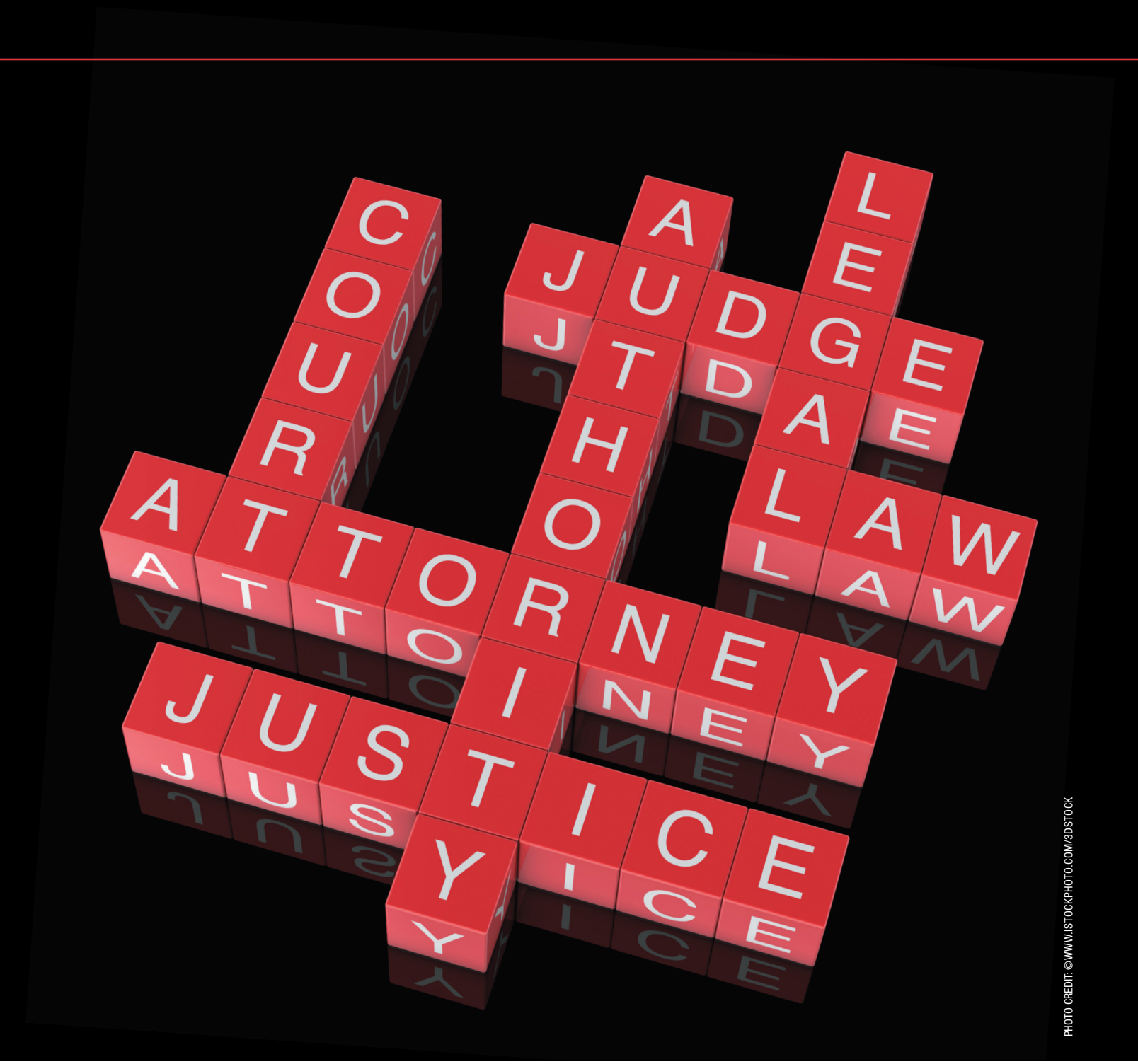
Despite constant revisions over the years, Georgia jury instruction practice still suffers from some significant flaws, not least an important systemic malfunction. Under current practice, jury instructions are intended to state legally correct propositions of law that will shield the result from appellate review rather than to assist juries in performing their true function. They often fail to first focus jurors on the decisive fact issues that they must resolve and then give them those rules, and only those rules, that they need to resolve those issues.

> A complaint not uncommon among jurors is that they just do not understand the judge's charge to the jury — it is too long, disjointed, repetitious and replete with technical terms. A famous playwright once said that judges' instructions are "grand conglomerations of garbled verbiage and verbal garbage." These criticisms are not the fault of either the trial judges or the appellate courts. The trial judge must act at his peril in choosing instructions. He has neither the time nor adequate guidelines to prepare these instructions. His guidelines are often verbose, argumentative appellate opinions that are sometimes conflicting. These opinions were not written for the purpose of setting out a good instruction. They were written to decide the law in a particular case. We know that even the approval of certain instructions by an appellate court is not the equivalent of saying the language in the approved instruction is the best language to be used. The trial judge is also faced with many requests for instructions by opposing counsel. These are usually biased in favor of one side or the other and serve only to further confuse the jury. Again he acts at his peril in failing to grant one or more of these requests because of the danger of reversal in the appellate courts.[1]

In the face of such problems, a number of courts have enacted a variety of reform measures. Some of these would be best characterized as "plain English" reforms, which are good as far as they go for helping jurors understand.[2] Others have gone further and focused their reforms on helping the jury perform its function, which is essentially fact-finding and fact-evaluation. This system is perhaps best developed in Kentucky, where it has been in place for decades,[3] but Massachusetts[4] has also recently gone this route, following the recommendation of the National Center for State Courts.[5] Nothing in this approach should be considered novel or foreign to Georgia, however. The truth is that it is the earliest approach to jury instructions. The first Chief Justice of Georgia, Joseph Lumpkin, described it as his approach in 1855.

> I give it as the result of thirty-four years' experience, that ordinarily, general charges, however abstractly true, are worse than useless — their effect being to misguide, instead of directing the Jury to a right finding; and the only instructions which are worth any thing, are such as enable the Jury to apply the law to the precise case made by the proof. If the case comes within an exception or limitation of a general rule, restrict the investigation until the exact point upon which it turns stands out prominently before the eye of the Jury, stripped of all generalities. Their task is then comparatively easy and safe.[6]

These reforms recognize that the goal of jury instructions is not to qualify jurors to decide questions of law or interpret legal precedents. They are not expected to harmonize excerpts from case law and pass a bar examination on the subject. Jurors will not be able to reproduce a map of the contours of the applicable law simply because those contours cannot be learned by ordinary citizens through cramming. What is



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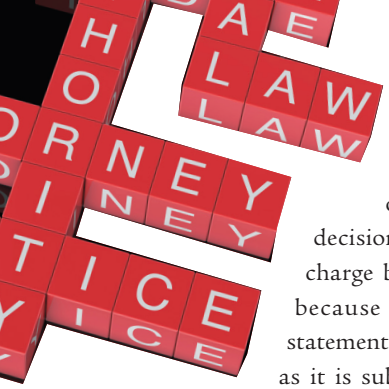
sensible to judges and lawyers, who have had years to learn the contours of the law, will remain opaque to jurors without similar training and experience.

Under this reform, jury instructions instruct jurors on their duty. They call for the jury to do something, rather than to contribute to the juror's random knowledge of law. Instructions are framed around the parties' respective burdens of proof and their contentions. Typically, a complete instruction on liability in a simple tort case would take the form, "D had a duty to do x, y, and z; if you believe from the evidence that D failed to comply with any of these duties and that the failure to comply was a substantial factor in causing P's injuries, you should find for P; otherwise, you should find for D."

2. Attacking Bad Proposed Instructions in Particular Cases

Short of a systematic change as sketched above, jury instructions may be reformed by attacking them, one at a time. The following will hopefully assist in that task.

It is no defense to a charge that it came from the Suggested Pattern Jury



Instructions[7] or an appellate decision.[8] Nor must a charge be given simply because it is a correct statement of law, as long as it is substantially covered in the more general principles.[9]

A. Argumentative Instructions

In my opinion, a challenge to instructions as argumentative is the most underutilized weapon in the trial lawyer's arsenal. The judge should be especially wary of appearing to take sides because "when the judge enters upon the arena occupied by the contending parties, he brings to the combat with the witnesses the overwhelming weight which attaches to the idea of judicial impartiality."[10] The appearance of impartiality must be maintained. "[N]o principle or practice tending to insure the impartial administration of justice and the purity of jurors, should in the slightest degree, be abandoned or impaired."[11] When a trial judge steps out of the role of neutrally stating principles of law and usurps the position of the jury in deciding fact questions or steps into the role of an advocate, the trial judge errs. The judge may do so in several often overlapping ways.

1) Commenting on the Evidence

In the Georgia system, trial courts may not express an opinion on a fact in issue.

It is error for any judge, during the progress of any case, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved. Should any judge violate this Code section, the violation shall be held by the Supreme Court or Court of Appeals to be error, the decision in the case shall be reversed, and a new trial shall be granted in the court below with such directions as the Supreme Court or the Court of Appeals may lawfully give.[12]

Abstraction in jury charges tends to mislead juries.

Therefore, the most adroit and careful use of words is necessary to *hide* from an alert juror intimation of the opinion really entertained by the trial judge ... The purpose of the legal inhibition against the expression or intimation of opinion by the judge is to protect a [party] in his weakness, as well as in his strength, and to preserve inviolable the priceless right of trial by jury. The province of the jury as the exclusive arbiters of facts is holy ground, not to be approached by the judge, even with bare feet and uncovered head. The judge should sit on the bench the calm and impartial incarnation of law, as silent as the Sphinx on contested questions of facts.[13]

Because the constitution reserves fact finding to the jury, a jury instruction may not direct the finding of any fact.[14] For example, under this proscription it is error for the judge to tell a jury:

- "It appears from the evidence that ..."[15]
- What has or has not been proven, if the fact is controverted or disputed in conflict.[16]
- What acts constitute ordinary care.[17]
- What actions by the parties constitute negligence, in the absence of a specific statute which declares certain acts negligence.[18]
- That the defendant's inability to avoid a collision under specific factual circumstances is not negligence.[19]
- That a witness's testimony is reliable.[20]
- That witnesses are presumed to speak the truth.[21]
- That unimpeached witnesses should be believed.[22]
- That the opinion of an experienced and honest expert is entitled to great weight and consideration.[23]
- That evidence for either or both parties was legitimate.[24]

Conversely, the charge should not infer that evidence of a party is weak. Therefore, it is improper to charge a jury:

- That the testimony of an impeached witness should be disregarded unless it is corroborated.[25]
- That circumstantial evidence is weak.[26]

Likewise, jury instructions may not assume facts which are not in evidence.[27]

2) Emphasizing Certain Facts

For the same reasons, jury instructions should avoid discussing the evidence in detail so as to appear to express an opinion on what has been proved, but instead should refer to the evidence only so far as is necessary to present the issues in the case.[28]

Instructions should not single out facts favorable to one party and identify conclusions that could be drawn from those facts, thereby emphasizing those facts above all others.[29] Such facts might include:

- The intelligence of witnesses.[30]
- The number of witnesses on each side.[31]
- That a witness is "positive".[32]
- A witness's certainty in the accuracy of his eyewitness identification of the defendant.[33]
- Selected facts of science.[34]
- That a prior consistent statement bolsters a later statement.[35]

3) Elaborations on General Charges that Suggest an Outcome

A charge should not draw conclusions or inferences from the evidence and should not suggest the reasoning the

jury should employ.[36] It should not express the opinion of the court on the outcome.[37] Therefore, a trial judge should not instruct a jury:

- That the general standard of conduct requires certain conduct under the facts of the case.[38]
- That a plaintiff is charged with equal knowledge of the risks associated with walking on commonly known and naturally occurring conditions, where there is an issue of fact as to whether plaintiff knew the specific hazard on which he fell.[39]
- That the plaintiff is required to resume gainful employment as soon as she reasonably could, given evidence of her potential discomfort.[40]
- To elaborate on the burden as requiring a "definite tilt" on the scales of justice, because this can be misunderstood as imposing a substantial burden.[41]
- That the failure to produce all of the evidence, or the best evidence, that a party should have produced creates a presumption that the claim against them is well founded. Though this instruction is grounded in a statute,[42] giving it is problematic in civil cases,[43] and it is inappropriate in criminal cases.[44] Even in civil cases, the charge on this presumption may be given as a charge "only in exceptional cases," and "the greatest caution must be exercised in its application."[45] The law does not require a party to account for every witness who has knowledge of the facts pertinent to the case.[46]
- That the jury should consider that a party has "more certain and satisfactory" evidence but produces only "weaker and inferior" evidence, to similar effect.[47]

4) Using Partisan Characterizations

Instructions should not adopt the disputed characterizations by one party of the evidence. The judge risks doing so by using partisan language in charges to support a disputed position, instead of letting the lawyers argue the point. A judge should not give charges such as the following:

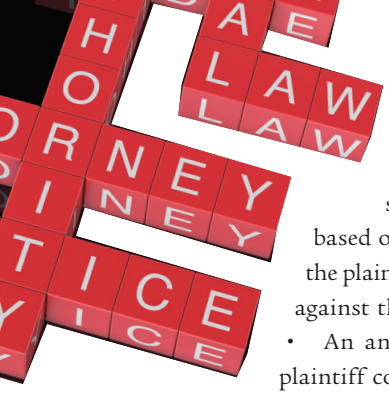
- Characterizing a party's behavior as such as "exaggeration" or "flight"[48]
- Characterizing the requesting party's own conduct.[49]
- Suggesting that plaintiff may have "magnified" his damages unjustifiably.[50]
- Stating that the jury should not "guess or speculate" about the cause of an injury.[51]
- Stating that the jury should not award "speculative" damages.[52]
- Stating that a "mere possibility" of causation is not enough.[53]
- To elaborate on the burden as precluding culpability based on a "bare suspicion".[54]
- Charging that "a verdict cannot be based on mere conjecture, speculation or suspicion, and a possible cause cannot be accepted by a jury as the operating cause unless the evidence excludes all others or shows something in the way of direct connection with the occurrence".[55]
- Charging that a plaintiff may not recover if her testimony is "self-contradictory, vague or equivocal".[56]
- Stating that the jury need not believe "inherently incredible or improbable" testimony.[57]

Jury instructions are intended to state legally correct propositions of law that will shield the result from appellate review rather than to assist juries in performing their true function.

5) Discussing Non-issues and Wrong-issues

A related example of an argumentative instruction is one that instructs on what the law *isn't*, what it *doesn't* require, what rule the jury *shouldn't* apply. Such instructions not only validate a partisan argument, but confuse the jury, which may wonder why they are being told what is not the law. The jury may conclude that the judge believes the non-issues to be applicable. The jury may misunderstand the relationship between the non-rule and the rule they are to apply. The court should avoid charging on non-issues and wrong-issues such as:

- "A seller is under no duty to sell accident proof or foolproof products."[58]
- The duty to provide safe equipment does not require the defendant to have the newest, safest, and best equipment.[59]
- Hindsight is not the standard in a negligence case where liability is based on what defendant knew at time of act.[60]
- The defendant may not be liable for acts or omissions that are based on "an honest exercise of professional judgment".[61]
- Damages should not be a windfall.[62]
- Wrongful death plaintiffs may not recover damages for pain and suffering.[63]



- The verdict should not be based on sympathy for the plaintiff or prejudice against the defendant.[64]
- An annuity that the plaintiff could buy with a recovery.[65]
- The tax consequences of a recovery.[66]
- A plaintiff's contributory negligence in causing own injury that the medical provider negligently treated.[67]

The intent of such charges may be cautionary in some cases, but even so, the courts hold it generally improper to so charge in the absence of a party's wrongful attempt to make issues of such non-issues.[68]

Cautionary instructions are not favored since in most instances they are productive of confusion and tend to restrict the jury's untrammeled consideration of the case ... Where there is nothing either in the record or in the evidence or argument before the court that necessitates such instructions they are not appropriate.[69]

6) Truisms in a Vacuum: The "Mere Fact That ..."

Some words in requested charges, such as "sole," "mere," "merely," and "simply," almost always mark an instruction intended to validate a partisan position. Such instructions fail for one of two reasons: (a) if taken literally, they are rarely adjusted to the evidence because the fact in a phrase such as "the mere fact that" rarely occurs as a "mere fact" in a vacuum; or conversely, (b) if such instructions are construed to apply to the facts of the case, they erroneously state general principles without stating many qualifications and exceptions.[70] They also tend to invade the province of the jury by defining what is not negligence. Therefore, the trial court should not give charges such as:

- "Negligence may not be inferred from the mere happening of an event."[71]
- "The mere fact that an automobile wreck happened and the plaintiffs may have sustained injuries or damages affords no basis for recovery against defendant unless the plaintiffs carry the burden of proof."[72]
- The mere fact of tire blowout does not prove negligence, or a plaintiff's contributory negligence.[73]
- The mere approval of construction project cannot be basis of claim for creating nuisance.[74]
- Negligence or contributory negligence is not shown "merely because of a failure to exercise that degree of care which would have absolutely prevented injury".[75]
- "The jury should not find against the defendant merely because he failed to exercise that degree of care which could have prevented injury."[76]

A trial judge should not state legal points in a vacuum, as if no evidence had been produced, because this can suggest that legal point is universal on the one hand, or that no evidence had been introduced that would bring the case within another legal point. Therefore, the trial court should not charge that:

- "There is no absolute duty on a driver to be able to stop his vehicle within the range of his vision."[77]
- "A man's responsibility for his negligence must end somewhere."[78]

7) Making Observations

Nor should instructions stray from legal principles into general observations that tend to support one party's side of the case. Therefore, the trial court should refuse to charge that:

- "No procedure is infallible."[79]
- Electricity is dangerous and heightens the duty of care.[80]
- "Accidents frequently occur through no one's fault."[81]
- Certain facts are "common knowledge".[82]

B. Overly Lengthy Instructions

Giving lengthy charges appears to be a holdover from pre-1965 law. Before 1965, Georgia law provided: "[i]n any court of record ... a new trial may be granted when the presiding judge may deliver an erroneous charge to the jury ... or refuse to give a pertinent legal charge in the language requested, when the charge so requested shall be submitted in writing."[83] This statute was the product of an "equalitarian and antiprofessional revolt" in the mid-nineteenth century that stripped judges of their right to control the administration of law in court and left them umpires of the law as presented by the parties.[84] As a result, trial judges were required to give "numerous unnecessary and redundant requests" in their instructions to juries.[85] The author submits that the habit has been hard to break. The habit causes several undesirable consequences.

1) Lack of Comprehensibility

The courts have recognized that the total length of a charge adversely affects the jurors' abilities to comprehend it.[86] Moreover, the charge is often an assemblage of separate, shorter, proposed instructions. Because these were not written in the form of a coherent overall instruction, they can give the impression when read to the jury of a rambling "grand conglomeration of garbled verbiage and verbal garbage".[87]

2) Ambiguities and Confusion

The trial judge's assembling of requested instructions into one charge can cause a correct statement of law to appear ambiguous and misleading in the context of other charges.[88] The assemblage frequently results in actual or apparent conflict among legal principles.[89]

3) Conflicting Instructions

The charge should not contain propositions or principles of law that conflict with each other.

A charge containing two distinct propositions conflicting the one with the other is calculated to leave the jury in such a confused condition of mind that they can not render an intelligible verdict, and requires the grant of a new trial.[90]

Conflicting charges result in reversal because the "jury can not be expected to select one part of a charge to the exclusion of another, nor to decide between conflicts therein, nor to determine whether one part cures a previous error, without having their attention specially called thereto, and being instructed accordingly."[91]

4) Repetitious Instructions

Repetitiousness of the instructions carries the possibility of such undue emphasis as to be an unfair, unbalanced statement of law.[92] Repetitious charges can "set impartiality at risk."[93] Repetition can require reversal where it appears from the charge as a whole that there was such undue emphasis as to result in an unfair statement of the law in relation to the [complaining party's] rights.[94] The Georgia Supreme Court has recently disapproved the second sentence of a pattern instruction because it duplicated the first, and thereby unduly emphasized it.[95] Accordingly, it is improper to overemphasize the burden of proof. For example, the trial court should not:

- Repeat an instruction on the burden of proof with each charge on the substantive law.[96]
- Overemphasize the defendant's contention that the plaintiff's case is based on conjecture, speculation, or guess through repeating the burden of proof.[97]
- Give "equal theories" or "evenly balanced evidence" charge,[98] unless perhaps the case is based solely on circumstantial evidence.[99]

5) Inapplicable Instructions

Too many instructions state correct legal points which are for the judge to apply, or at least not for the jury. Thus, the trial court should not give instructions on:

- Rules governing the admissibility of evidence.[100]
- The burden of coming forward with evidence, because the failure to produce evidence will result in a directed verdict.[101]
- Inapplicable means of impeachment.[102]
- The jury's right to consider evidence that has been admitted.[103]

Instead of abstract rules on admissibility, a jury instruction should tell the jury what to do with evidence that has been admitted.[104] In addition to rules of evidence, the trial court should not instruct upon:

- Remedies that the plaintiff is not seeking.[105]
- Rules of contract construction.[106]

These reforms recognize that the goal of jury instructions is not to qualify jurors to decide questions of law or interpret legal precedents.

C. Overgenerality and Abstraction

Abstraction in jury charges tends to mislead juries. Over-general instructions are often mixed with "matters somewhat irrelevant" and tend to bewilder the jury and lead them astray.[107] A charge containing points already covered but expressed in very general terms could be seen to dilute the message of other charges.[108] "When jurors hear words which they do not understand, they discount or ignore those words."[109] For this reason, if no other, courts should police poor charges more aggressively.

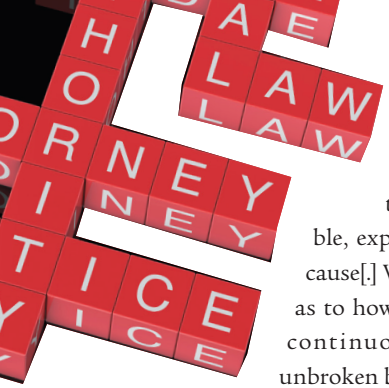
Instructing on general propositions of law, without anchor in the issues in the case, has been recognized to pose the problem that, in the jury room, a juror can argue that there must have been evidence on the point of the charge because the judge would not have given the instruction otherwise.[110] Without knowing what the charge means in the context of the case before them, juries can only speculate about the correct rules governing their deliberations. "A rule of law so general as not to be practically useful at some point where the case presses before the jury, need not be given in charge."[111]

Instead, the trial court should "omit generalized instructions, no matter how instructive, in favor of a short charge mentioning only the few factual issues really disputed by the parties."[112]

3. Causation

The "standard" definition of causation issues from the Suggested Pattern Jury Instructions[113] has particular problems. Various cases and authors have criticized the standard instruction in the Suggested Pattern Jury Instructions.[114] Judge Mikell has described its mind-numbing language as "an affront to communication."[115] According to Justice Weltner, "the second and third sentences of the charge on proximate cause are devoid of content and may be erroneous in that they speak of 'remote' being a type of 'causation.' (In reality, 'remote' traditionally has been the legal conclusion that there shall be no recovery.)"[116] A paraphrase of the second sentence has been held to be confusing.[117] As recorded in an appellate decision, a lay jury supplied the following critique of a variation of the standard charge.

The jury began its deliberations. However, shortly thereafter, the jury submitted a note to the trial court with the following question:



In layman's terms, if possible, explain proximate cause[.] We are confused as to how a natural and continuous sequence, unbroken by other causes, is to be constructed by us. We don't understand and cannot agree on how to do this.

Attached to the jury's note was a copy of the jury instruction on proximate cause given by the trial court, with part of the instruction underlined for emphasis: "Proximate cause is that which is nearest in the order of responsible causes *as distinguished from remote, that which stands last in causation not necessarily in time or place but in causal relation*."[118]

Various recent cases have held that it is not error to refuse to give this charge. One case found that it was adequate to submit the question in terms of whether the medical expenses resulted directly from the acts of the defendant.[119] Another concluded that it was unnecessary in a fairly typical case in which the plaintiff's injuries were either caused by the accident, aggravated by the accident, or not caused by the accident.[120]

The charge on causation should not describe the defendant's actions as a "substantial" factor in causing the loss.[121]

The charge on causation should be adjusted to the real issues in the case. It need not describe the concept of "foreseeability" if there is no real factual issue concerning the foreseeability of injury.[122] But if the duty of care requires that a physician consider unlikely but serious consequences, it is error to instruct that "negligence consists of not foreseeing and guarding against that which is probable and likely to happen, not against that which is only remotely and slightly possible."[123]

A charge on foreseeability need not add an elaboration on what kind of proof satisfies the standard.[124]

It is improper to require the jury to break down its analysis between negligence and proximate cause, at least in those cases in which the issues are intertwined.[125]

Instructions concerning the "dominant cause" are erroneous where there is more than one tortfeasor because they suggest that there can be only one proximate cause of an injury.[126] Under the same circumstances, instructions on finding the defendant liable if it is the "sole proximate cause" are erroneous.[127] The author suggests that the rest of the Suggested Pattern Jury Instruction on causation is subject to the same objection. ●

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Notes

1 *State Hwy. Dept. v. Price*, 123 Ga. App. 655, 657 (2) (1971).

2 See, e.g., The "Plain English" Project of the Alabama Pattern Jury Instructions Committee - Civil, 60 Ala. Lawyer 369 (2007).

3 John S. Palmore & Ronald W. Eades, Kentucky Instructions to Juries (1989).

4 Peter M. Lauriat, Jury Trial Innovations in Massachusetts, 83-84 (2000).

5 G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead, eds., Jury Trial Innovations, 163-64 (National Center for State Courts, 1997)): "Jury instructions are not intended to provide a crash course on governing legal principles so that duly educated jurors can engage in the same decision-making process as a well-trained judge. Rather, jury instructions should present the factual issues to be decided and those legal rules the jury must use in deciding such issues. Most instructions can be clarified by eliminating any unnecessary 'legal education.'"

6 *Haynes v. State*, 17 Ga. 465, 485 (1855). Other jurists have expressed similar thoughts. *Southern Cotton Oil Co. v. Thomas*, 155 Ga. 99, 99 (1) (1923) (Russell, C.J.) ("If possible, the instructions of a trial judge should fit the evidence as snugly as a skillful tailor could make a suit of clothes to fit the human body."); *Ransone v. Christian*, 56 Ga. 351, 357-58 (10) (1876) ("To give generalities, abstract propositions of law, to the jury in charge, would be error; to refuse to give them, and yet read nine sections of the Code without explanation, seems to us equally erroneous. What the jury need is a clear explanation of the law of the case at bar, and its plain application to the facts. If they believe such and such facts to exist, then such is the law."). See *Imperial Foods Supply, Inc. v. Purvis*, 260 Ga. App. 614, 617-618 (2003) (noting these approaches with approval).

7 *Bailey v. Edmundson*, 280 Ga. 528, 534 (7) (2006); *State v. Hobbs*, 288 Ga. 551, 552-553 (2010).

8 *Ga. DOT v. Miller*, 300 Ga. App. 857, 866 (2009) ("Language which would be proper in a headnote or in the opinion by a reviewing court may be improper when embodied in a charge to a jury.").

9 *Ga. DOT v. Miller*, 300 Ga. App. 857, 866 (2009).

10 *Ford v. State*, 2 Ga. App. 834, 837 (1907).

11 *McMichael v. State*, 252 Ga. 305, 309 (1984).

12 OCGA § 9-10-7. A comparable provision for criminal cases appears at OCGA § 17-8-57.

13 *Taylor v. State*, 2 Ga. App. 723, 729 (1907) (emphasis added).

14 *Wadkins v. Smallwood*, 243 Ga. App. 134, 139-40 (2000).

15 *Clark v. Southeast Atlantic Corp.*, 189 Ga. App. 629, 630 (1988).

16 *McLarty v. Embardt Corp.*, 227 Ga. 104 (1970); *Holtzendorff v. De Renne*, 129 Ga. 226 (1907); *Rogers v. Swinks*, 102 Ga. App. 444 (1960); *Combustion Chemicals, Inc. v. Spires*, 209 Ga. App. 240, 241-42 (1993) (referring to defendant's activity as "inherently dangerous").

17 *Cobb County Kennestone Hosp. Auth. v. Crumbley*, 179 Ga. App. 896, 897-98 (1986) (error to instruct that nursing home was not required to have a constant attendant).

18 *Howard v. Hall*, 112 Ga. App. 247 (1965).

19 *Stone's Independent Oil Distributors v. Bailey*, 122 Ga. App. 294, 303-04 (1970).

20 *Starr v. State*, 269 Ga. App. 466, 466-468 (2004) (charging text of child hearsay statute, including the criterion that "the court finds that the circumstances of the statement provide sufficient indicia of reliability").

21 *Blackmon v. State*, 272 Ga. 858, 859-60 (2000) (noting that the court has recommended that trial courts not give the instruction, but affirming in spite of the instruction because under the facts of the case it was "not misleading, since reference was made to the presumption of truthfulness simply as the underlying legal rationale for the jury's initial duty to reconcile a conflict in the evidence without automatically assuming that any witness had committed perjury."); *Noggle v. State*, 256 Ga. 383, 385-86 (1986) (following federal courts in stating that the presumption-of-truthfulness charge should not be given because it "can be misleading and is of little positive value"); *Cupp v. Naughten*, 414 U.S. 141, 145 (1973). A presumption of truthfulness directed by the judge to the jury conflicts with the proposition that the jury may believe or disbelieve all or part of the testimony

of any witness, lay or expert. *Johnson v. Watson*, 228 Ga. App. 351, 353-54, (1997).

22 *Miller v. State*, 174 Ga. App. 703, 704 (1985). *See also Mize v. State*, 173 Ga. App. 368, 368 (1985) (holding that a charge that unimpeached testimony cannot be arbitrarily disregarded is a sound principle of law, though not to be given regarding opinions or when the evidence is in conflict); *Matthews v. Blanos*, 201 Ga. 549, 567-68 (1946) (charge that unimpeached testimony cannot be arbitrarily disregarded "does not mean that the jury are obliged to believe testimony which under the facts and circumstances they discredit").

23 *Merritt v. State*, 107 Ga. 675, 680 (1899). *Accord*, *Hitchcock v. Key*, 163 Ga. App. 901, 904 (1982).

24 *Byrd v. Med. Ctr. of Cent. Ga., Inc.*, 258 Ga. App. 286, 291 (2002) (charge that court could not challenge medical expert's testimony and establish its own standard amounted to support for expert's testimony).

25 *Berry v. State*, 267 Ga. 476, 479-80 (1997) (error was not reversible because other instructions stated that credibility is exclusively for the jury); *James v. State*, 180 Ga. App. 7, 9-10 (1986).

26 *Parks v. Fuller*, 100 Ga. App. 463, 471-72 (3) (1959) (finding four separate elaborations on the burden of proof subject to this criticism).

27 *Turner v. Malone*, 176 Ga. App. 132, 133 (1985) (request assumed financial arrangement between a party and a witness).

28 *Motes v. State*, 192 Ga. App. 302, 305 (1989).

29 *Barber v. Gillett Communications of Atlanta, Inc.*, 223 Ga. App. 827, 832-33 (1996).

30 *McKenzie v. State*, 293 Ga. App. 350, 352 (2008).

31 *Brinson v. State*, 268 Ga. 227, 229 (1997); *Clifford v. State*, 266 Ga. 620, 621 (1996); *Johnson v. State*, 251 Ga. App. 455, 458 (2001). It is difficult to see a logical reason for failing to apply this holding in civil cases.

32 Charging that a "positive witness" is to be believed is dangerous because it tends to invade the province of the jury to determine credibility in the way the jury deems best. *Green v. State*, 253 Ga. 693, 694 (1985).

33 *Brodes v. State*, 279 Ga. 435, 441-442 (2005).

34 *Stanley v. State*, 289 Ga. App. 373, 375-376 (2008).

35 *Boyt v. State*, 286 Ga. App. 460, 468 (2007).

36 *Clark v. Southeast Atlantic Corp.*, 189 Ga. App. 629, 630 (1988) ("A charge which states inferences from the evidence, reasoning, or conclusions is argumentative.")

37 *Ga. DOT v. Miller*, 300 Ga. App. 857, 866 (2009).

38 *Southern R. Co. v. Oliver*, 177 Ga. App. 729, 732 (1986).

39 *Augusta Country Club, Inc. v. Blake*, 280 Ga. App. 650, 657 (2006).

40 *Southern R. Co. v. Oliver*, 177 Ga. App. 729, 732 (1986).

41 *Dyer v. Souther*, 274 Ga. 61, 62 (2001) (error harmless in view of rest of charge). The trial court need not give an instruction that a slight tilt of the scales satisfies the plaintiff's burden. *Sawyer v. Cardiology of Ga., P.C.*, 258 Ga. App. 722, 724 (2002).

42 OCGA § 24-4-22.

43 The Supreme Court has challenged the need for instructions on missing witnesses from an early date in civil cases. *Richmond & D. R. Co. v. Mitchell*, 92 Ga. 77, 83 (1893) ("to put the jury on the lookout for other witnesses, witnesses not introduced or accounted for, was rather a dangerous thing.").

44 *Morgan v. State*, 267 Ga. 203, 205-206 (1996) (no instruction permitted, though counsel may comment, where appropriate, on the absence of key witnesses); *Radford v. State*, 251 Ga. 50, 53 (1983); *Sokolic v. State*, 228 Ga. 788, 790-91 (1972).

45 *Johnson v. Riverdale Anesthesia Assoc.*, 249 Ga. App. 152, 154 (2001).

46 *Bakery Services, Inc. v. Thornton Chevrolet, Inc.*, 224 Ga. App. 31, 33 (1996).

47 *Meacham v. Barber*, 183 Ga. App. 533, 538-39 (1987) (jury might discount deposition testimony rather than live testimony).

48 *Mathis v. Watson*, 259 Ga. 13, 13 (1989); *Gaffron v. Metropolitan Atlanta Rapid Transit Auth.*, 229 Ga. App. 426, 432 (1997); *Sapp v. Johnson*, 184 Ga. App. 603, 605 (1987).

49 *Shaw v. McDonald's Restaurants of Georgia, Inc.*, 191 Ga. App. 583, 584-85 (1989) (party's "slight deviation").

50 *Ammons v. Six Flags Over Georgia, Inc.*, 172 Ga. App. 210, 210-11 (1984) (general charge on credibility should suffice).

51 *Levine v. Choi*, 240 Ga. App. 384, 387 (1999) (disapproving instruction that law does not allow jury to "guess or speculate" about cause of injury); *Ga. DOT v. Miller*, 300 Ga. App. 857, 865 (2009) (adequately covered in basic charge).

52 *Central of Ga. R. Co. v. Mock*, 231 Ga. App. 586, 590 (1998) (charge that speculative damages were not recoverable); *Dept. of Transp. v. Sharpe*, 226 Ga. App. 354, 355-56 (1997), *rev'd on other grounds*, 270 Ga. 101 (1998) (same); *All-Georgia Dev., Inc. v. Kadis*, 178 Ga. App. 37, 41 (1986) (same); *Walker v. Bishop*, 169 Ga. App. 236, 242-43 (1983) (same, regarding general or punitive damages).

53 *Ga. DOT v. Miller*, 300 Ga. App. 857, 865 (2009) (adequately covered in basic charge).

54 *Wallace v. State*, 277 Ga. App. 280, 281 (2006).

55 *Maurer v. Chyatte*, 173 Ga. App. 343, 346 (1985).

56 *Weathers v. Cowan*, 176 Ga. App. 19, 22 (1985) (error because it violates OCGA § 24-4-4 which authorizes the jury to consider all facts and circumstances in determining where the preponderance of the evidence lies). The charge has been approved in variations that allow the jury to consider other evidence that supports the party's right to recover, but held to be erroneous if it ignores other evidence on the same point. *Shennett v. Piggly Wiggly Southern, Inc.*, 197 Ga. App. 502, 503 (1990); *Kane v. Cohen*, 182 Ga. App. 485, 488 (1987); *Weathers v. Cowan*, 176 Ga. App. 19, 20-22 (1985); *Maurer v. Chyatte*, 173 Ga. App. 343, 343-44 (1985).

57 Such an instruction can mislead the jury into believing that the judge believes that the testimony fit this characterization, discrediting a witness in the eyes of the jury. *Tolver v. State*, 251 Ga. App. 297, 298 (2001); *Stephens v. State*, 245 Ga. App. 823, 825-26 (2000); *Brandon v. State*, 241 Ga. App. 887, 888-89 (2000); *Dixie Ohio Express, Inc. v. Brackett*, 106 Ga. App. 862, 872-74 (1962).

58 *Michelin Tire Corp. v. Crawford*, 170 Ga. App. 359, 360 (1984).

59 *Southern R. Co. v. Oliver*, 177 Ga. App. 729, 732-33 (1986).

60 *McCoy v. Alvista Care Home, Inc.*, 194 Ga. App. 599, 601 (1990).

61 *Johnson v. Leibel*, 307 Ga. App. 32, 41 (2010).

62 *Central of Ga. R. Co. v. Mock*, 231 Ga. App. 586, 590 (1998).

63 *Park v. Nichols*, 307 Ga. App. 841, 846 (2011).

64 *Allstate Ins. Co. v. Baugh*, 173 Ga. App. 615, 618-19 (1985).

65 *Brown v. Macheers*, 249 Ga. App. 418, 423 (2001); *Fincher v. State*, 289 Ga. App. 64, 67-68 (2007).

66 *Consolidated Freightways Corp. v. Futrell*, 201 Ga. App. 233, 236-37 (1991).

67 *Overstreet v. Nickelsen*, 170 Ga. App. 539, 540 (1984).

68 *Central of Ga. R. Co. v. Mock*, 231 Ga. App. 586, 590 (1998) (error to instruct that damages should not be a windfall to the plaintiff in absence of plaintiff's effort to seek damages beyond those allowed by law); *Allstate Ins. Co. v. Baugh*, 173 Ga. App. 615, 618-19 (1985) (instruction against basing verdict on sympathy for plaintiff or prejudice against defendant not to be given unless plaintiff injects improper circumstances into the case). See also *Fincher v. State*, 289 Ga. App. 64, 67-68 (2007).

69 *Southern R. Co. v. Grogan*, 113 Ga. App. 451, 457 (1966) (not error to refuse to instruct that individual and corporation are persons of "equal standing and equal worth," that law is no respecter of persons, and that a corporation is entitled to same fair treatment as a private individual).

70 *Price v. State*, 175 Ga. App. 780, 782-83 (1985) (proposed charge stated that police had no right to arrest a person "simply because he walked away" was properly rejected because defendant did not "simply walk away," other events occurred that could justify the arrest).

71 *Alterman Foods, Inc. v. Cathcart*, 172 Ga. App. 809, 810-11 (1984).

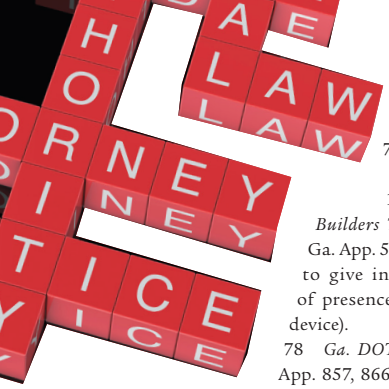
72 *Ga. DOT v. Miller*, 300 Ga. App. 857, 864-865 (2009) (point adequately covered in main charge).

73 *Firestone Tire & Rubber Co. v. Hall*, 152 Ga. App. 560, 564-65 (1979).

74 *City of Roswell v. Bolton*, 271 Ga. App. 1, 7 (2004).

75 *Leverett v. Flint Fuel, Inc.*, 183 Ga. App. 75, 79-80 (1987).

76 *Adams v. Smith*, 129 Ga. App. 850, 854-55 (1973).



77 *Plyler v. Smith*, 193 Ga. App. 114, 116 (1989); *Fouts v. Builders Transport, Inc.*, 222 Ga. App. 568, 572 (1996) (error to give instruction because of presence of traffic control device).

78 *Ga. DOT v. Miller*, 300 Ga. App. 857, 866 (2009).

79 *Ellerbee v. State*, 215 Ga. App. 102, 105 (1994).

80 *Little Ocmulgee EMC v. Lockhart*, 212 Ga. App. 282, 285 (1994).

81 *CSX Transp., Inc. v. McCord*, 202 Ga. App. 365, 369 (1991).

82 *Atlantic C. L. R. Co. v. Clements*, 92 Ga. App. 451, 454-55 (1955).

83 Ga. Code Ann. § 70-207.

84 *Bibb Transit Co. v. Johnson*, 107 Ga. App. 804, 805 (1963).

85 *Gates v. Southern R. Co.*, 118 Ga. App. 201, 203-04 (1968) (stating that as a result of the 1965 change, "these days error is more likely to exist in a too liberal giving of redundant requests than from the exercising of a restrictive discretion in charging them").

86 *State Hwy. Dept. v. Price*, 123 Ga. App. 655, 657-58 (1971).

87 *State Hwy. Dept. v. Price*, 123 Ga. App. 655, 657 (1971).

88 *Continental Research Corp. v. Reeves*, 204 Ga. App. 120, 127 (1992).

89 *E.g.*, *Gunn v. Dept. of Transp.*, 222 Ga. App. 684, 686 (1996) (juxtaposition of internally inconsistent charges was confusing).

90 *MTW Inv. Co. v. Alcovy Props.*, 273 Ga. App. 830, 833 (2005).

91 *Dent v. Memorial Hosp. of Adel*, 270 Ga. 316, 317 (1998); *Luke v. State*, 177 Ga. App. 518, 519 (1986) ("Where the jury is left to pick and choose between the incorrect principle and the correct principle, an assignment of error on the incorrect portion of the charge is meritorious.")

92 *Murray v. State*, 253 Ga. 90, 93 (1984); *Wendlandt v. Shepherd Constr. Co., Inc.*, 178 Ga. App. 153, 155-56 (1986); *Jackson v. Rodriquez*, 173 Ga. App. 211, 213 (1984).

93 *Lewis v. Emory University*, 235 Ga. App. 811, 820 (1998).

94 *Jackson v. Rodriquez*, 173 Ga. App. 211, 213(1984).

95 *Smith v. Finch*, 285 Ga. 709, 712 (2009).

96 *Mortensen v. Fowler-Flemister Concrete, Inc.*, 252 Ga. App. 395, 396-97 (2001).

97 *Parks v. Fuller*, 100 Ga. App. 463, 471-72 (3) (1959) (finding four separate elaborations on the burden of proof subject to these criticisms).

98 *Ga. DOT v. Miller*, 300 Ga. App. 857, 865 (2009) (adequately covered in basic charge); *Pressley v. Jennings*, 227 Ga. 366, 374 (1971) (general instruction on burden of proof adequately covered points of requested instruction that the defendant has no burden to disprove plaintiff's case and the verdict should be for the defendant if the evidence were "evenly balanced"); *Southern R. Co. v. Hand*, 216 Ga. App. 370, 373-74 (1995).

99 *Kyler v. State*, 270 Ga. 81, 84 (1998), *abrogated on other grounds*, *Mann v. State*, 273 Ga. 366 (2001).

100 *Ike v. Kroger Co.*, 248 Ga. App. 531, 533 (2001) (no need to instruct on the admissibility of testimony that was admitted); *Blume v. Richmond County*, 190 Ga. App. 366, 367 (1989).

101 *Macon-Bibb County Hosp. Auth. v. Ross*, 176 Ga. App. 221, 225 (1985) ("There simply is no reason to advise the jury of the plaintiff's burden" to produce expert opinion as to the standard of care in a medical negligence case, since plaintiff's failure to do so can be met by directed verdict).

102 *Randolph v. State*, 246 Ga. App. 141, 145 (2000); *Ga. Farm Bureau Mut. Ins. Co. v. Turpin*, 294 Ga. App. 63, 65 (2008). Impeachment is generally deemed to be adequately covered in a general charge on credibility. *Sharp v. Fagan*, 215 Ga. App. 44, 46 (1994).

103 *Watkins v. State*, 290 Ga. App. 41, 42 (2008).

104 *Maulding v. Housing Auth. of City of Marietta*, 223 Ga. App. 158, 160 (1996).

105 *Sims v. Heath*, 258 Ga. App. 681, 684 (2002).

106 *Travelers Ins. Co. v. Blakey*, 255 Ga. 699, 700 (1986); *Buford-Clairmont Co. v. RadioShack Corp.*, 275 Ga. App. 802, 806 (2005).

107 *Stewart v. Lanier House Co.*, 75 Ga. 582, 599 (1886); *Boyd v. State*, 17 Ga. 194, 201-02 (1855) ("Instead of assisting, [an overgeneral instruction] but too often misleads the Jury.").

108 *Preston v. State*, 282 Ga. 210, 213 (2007) (directing that pattern charge on justification defense in criminal cases not be used).

109 *Boyt v. State*, 286 Ga. App. 460, 466 (2007).

110 *Poland v. C. C. Osborne Lumber Co.*, 34 Ga. App. 105, 108 (1925).

111 *City of Griffin v. Inman, Swann & Co.*, 57 Ga. 370, 371 (1876).

112 *Imperial Foods Supply, Inc. v. Purvis*, 260 Ga. App. 614, 618 (2003).

113 The standard charge has occasionally changed. One version of it is this:
Proximate cause is that which, in the natural and continuous sequence, unbroken by other causes, produces an event, and without which the event would not have occurred. Proximate cause is that which is nearest in the order of responsible causes, as distinguished from remote, that which stands last in causation, not necessarily in time or place, but in causal relation. It is sometimes called the dominant cause.

114 *Atlanta Obstetrics & Gynecology Group, P.A. v. Coleman*, 260 Ga. 569, 571 (1990) (Weltner, J., concurring); *T. J. Morris Co. v. Dykes*, 197 Ga. App. 392, 395-96 (1990); Mikell, Jury Instructions and Proximate Cause: An Uncertain Trumpet in Georgia, 60 Ga. St. B. Jnl. 60, 62, 63 (Nov. 1990); Cork, A Better Orientation to Jury Instructions, 54 Mercer L. Rev. 1, 53-56 (2002).

115 Charles B. Mikell, Jury Instructions and Proximate Cause: An Uncertain Trumpet in Georgia, 60 Ga. St. B. Jnl. 60, 61 (Nov. 1990) (though "proximate cause" is a convenient shorthand among lawyers for complex legal issues about the limits of liability, jurors may regard it as hair-splitting or double talk, if they understand it at all).

116 *Atlanta Obstetrics & Gynecology Group, P.A. v. Coleman*, 260 Ga. 569, 571 n.3 (1990) (Weltner, J., concurring).

117 *T. J. Morris Co. v. Dykes*, 197 Ga. App. 392, 395-96 (4) (1990).

118 *Pearson v. Tippmann Pneumatics, Inc.*, 277 Ga. App. 722, 724-25 (2006), *rev'd*, 281 Ga. 740 (2007).

119 *Hancock v. Bryan County Bd. of Educ.*, 240 Ga. App. 622, 627-28 (1999) (court need not give the "precise, legal *definition*" as long as it charges the jury "as to the legal *meaning* of proximate cause and its application to the facts.").

120 *Gray v. Elias*, 236 Ga. App. 799, 802-03 (1999).

121 *John Crane, Inc. v. Jones*, 262 Ga. App. 531, 532-35 (2003), *aff'd* 278 Ga. 747, 748-752 (2004).

122 *Gates v. Navy*, 274 Ga. App. 180, 183 (2005).

123 *Smith v. Finch*, 285 Ga. 709, 710 (2009).

124 *TGM Ashley Lakes, Inc. v. Jennings*, 264 Ga. App. 456, 463-464 (2003).

125 *Critser v. McFadden*, 277 Ga. 653, 655-56 (2004).

126 *Thompson v. Thompson*, 278 Ga. 752, 754 (2004); *Joiner v. Lane*, 235 Ga. App. 121, 122-23 (1998); *Whitley v. Gwinnett County*, 221 Ga. App. 18, 24 (1996); *Locke v. Vonalt*, 189 Ga. App. 783, 788 (7) (1989).

127 *Armstrong v. Bailey*, 114 Ga. App. 269, 269 (1966).