

Special Contribution

A Better Orientation for Jury Instructions

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Research in the past thirty years confirms what judges and lawyers already knew: jurors often do not understand jury instructions, even pattern instructions developed by judges and lawyers with the goal of increasing juror understanding. Numerous articles have suggested methods for redrafting pattern instructions so they will be more comprehensible to jurors without legal training. This Article will survey some of this research, but the prime objective of this Article is to call for a different orientation to jury instructions.

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Much of current practice conceives jury instruction as a miniature, accelerated education process¹ in which the judge lectures on one or more fields of law and the jurors are expected to assimilate the lecture into a coherent and correct understanding of the law. This will be called the "Lecture Approach." The goal of this process is that the jurors will understand all of the contours of legal doctrine reflecting on the legal dispute before them. The lawyers for each party will supply to the judge a series of proposed jury instructions comprised of excerpts from reported decisions or statutory text, selected in a partisan manner, emphasizing language that is most favorable to the client's case, and often repeating such language in different ways. The current rules for presenting instructions and obtaining review of the judge's decisions give no incentive to lawyers to submit balanced and simple, but complete, jury instructions. After receiving opposing, unbalanced sets of proposed instructions from the lawyers, the judge will then attempt to assemble the excerpts into a cohesive, neutral body of text that will educate the jury about all relevant aspects of the law applicable to any issue raised by the evidence and the contentions of the parties. Unfortunately, the instructions proposed by counsel will hamper, not assist, the judge's efforts to instruct the jury. Unless the judge can accomplish a creative synthesis of the proposed instructions, or ignores them, the jury will hear a number of excerpts that apparently conflict with each other. Further, the excerpts often contain misleading legal usages of common terms, legal jargon, and other confusing and misleading instructions. The result is that the jury instructions will fail to enable jurors to understand the contours of the applicable law simply because those contours cannot be learned by ordinary citizens through cramming; the law can only be learned by legal study that systematizes and harmonizes the body of relevant legal texts into a coherent whole. What is 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.

Instead of treating jury instruction as a compulsory mini-law school, it is far superior to orient jury instruction practice so that it helps the jury do its job, which is to resolve questions of fact. The method advocated in this Article, which is already practiced in Kentucky and

1. "The current answer [to how untrained jurors can be expected to know a complex body of law] is the judge's presentation of an abbreviated legal education right in the courtroom, generally at the end of the trial." Firoz Dattu, *Illustrated Jury Instructions: A Proposal*, 22 LAW & PSYCHOL. REV. 67, 67-68 (1998).

toward which the Georgia Supreme Court may be moving,² is to limit instructions to the core factual issues that control the ultimate verdict. This method will be called the “Kentucky Approach.” The judge gives instructions in order to call for the jury to do something, rather than to contribute to the jurors’ knowledge of somewhat random information about the 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 of, “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.” Instructions in cases with legal issues of greater complexity will still be framed in terms of the factual issues that the jury must resolve in order to determine whether a party with the burden of proof has sustained that burden. Examples of instructions in increasingly complex tort cases are given in the Appendix. The point of these instructions is to call upon the jury to perform its fact-finding function, rather than the essentially legal function of harmonizing disparate legal texts.

Much appellate litigation over jury instructions reflects a conflict between these two orientations toward jury instructions, and the tension between them is nowhere more apparent than in the appellate disputes over the “legal accident” instruction in tort law. Prior to the final abolition of the instruction in 1992,³ the approved pattern instruction on this concept provided,

If you should find from the evidence in this case that neither plaintiff nor defendant were guilty of negligence, then any injuries or damages would be the result of an accident. The word “accident” has a specific and distinct meaning, as it is used in connection with this case.

2. See, e.g., *Dyer v. Souther*, 274 Ga. 61, 62, 548 S.E.2d 1, 1-2 (2001) (rejecting “definite tilt” explanation of preponderance standard); *Harris v. State*, 273 Ga. 608, 609-10, 543 S.E.2d 716, 717-18 (2001) (rejecting instruction that user of deadly weapon is presumed to intend to kill); *Blackmon v. State*, 272 Ga. 858, 859-60, 536 S.E.2d 148, 149-50 (2000) (opposing charge that “witnesses . . . [are] presume[d] to speak the truth”); *Mallory v. State*, 271 Ga. 150, 152, 517 S.E.2d 780, 783 (1999) (disapproving of “moral and reasonable certainty” standard in criminal cases); *Tolbert v. Duckworth*, 262 Ga. 622, 623, 423 S.E.2d 229, 230 (1992) (abolishing “legal accident” instruction); *Renner v. State*, 260 Ga. 515, 518, 397 S.E.2d 683, 686 (1990) (abolishing jury instruction on “flight” in criminal cases); *Mathis v. Watson*, 259 Ga. 13, 13, 376 S.E.2d 660, 661 (1989) (rejecting charge on “magnified or exaggerated damages”).

3. *Tolbert*, 262 Ga. at 623, 423 S.E.2d at 230; *McGee v. Jones*, 232 Ga. App. 1, 6, 499 S.E.2d 398, 402 (1998) (expanding *Tolbert* to disallow summation about “legal accident” as opposed to lack of negligence or causation).

Accident is strictly defined as an occurrence which takes place in the absence of negligence and for which [no] one would be liable.⁴

The supreme court rejected this instruction for several reasons that apply to jury instructions generally.⁵ It noted that the use of the term "accident" would create "confusion because of the difference between the legal definition of 'accident' and the commonly understood meaning of the word as an unintended act."⁶ More generally, it found the instruction "unnecessary, misleading, and confusing" because it was "nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury," and that the "standard instructions on negligence, proximate cause, and burden of proof are sufficient to instruct the jury that the plaintiff may not recover when an injury occurs without the defendant's fault."⁷ In other words, the supreme court rejected this instruction because more narrowly focused instructions sufficed.⁸ These instructions sufficed because the accident instruction was, at best, an additional way of saying the same thing and, at worst, posed a substantial risk of misleading jurors about the correct standard.⁹

On the other side, appellate judges argued that an "accident" charge was necessary in order to counter "the charitable though misguided notion that misfortune is itself compensable, regardless of fault," and that the plaintiff could not be harmed "merely by having it called to the jury's attention that it is possible, at least, for the injury to have occurred notwithstanding the absence of negligence on the part of either of the parties to the lawsuit."¹⁰ Another judge, writing for the majority in a whole court case, ruled the charge mandatory by reasoning that trial judges should not charge only "abstruse summaries of 'general principles' presented in their most encapsulated, reversal-proof form"

4. *Tolbert*, 262 Ga. at 623, 423 S.E.2d at 229-30.

5. *Id.*, 423 S.E.2d at 230.

6. *Id.*

7. *Id.* at 623-24, 423 S.E.2d at 230.

8. *Id.*

9. Some, but not all, earlier decisions of the court of appeals had recognized the potentially misleading character of an "accident" instruction, that it was "merely elaborative" of more basic instructions, and should not be required because it "merely restates a phase of the law of negligence, is unnecessary, serves no useful purpose, overemphasizes the defendant's case, is misleading and confusing, does not necessarily preclude fault or negligence, and is susceptible to different meanings and constructions." *Benson v. Hunter*, 184 Ga. App. 40, 40, 360 S.E.2d 612, 613 (1987); *Glenn McClendon Trucking Co. v. Williams*, 183 Ga. App. 508, 511, 359 S.E.2d 351, 355 (1987); *Chadwick v. Miller*, 169 Ga. App. 338, 342, 312 S.E.2d 835, 838 (1983).

10. *Benson*, 184 Ga. App. at 41, 360 S.E.2d at 614 (Banke, J., dissenting).

and refuse to give clarifying instructions reflecting "unique characteristics" of the particular lawsuit.¹¹ In deciding whether to add another, more specific charge to an existing general charge, the court should first determine whether the general charge, viewed from the perspective of an average juror who is unskilled in the law, gives the juror the rules needed to resolve the issue.¹²

Although the narrow, more "Kentuckian" view prevailed with regard to the legal accident doctrine,¹³ the expansive Lecture Approach has prevailed in a number of other conflicts noted below.

This Article will first document the importance of ensuring that the jury correctly understands the trial judge's instructions on the law. It will then survey various problems that the current system of jury instruction practice in Georgia poses. Legal jargon and writing styles contribute to incomprehensibility. The length and disjointed composition of the overall charge hinder understanding. The tendency of charges to elaborate on the controlling standards in argumentative ways causes the charge to confuse or mislead the jury about the issues they are to resolve and the proper standards for resolving them. The Article will then examine why jury instruction continues to be so poor, including the partisanship of lawyers, the fear of reversal of trial judges, and appellate rules for review. The Article will propose that Georgia adopt an overall approach to jury instruction similar to Kentucky's system. This approach will best cohere with our fundamental notion that juries resolve issues of fact, not issues of law. It will eliminate jargon and impose a structure and limit on jury instructions that promotes understanding by jurors. The Article will then examine several areas of jury instruction practice in Georgia, document the counter-productive results of the Lecture Approach, and show how much more comprehensible and legally better the instructions would be if the Kentucky Approach were applied.

I. THE IMPORTANCE OF MAKING INSTRUCTIONS UNDERSTANDABLE AND UNDERSTOOD

It is critically important that the jury understand the court's instructions.

11. *Smoky, Inc. v. McCray*, 196 Ga. App. 650, 655, 396 S.E.2d 794, 800 (1990).

12. *Id.* at 655-56, 396 S.E.2d at 800.

13. *See also Hamrick v. Wood*, 175 Ga. App. 67, 68, 332 S.E.2d 367, 368 (1985) (holding that the last clear chance doctrine need not be charged when the court gives general principles of negligence, contributory negligence, proximate cause, and a specific instruction on the defendant's duty to control the vehicle when he sees someone threatened).

[J]urors should be able to understand the law as the judge explains it. Otherwise, we would not be governed by the rule of law, but simply by the rule of people. We have juries in order to inject an element of democracy into the legal system, but we do not seek freewheeling, anarchic decisions without legal foundation.¹⁴

Our country and state have made a political decision to have ordinary lay people decide disputes as jurors, determining facts and applying law. If the law is too complex for the jury to apply faithfully, our political system must change. Fidelity to our constitutional decentralization of dispute resolution power requires that we endeavor to make the law comprehensible to ordinary lay people.¹⁵

The vast majority of jurors make a good faith effort to follow instructions given to them by the trial judge.¹⁶ Although it is presumed that jurors understand and follow jury instructions,¹⁷ which is a "crucial assumption underlying the system of trial by jury,"¹⁸ "[o]nce it is established that jurors do not fully understand instructions, the related assumption that jurors faithfully follow them also becomes subject to grave doubt. Even with the best of intentions, people cannot follow instructions that they do not comprehend."¹⁹

When jurors do not understand the instructions, the rational administration of law under our jury system fails to attain its goals. Abstract and vague instructions lead to uncertainty about how to apply the law to the facts, which may invite the jury to decide the case without regard to the facts or the law.²⁰ Even if the instruction is legally accurate, the jury can misinterpret it, "sometimes to the point of

14. Dattu, *supra* note 1, at 67-68.

15. Peter M. Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37 n.37 and accompanying text (1993) (citing numerous articles arguing pro and con on whether juries should decide complex cases).

16. W.W. Steele & E.G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 96 (1988).

17. *Stanley v. Squadrito*, 107 Ga. App. 651, 658-59, 131 S.E.2d 227, 233 (1963) ("We should not assume that the jury paid no attention to some portions of the charge; but on the contrary the presumption is that the jury pays attention to and correctly applies all of the charge"). In exceptional cases, such as powerfully incriminating testimony of a non-testifying co-defendant, the courts recognize that a jury will be disinclined to follow limiting instructions. *Moss v. State*, 275 Ga. 96, 98, 561 S.E.2d 382, 386 (2002).

18. *Tatum v. State*, 249 Ga. 422, 424, 291 S.E.2d 701, 703 (1982), *disapproved on other grounds by Hanifa v. State*, 269 Ga. 797, 505 S.E.2d 731 (1998).

19. Tiersma, *supra* note 15, at 42.

20. See Ronald W. Eades, *The Problem of Jury Instructions in Civil Cases*, 27 CUMB. L. REV. 1017, 1020 (1996).

applying an understanding that contradicts the instruction.”²¹ When confused, juries are more likely to discuss legally irrelevant or inappropriate issues and to ignore critical issues, and one or two jurors often assert expertise and dominate the discussion.²² Hung juries may result from lack of comprehension of the law rather than disagreement about the facts.²³ “Ironically, the pattern instruction may remove law completely from the case. The jury may be so confused by the legal explanations that it decides the case on who it thinks should win.”²⁴

II. THE MULTI-FACETED PROBLEM OF JURY INSTRUCTIONS

From the perspective of the end user, the juror, jury instructions are often either incomprehensible or misleading at several levels. Many of the words used in a charge are legal jargon, unfamiliar to a jury. Other words are ambiguous, either in general or in the context of other words nearby. Some words are particularly misleading because they are both ambiguous and jargon, as when a common word carries a special legal significance. Sentences are often long and complex, if not convoluted. Many instructions are abstract or overly general, without teaching the jury how to apply them to the case. Many instructions are proposed for a variety of argumentative purposes, such as to suggest that the judge has an opinion about the facts proven or to validate a partisan position. Some instructions present useless information, such as what the law is *not*. The charge, as a whole, is itself frequently long and complex, often containing disjointed statements of law, conflicting or apparently conflicting principles, and repeated servings of various affronts to ordinary English.²⁵ Even appellate judges have difficulty determining what a jury would understand by particular language.²⁶

21. Darryl K. Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions*, 73 S. CAL. L. REV. 1105, 1105 (2000) (proposing review of jury instructions in terms of their effects on the outcome of cases).

22. Tiersma, *supra* note 15, at 42-43.

23. See David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 478-79 (May 1976), *quoted in* Brown v. City of Fitzgerald, 177 Ga. App. 859, 860, 341 S.E.2d 476, 478 (1986).

24. Eades, *supra* note 20, at 1026.

25. “[T]he jury’s efforts [to adhere to the law] are seriously undermined because of the badly organized, jargon-filled, convoluted prose used by lawyers and judges who write jury instructions.” Steele & Thornburg, *supra* note 16, at 98. The primary reason for juror confusion is “abstract, technical, and convoluted presentation of jury instructions.” Dattu, *supra* note 1, at 69.

26. See *Weathers v. Cowan*, 176 Ga. App. 19, 23-25, 335 S.E.2d 392, 396-97 (1985) (Beasley, J., concurring) (expressing uncertainty about a long, convoluted sentence in a long charge).

The definitive description of the situation in Georgia cases, still applicable thirty years later, is this:

This case illustrates forcefully: the pitfalls of semantics; the dilemma trial judges face in preparing instructions, confronted with both conflicting requests to charge and numerous appellate court decisions; and finally, the near futility of appellate review based on the premise that the jury heard, understood, digested and correctly applied [seventeen] transcript pages of instructions, which, because they might have contained some error, led the jury to reach a completely erroneous verdict.

The trial judge here appeared to do his best to sort out the various possible elements of compensation under the pleadings and evidence, and to charge the jury in accordance with the latest appellate decisions on the subject. Under the circumstances, he did remarkably well.

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 judge's 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.²⁷

Because judges and litigators are accustomed to this practice, it is difficult to imagine oneself in the position of a juror encountering this for the first time. Therefore, to approximate that experience,

Imagine a tax class at a law school in which the entire course consists of a verbatim reading of the Internal Revenue Code. Students are not told that they have the right to ask questions, and the formal atmosphere of the class does not encourage them to do so. When one summons the courage to pose a question, the professor responds by

27. *State Hwy. Dep't v. Price*, 123 Ga. App. 655, 657, 182 S.E.2d 175, 177 (1971). The playwright mentioned is Channing Pollock.

rereading the entire lecture word for word, so as not to draw undue emphasis to any particular section of the Code. He refuses to give students a copy of the Code or to provide any examples or illustrations that might help them understand how the Code works in practice; he also forbids the students to do outside research. Then he hands out the final examination.²⁸

or likewise,

Consider for a moment how well a group of lawyers and speech professors would do if they were given a thirty minute lecture on how to perform an appendectomy and then were immediately tested on their comprehension. During the lecture, note taking and questioning would be prohibited. Copies of the lecture would not be allowed in the operating room. Assume further that during the lecture, a great many of the words used [are] peculiar to the medical profession and would not be explained in the lecture.²⁹

Jury instructions often sound to jurors as these situations sound to lawyers and judges. But in one respect, jury instructions are worse. As a product of the adversarial system, they can often be misleading and contradictory. The problems will be analyzed below.

A. *Comprehension*

1. *Jargon*

Empirical researchers have consistently reported a problem with the use of legal jargon—terms of legal art that carry no intuitive meaning to lay jurors or a lay meaning different from the legally correct meaning.³⁰ An example from Georgia of the confusion of lay and legal meanings is the “legal accident” instruction discussed above.³¹ An example of pure incomprehensible jargon from Georgia is the “proximate cause” instruction, discussed below.³² Across the country, researchers

28. Tiersma, *supra* note 15, at 39-40.

29. Strawn & Buchanan, *supra* note 23, at 482.

30. For an assessment of the argument that jurors cannot fully unlearn what they already believe about legal terms and principles, however well written the applicable legal principles may be, see Peter W. English and Bruce D. Sales, *A Ceiling or Consistency Effect for the Comprehension of Jury Instructions*, 3 PSYCHOL., PUB. POL'Y & L. 381, 382 (1997). See also Robert L. Winslow, *The Instruction Ritual*, 13 HASTINGS L.J. 456, 459 (1962) (“Such [pattern] instructions assume that the juror can learn the meaning of a word, e.g., negligence, from the definition.”).

31. See *supra* text accompanying notes 3-12.

32. See *infra* text accompanying notes 270-81.

have found consistently low comprehension rates among jurors, mock and actual, when presented with pattern jury instructions written by committees of judges or lawyers who intended to increase juror comprehension. Lieberman and Sales surveyed a number of recent studies showing tested rates of comprehension estimated at 13%, 39%, 41%, 51%, 60%, 70%, and 73%; indeed, some of the studies showed no difference in comprehension whether the jury was instructed or not.³³ Part of the problem lies in the drafter's preference for uncommon terms when common terms are quite adequate.³⁴ The fact that many cases involve jurors consulting dictionaries shows that they do not understand instructions.³⁵ Judge Frank remarked that "everyone who stops to see and think knows that these words might as well be spoken in a foreign language—that, indeed, for all the jury's understanding of them, they are spoken in a foreign language."³⁶ In the oft-quoted words of a juror, "[T]he Judge instructed us in language none of us understood. It was involved and tedious and long, and so full of whereases and therewiths that he lost us halfway through. . . . [W]e proceeded to consider the case according to our rough sense of justice without much regard for the law."³⁷

There is no reason to think that Georgia juries fare better with legal jargon. Although there has been no comprehensive empirical study of jury comprehension in Georgia, Judge Mikell conducted a study of jury comprehension of Georgia's standard instruction on "proximate cause" by putting a short questionnaire to jurors after completion of twenty-seven negligence trials from 1986 to 1990. He found that more than half of the jurors found the concept to be significant, but that only twenty-two percent of the jurors correctly understood the instruction.³⁸ He concluded that "[a] trial judge who reads a jury this instruction might just as well read a poem in Mandarin Chinese. It probably makes no difference in the outcome of a case whether the trial judge uses the

33. Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL., PUB. POL'Y & L. 589, 597 (1997).

34. Winslow, *supra* note 30, at 461 (noting that jury confounded by use of words like "prudent" rather than more common words like "careful").

35. Tiersma, *supra* note 15, at 74-76.

36. JEROME FRANK, *LAW AND THE MODERN MIND* 181 (1930).

37. Mrs. Ben T. Head, *Confessions of a Juror*, 44 F.R.D. 330, 336 (1968) (quoting a former juror's statement to a Tenth Circuit conference).

38. Charles B. Mikell, *Jury Instructions and Proximate Cause: An Uncertain Trumpet in Georgia*, 27 GA. ST. B.J. 60, 62-63 (Nov. 1990).

present charge, instructs in a foreign language, or desists from instructing at all.”³⁹

2. Overgenerality

Juries are also confused by instructions drafted in general or abstract terms that do not convey any clear understanding about what the jury is to do with the principles they are learning. Overgenerality poses three related problems. First, by being drafted as universally applicable as possible, the legal language they use is invariably difficult for the jury to understand.⁴⁰ “General propositions do not enlighten but tend to cloud the minds of the jury; a distinct application of controlling principles to the facts of the particular case is what they need.”⁴¹ Second, by being overly general, the instructions rarely find any application to a particular case. Juries must apply law to specific facts. A broad general outline of the law does not assist the jury in reaching a decision in the case.⁴² “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.”⁴³

It is much better for the court to tell the jury the precise law applicable to the facts of the case, in plain terms, that are comprehensible to men of ordinary business qualifications, than to deal in abstract legal principles that can only be readily apprehended by men of technical skill and learning.⁴⁴

Third, as a consequence of the other two, the abstraction of the charges tends to mislead juries. Overgeneral instructions are often mixed with “matters somewhat irrelevant” and tend to bewilder the jury and lead them astray.⁴⁵ Instructing on general propositions of law, without

39. *Id.* at 64. Justice Frankfurter noted that all too often instructions to juries are “abracadabra.” *Andres v. United States*, 333 U.S. 740, 765 (1948) (Frankfurter, J., concurring).

40. Eades, *supra* note 20, at 1022.

41. *Ransone v. Christian*, 56 Ga. 351, 353 (1876).

42. Eades, *supra* note 20, at 1022.

43. *City of Griffin v. Inman, Swann & Co.*, 57 Ga. 370, 372 (1876).

44. *Klink v. Boland*, 72 Ga. 485, 492 (1884); *see also Goldstein v. Karr*, 110 Ga. App. 806, 813, 140 S.E.2d 40, 46 (1964).

45. *Stewart v. Lanier House Co.*, 75 Ga. 582, 599 (1886); *Boyd v. State*, 17 Ga. 194, 202 (1855) (“Instead of assisting, [an overgeneral instruction] but too often misleads the Jury.”); *Roberts v. State*, 114 Ga. 450, 451-52, 40 S.E. 297, 297 (1901) (reversing conviction based on failure to give requested specific application of justifiable homicide principle); *Pope v. State*, 52 Ga. App. 411, 413-14, 183 S.E. 630, 632 (1936) (reversing conviction on manslaughter as a killing during the commission of an unlawful act without an instruction

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.⁴⁶ 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.

B. Length and Structural Confusion

The length, structure, and content of jury instructions pose problems apart from the meaning of specific legal terms. Longer charges tend to be padded by the proposed instructions of the lawyers, each contesting to have more propositions presented in the language most favorable to their clients, or to have the judge argue the meaning of the law by elaborating on it. If the judge tracks the language of the lawyers, the charge becomes argumentative, as discussed in the next section. If the judge completely neutralizes the proposed instructions, the charge becomes overgeneral and abstract, as discussed in the previous section.⁴⁷ If the judge charts a middle course, covering all of the subjects requested with somewhat more neutral phrasing, the length and composition of the overall charge still pose problems. The longer the instruction, the greater the tedium, the more likely that points favorable to one side or the other will be repeated and emphasized, the greater the probability that some part will conflict, or appear to conflict, with another part. Even if the parts do not conflict, they are apt to be heard as a confusing, disjointed series of propositions.

1. Length

Georgia jury charges are often too long. A recent Westlaw search of Georgia cases in which the terms "charge" or "instruction" occurred within five words of "extensive," "elaborate," "voluminous," "lengthy," or "overflowing" returned 334 cases, and a random sampling of those cases showed that most described either the entire instruction or the instruction on a particular topic.

Giving lengthy charges appears to be a holdover from pre-1965 law. Before 1965, Georgia law provided: "In any court of record . . . a new

on what acts would be unlawful).

46. *Poland v. C.C. Osborne Lumber Co.*, 34 Ga. App. 105, 108, 128 S.E. 198, 199-200 (1925).

47. The less argumentative a charge becomes, the more abstract and general it usually becomes. *Johnson v. Myers*, 118 Ga. App. 773, 776, 165 S.E.2d 739, 743 (1968). A third option, narrow and focused instructions, is the goal of this Article.

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."⁴⁸ As a result, trial judges were required to give "numerous unnecessary and redundant requests" in their instructions to juries.⁴⁹ Although it is no longer necessary to give each correct instruction proposed by counsel, Georgia case law shows that the habit is hard to break,⁵⁰ particularly in the area of medical malpractice law.⁵¹ The courts have recognized that the total length of a charge adversely affects the jurors' abilities to comprehend it⁵² and that the repetitiousness of the instructions carries the possibility of such undue emphasis as to be an unfair, unbalanced statement of law,⁵³ however, the author has

48. GA. CODE ANN. § 70-207 (repealed 1965). In *Bibb Transit Co. v. Johnson*, 107 Ga. App. 804, 805, 131 S.E.2d 631, 632 (1963), the court observed that it was "unfortunately" bound to reverse by this statute, which 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.

49. *Gates v. S. R.R.*, 118 Ga. App. 201, 203-04, 162 S.E.2d 893, 895 (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").

50. The law requires a set of instruction that is "full" and that covers "every controlling, material, substantial and vital issue in the case." Luther C. Hames, Jr., *Pattern Jury Instructions*, 27 MERCER L. REV. 291, 291 (1975) (citing *Atl. Coast Line R.R. v. Coxwell*, 93 Ga. App. 159, 91 S.E.2d 135 (1955); *Berger v. Plantation Pipe Line Co.*, 121 Ga. App. 362, 364, 173 S.E.2d 741, 743 (1970); and *Am. Family Life Ins. Co. v. Glenn*, 109 Ga. App. 122, 126, 135 S.E.2d 442, 445 (1964)). More recent cases are collected *infra* at notes 127-33. Lawyers often exhibit the habit as well. *Rayburn v. Dempsey*, 217 Ga. App. 255, 256, 457 S.E.2d 220, 222 (1995) (refusing request that combined three principles in one sentence of the requested instruction).

51. See *infra* text accompanying notes 282-304.

52. See *State Hwy. Dep't v. Price*, 123 Ga. App. 655, 657-58, 182 S.E.2d 175, 177-78 (1971). Justice Bell observed that most jury instructions are overlong and abstruse and argued that the courts should eliminate instructions that, while technically correct, are unnecessary. *Cameron v. State*, 256 Ga. 225, 228, 345 S.E.2d 575, 578 (1986) (Bell, J., concurring).

53. *Murray v. State*, 253 Ga. 90, 93, 317 S.E.2d 193, 196 (1984); *Wendlandt v. Shepherd Constr. Co.*, 178 Ga. App. 153, 155-56, 342 S.E.2d 352, 354-55 (1986); *Jackson v. Rodriguez*, 173 Ga. App. 211, 213, 325 S.E.2d 857, 859 (1984); *Mullis v. Chaika*, 118 Ga. App. 11, 17-18, 162 S.E.2d 448, 453 (1968). Repetitious charges can "set impartiality at risk." *Lewis v. Emory Univ.*, 235 Ga. App. 811, 820, 509 S.E.2d 635, 644 (1998). "Care must be exercised to see that requested charges on the same point will not subject the court's charge to the criticism that it is unduly repetitious." *Sepulvado v. Daniels Lincoln-Mercury, Inc.*, 170 Ga. App. 109, 111, 316 S.E.2d 554, 557 (1984). In questioning a witness by a judge, the courts have recognized that "a long examination may divert the jurors' attention from the witnesses' testimony to the court's questions in an effort to ascertain the

found no case that was reversed for undue emphasis through repetition alone.⁵⁴

2. Disjointedness

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."⁵⁵ Assembling jury instructions in this manner frequently confuses the jury on how to apply the law to the facts, and this confusion often surfaces only because the jury asks for a clarification. For example, in one tort case, the jury manifested its confusion over instructions on the plaintiff's contributory negligence and on the defendant's liability if the defendant were more than fifty percent negligent by asking "which charge would rule?"⁵⁶ The appellate court decided that the trial judge erred in refusing to give further instructions that would clarify the confusion and in asking the jury simply to remember the instructions previously given.⁵⁷ The significant point for purposes of this Article is that the confusion caused by giving disjointed instructions became apparent, and thus required a remedy, only because the jury asked the question. One wonders how many verdicts have been rendered based on jurors misunderstanding how legal principles fit together without daring to seek clarification.

judge's opinion," *Coggin v. Fitts*, 268 Ga. 112, 113, 485 S.E.2d 495, 497 (1997), and the same possibility should be recognized regarding lengthy jury instructions.

54. The closest approaches to a reversal were: *Cohran v. Douglasville Concrete Prods., Inc.*, 153 Ga. App. 8, 14, 264 S.E.2d 507, 512 (1980) (finding charge repetitive but not addressing whether the error is reversible because the case was reversed on other grounds); *Gellis v. B.L.I. Constr. Co.*, 148 Ga. App. 527, 545, 251 S.E.2d 800, 814 (1978) (not considered because case was reversed for other reasons); *Hill v. Copeland*, 148 Ga. App. 232, 232, 250 S.E.2d 822, 823 (1978) (same); *Moore v. Green*, 129 Ga. App. 268, 269, 199 S.E.2d 317, 318 (1973) (noting it would have been better not to have given repetitive instructions, but those given were not prejudicial).

55. *State Hwy. Dep't v. Price*, 123 Ga. App. at 657, 182 S.E.2d at 177.

56. *Brown v. City of Fitzgerald*, 177 Ga. App. 859, 859, 341 S.E.2d 476, 477 (1986).

57. *Id.* See also *Matheson v. Stilkenboom*, 251 Ga. App. 693, 694-95, 555 S.E.2d 73, 74-75 (2001) (holding that the trial judge erred in refusing to respond to the juror's "uncertainty and confusion regarding the definition of negligence"; "[t]he jury must be able to understand the law in order to return a lawfully arrived-at verdict"); *Miller v. State*, 236 Ga. App. 825, 831 n.13, 513 S.E.2d 27, 32 (1999) (failure to charge on proximate cause in criminal case when jury manifested confusion).

3. Confusion

Jury confusion arises from other sources as well. The habit of submitting and delivering instructions taken from appellate decisions, without adjusting the excerpts to the issues in the present case, often confuses or misleads the jury in applying the law to the facts.⁵⁸ 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.⁵⁹ The assemblage frequently results in actual or apparent conflict among legal principles.⁶⁰ 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."⁶¹ In a different line of cases, however, appellate courts have avoided reversing verdicts by resorting to the more face-saving notion that the overall jury charge can cure the conflict.⁶²

C. Argumentative Instructions

Finally, the overall jury instruction can become misleading and confusing when the trial judge gives argumentative instructions. Argumentative instructions, usually originating in the proposed instructions of the parties, take several forms. They can amount to a

58. See *Cont'l Research Corp. v. Reeves*, 204 Ga. App. 120, 126-27, 419 S.E.2d 48, 54 (1992) (holding that correct rule taken from a prior case may not correctly state the controlling law in a case involving other factual issues).

59. *Id.* at 127, 419 S.E.2d at 54-55.

60. *E.g.*, *Gunn v. Dep't of Transp.*, 222 Ga. App. 684, 686, 476 S.E.2d 46, 48 (1996) (noting that juxtaposition of internally inconsistent charges was confusing).

61. *Dent v. Mem'l Hosp. of Adel*, 270 Ga. 316, 317, 509 S.E.2d 908, 910 (1998). See *Thompson v. Zwiren*, 254 Ga. App. 204, 207, 561 S.E.2d 493, 495 (2002); *Luke v. State*, 177 Ga. App. 518, 519, 340 S.E.2d 30, 32 (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.'" *Id.* (quoting *George v. State*, 103 Ga. App. 598, 600, 120 S.E.2d 55, 57 (1961); see also *Johnson v. State*, 148 Ga. App. 702, 704, 252 S.E.2d 205, 207 (1979). *Executive Committee of the Baptist Convention v. Ferguson*, 213 Ga. 441, 443, 99 S.E.2d 150, 152-53 (1957), cites more than ten cases requiring the trial judge to draw attention to the prior incorrect instruction at the time of correcting it.

62. *E.g.*, *Levine v. Choi*, 240 Ga. App. 384, 387, 522 S.E.2d 673, 676 (1999) (holding that the charge that plaintiff could not recover if cause of injury could not be determined "with certainty" was "cured" by repeatedly instructing that the burden of proof was the preponderance standard). See *infra* the discussion of the "as a whole rule" in the text accompanying notes 136-39.

comment on what has been proved. They can supply or validate the argument of counsel. They can even invade the province of the jury to make decisions.

1. Comment on the Proof

Georgia law prohibits trial judges from expressing an opinion on what has been proved by the evidence,⁶³ or commenting on the evidence.⁶⁴ These prohibitions apply to jury instructions.⁶⁵

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.⁶⁶

Therefore, "the most adroit and careful use of words is necessary to *hide* from an alert juror an intimation of the opinion entertained by the trial judge."⁶⁷ Argumentative instructions violate this norm. Jury instructions should neither assume facts that are not in evidence,⁶⁸ nor facts that are in dispute.⁶⁹ The instructions should avoid discussing the evidence in detail so as to appear to express an opinion on what has been proved, but should refer to the evidence only so far as necessary to present the issues in the case.⁷⁰ Instructions should not argue a party's specific contentions and, thus, should not instruct the jury to reach a particular conclusion based upon findings of specific facts that are in

63. See O.C.G.A. § 9-10-7 (1982); *id.* § 17-8-57.

64. See *id.* § 17-8-55 (1997).

65. See *Coggin v. Fitts*, 268 Ga. 112, 113, 485 S.E.2d 495, 497 (1997).

66. *Taylor v. State*, 2 Ga. App. 723, 729, 59 S.E. 12, 15 (1907).

67. *Id.* (emphasis added).

68. *Parker v. Clickener*, 193 Ga. App. 321, 325, 387 S.E.2d 587, 589-90 (1989); *Turner v. Malone*, 176 Ga. App. 132, 133, 335 S.E.2d 404, 405 (1985) (noting that request assumed financial arrangement between a party and a witness).

69. *Combustion Chems., Inc. v. Spires*, 209 Ga. App. 240, 241-42, 433 S.E.2d 60, 62 (1993) (referring to defendant's activity as "inherently dangerous"); *Sapp v. Johnson*, 184 Ga. App. 603, 605, 362 S.E.2d 82, 84 (1987); *Int'l Images, Inc. v. Smith*, 171 Ga. App. 172, 175, 318 S.E.2d 711, 714 (1984).

70. *Clark v. Southeast Atl. Corp.*, 189 Ga. App. 629, 630, 377 S.E.2d 19, 20 (1988) (request was in the form, "[i]t appears from the evidence that . . .").

dispute.⁷¹ Even if such charges state correct principles of law, they run the risk of suggesting to the jury that the trial judge has an opinion about what the evidence has shown and the conclusion to be drawn from it.⁷²

2. Supplying Argument

Many proposed jury instructions ask the court to do, and often the court does, what is properly within the sphere of counsel's closing argument, such as recalling the evidence presented and suggesting the proper conclusion.⁷³ Several examples are given in the following paragraphs. But the courts have recognized that a charge should not draw conclusions or inferences from the evidence and should not suggest the reasoning that the jury should employ.⁷⁴ Nor should instructions stray from legal principles into general observations that tend to support one party's side of the case.⁷⁵ An instruction should not instruct that certain facts are "common knowledge."⁷⁶

Some words in requested charges, such as "mere," "merely," and "simply," almost always mark an instruction intended to validate a partisan position. Such instructions fail for one of two reasons:⁷⁷(a) if

71. *Petkas v. Grizzard*, 253 Ga. 407, 408, 321 S.E.2d 323, 324 (1984) (request was in the form, "[i]f you find that plaintiff made these statements with knowledge . . . , [then] plaintiff would be barred").

72. *Cameron v. State*, 256 Ga. 225, 227-28, 345 S.E.2d 575, 578 (1986) (Bell, J., concurring), *adopted in* *Renner v. State*, 260 Ga. 515, 518, 397 S.E.2d 683, 686 (1990) (abolishing jury instruction on "flight" in criminal cases as an elaboration of the charge on circumstantial evidence because mentioning "flight" in the instruction intimates that the trial judge has an opinion that flight occurred and the defendant is guilty); *Strickland v. State*, 8 Ga. App. 421, 423, 69 S.E. 313, 315 (1910) (noting that instruction that witness could not be impeached by showing intoxication suggests that judge believes witness was intoxicated).

73. *Miller v. State*, 243 Ga. App. 764, 766, 533 S.E.2d 787, 791 (2000).

74. *See, e.g., Clark*, 189 Ga. App. at 630, 377 S.E.2d at 20 ("A charge which states inferences from the evidence, reasoning, or conclusions is argumentative.").

75. *Ellerbee v. State*, 215 Ga. App. 102, 105, 449 S.E.2d 874, 878 (1994) (request stated that "[n]o procedure is infallible" regarding breath test); *Little Ocmulgee EMC v. Lockhart*, 212 Ga. App. 282, 285, 441 S.E.2d 796, 799 (1994) (plaintiff's request emphasized the danger of electricity and heightened duty of care); *CSX Transp., Inc. v. McCord*, 202 Ga. App. 365, 369, 414 S.E.2d 508, 512 (1991) (request stated that "[a]ccidents frequently occur through no one's fault").

76. *Atl. Coast Line R.R. v. Clements*, 92 Ga. App. 451, 454-55, 88 S.E.2d 809, 812-13 (1955).

77. *See Price v. State*, 175 Ga. App. 780, 782-83, 334 S.E.2d 711, 714-15 (1985) (holding that the proposed charge stated that police had no right to arrest a person "simply because he walk[ed] away" was properly rejected because defendant did not "simply walk away," other events occurred that could justify the arrest).

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; (b) conversely, if such instructions are construed to apply to the facts of the case, they erroneously state general principles without stating many qualifications and exceptions. They also tend to invade the province of the jury by defining what is not negligence.⁷⁸ Thus a court should not give a charge of the form, "the mere fact of X does not demonstrate negligence,"⁷⁹ "[the jury should not] find against [the] defendant merely because he failed to exercise that degree of care which could have prevented injury,"⁸⁰ or "negligence may not be inferred from the mere happening of an event."⁸¹ Assume, for example, that a request of the form "the mere fact of X does not constitute negligence" would be correct in the abstract, but the evidence showed other facts and circumstances sufficient to support a finding of negligence by proving that the defendant did X carelessly and negating any excuse for X. If the instruction were given in this context, it could easily mislead the jury into believing that some additional careless acts would be necessary in order to recover. To avoid misleading the jury, the instruction would have to be extended with a clause such as "but if the defendant did X carelessly, that would constitute negligence." While it may be proper to argue the point of a "mere fact" charge to support one party's position in summation, it is misleading to charge the jury in this manner.

A related example of an argumentative instruction is one that instructs on what the law *isn't*, what it *doesn't* require. Such instructions not only validate a partisan argument, but confuse the jury, which

78. See *infra* text accompanying notes 97-102.

79. *Firestone Tire & Rubber Co. v. Hall*, 152 Ga. App. 560, 564-65, 263 S.E.2d 449, 453 (1979) (noting that mere fact of tire blowout does not prove negligence). This also applies to a plaintiff's contributory negligence. *Leverett v. Flint Fuel, Inc.*, 183 Ga. App. 75, 78-80, 357 S.E.2d 882, 885 (1987) (stating that plaintiff not contributorily negligent "merely because of a failure to exercise that degree of care which would have absolutely prevented injury"). But see *Fulton-Fritchlee v. Douglas*, 240 Ga. App. 413, 416, 523 S.E.2d 349, 352 (1999); *Johnstone v. Malone Office Equip. Co.*, 192 Ga. App. 137, 138-39, 384 S.E.2d 208, 210 (1989) (noting that instruction that the mere fact that a vehicle is struck in the rear does not fix liability on the driver of the striking vehicle upheld because an issue about plaintiff's pre-existing injuries somehow validated it); *Lucas v. Love*, 238 Ga. App. 463, 466, 519 S.E.2d 253, 257 (1999) (holding it was not error to charge "that 'the mere fact that a vehicle is struck by another vehicle does not establish liability on the driver of either vehicle'"). *Meeks v. Cason*, 208 Ga. App. 658, 660-61, 431 S.E.2d 407, 409 (1993) (same).

80. *Adams v. Smith*, 129 Ga. App. 850, 854-55, 201 S.E.2d 639, 644 (1973).

81. *Alterman Foods, Inc. v. Cathcart*, 172 Ga. App. 809, 810-11, 324 S.E.2d 513, 515 (1984). Accord *Lucas*, 238 Ga. App. at 465, 519 S.E.2d at 256-57.

must wonder why they are being told what the law is not.⁸² They often invade the province committed to the jury, as shown below.⁸³ The courts normally frown upon instructions about such nonissues,⁸⁴ at least in the absence of a party's wrongful attempt to make them issues.⁸⁵

Cautionary instructions are not favored since in most instances they are productive of confusion and tend to restrict the jury's untrammelled 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.⁸⁶

In all of these instances, instructing on what the law requires will suffice. Nevertheless, the courts have approved such instructions in some circumstances. For example, the Georgia Supreme Court has held that a jury instruction on the "clear and convincing" standard of proof should describe it as "an intermediate standard of proof, requiring a higher minimum level of proof than the preponderance of the evidence

82. For examples of erroneous instructions on such nonissues, see *S. R.R. v. Oliver*, 177 Ga. App. 729, 732-33, 341 S.E.2d 270, 272-73 (1986) (holding it was error to elaborate on a duty to provide safe equipment by stating that the defendant is not required to have the newest, safest, and best equipment); *Michelin Tire Corp. v. Crawford*, 170 Ga. App. 359, 360, 317 S.E.2d 336, 337 (1984) (stating that a charge that "a seller is under no duty to sell accident proof or foolproof products" is argumentative).

83. See *infra* text accompanying notes 97-102.

84. *Brown v. Macheers*, 249 Ga. App. 418, 423, 547 S.E.2d 759, 764 (2001) (holding it was error to instruct on an annuity that the plaintiff could buy with a recovery); *Consol. Freightways Corp. v. Futrell*, 201 Ga. App. 233, 236-37, 410 S.E.2d 751, 754-55 (1991) (noting it is probably error to instruct on the tax consequences of a recovery); *McCoy v. Alvista Care Home, Inc.*, 194 Ga. App. 599, 601, 391 S.E.2d 419, 421 (1990) (charging that hindsight is not the standard in a negligence case is erroneous when liability is based on what defendant knew at time of act); *Overstreet v. Nickelsen*, 170 Ga. App. 539, 540, 317 S.E.2d 583, 585 (1984) (plaintiff's contributory negligence in causing own injury that defendant negligently treated is a nonissue). *But see, e.g.*, *Clemons v. Atlanta Neurological Inst., P.C.*, 192 Ga. App. 399, 400-02, 384 S.E.2d 881, 883-84 (1989) (deeming remark that defendant is not an "insurer," though not in issue, inconsequential).

85. *Central of Ga. R.R. v. Mock*, 231 Ga. App. 586, 590, 499 S.E.2d 673, 677 (1998) (holding it was 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, 327 S.E.2d 576, 579-80 (1985) (noting that instruction against basing verdict on sympathy for plaintiff or prejudice against defendant not to be given unless plaintiff injects improper circumstances into the case); *Butler v. Kane*, 96 Ga. App. 521, 525, 100 S.E.2d 598, 601 (1957) (same).

86. *S. R.R. v. Grogan*, 113 Ga. App. 451, 457, 148 S.E.2d 439, 444 (1966) (holding it was 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).

standard, but less than that required for proof beyond a reasonable doubt.⁸⁷ There appears to be no other definition of "clear and convincing" proof in Georgia. Thus, the jury is informed that more proof is required than for one inapplicable standard, and less proof is required than for another inapplicable standard. However, the jury is not told how much more or less proof is required, and the jury cannot be trusted to understand the terms "clear and convincing," even with the help of counsel.⁸⁸

3. Taking Sides

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."⁸⁹ 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."⁹⁰ A court may not unduly stress the contentions of a party,⁹¹ although this is commonly done in long, repetitious charges.⁹² Instructions should not adopt one party's characterizations of another party's conduct, such as "exaggeration" or "flight,"⁹³ or of their position

87. *Clarke v. Cotton*, 263 Ga. 861, 862 n.1, 440 S.E.2d 165, 167 (1994). *Accord Wal-Mart Stores, Inc. v. Johnson*, 249 Ga. App. 84, 88, 547 S.E.2d 320, 324 (2001); *Gen. Motors Corp. v. Moseley*, 213 Ga. App. 875, 887, 447 S.E.2d 302, 312 (1994).

88. *But see, e.g., Scott v. State*, 251 Ga. App. 510, 515, 554 S.E.2d 513, 518 (2001) (recognizing that the definitions of legal concepts consist of "words, some of which are neither further defined nor in need of further definition").

89. *Ford v. State*, 2 Ga. App. 834, 837, 59 S.E. 88, 89 (1907).

90. *McMichael v. State*, 252 Ga. 305, 309, 313 S.E.2d 693, 697 (1984) (quoting *Monroe v. State*, 5 Ga. 85, 145 (1848)).

91. *Ammons v. Six Flags Over Ga., Inc.*, 172 Ga. App. 210, 210-11, 323 S.E.2d 2, 2 (1984) (noting it was improper to charge that jury should disregard plaintiff's evidence to the extent of unjustified magnification of damages, as general charge on credibility should suffice).

92. *See supra* text accompanying notes 53-54.

93. *Mathis v. Watson*, 259 Ga. 13, 13-14, 376 S.E.2d 660, 661 (1989) (charge to disregard magnified or exaggerated damages "unduly stresses the defendant's contentions with regard to the evidence" and "the thrust of such a charge concerns the credibility of witnesses, and can be sufficiently covered in the general charge on credibility"); *Gaffron v. Metro. Atlanta Rapid Transit Auth.*, 229 Ga. App. 426, 432, 494 S.E.2d 54, 59 (1997) (stating that same charge "may have improperly suggested to the jury that Gaffron's testimony in some way might have been magnified or exaggerated"); *Sapp v. Johnson*, 184 Ga. App. 603, 605, 362 S.E.2d 82, 84 (1987) (characterizing defendant's leaving the scene as "flight"); *Ammons*, 172 Ga. App. at 210-11, 323 S.E.2d at 2 (referring to plaintiff's

in court, such as “speculative.”⁹⁴ Nor should they adopt the characterizations of the party’s own conduct.⁹⁵ 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.⁹⁶

4. Invading the Province of the Jury

The constitution reserves fact finding to the jury.⁹⁷ Therefore, a jury instruction may not direct the finding of any fact.⁹⁸ In the context of tort law, this means that a trial judge may not tell a jury what acts would or would not constitute negligence unless those acts are declared by statute to be negligent.⁹⁹ Nonetheless, lawyers frequently request elaborations on the standard of care that violate this norm, and trial judges frequently give them, subject to appellate case law that is inconsistent. An instruction of the form that a defendant’s inability to avoid a collision under specific factual circumstances is not negligence is argumentative and “usurp[s] the function of the jury.”¹⁰⁰ Likewise, an instruction that “there is no absolute duty on a driver to be able to

“unjustified magnification” of extent of injuries).

94. *Levine v. Choi*, 240 Ga. App. 384, 387, 522 S.E.2d 673, 675-76 (1999) (disapproving instruction that law does not allow jury to “guess or speculate” about cause of injury, but finding the error harmless because the court otherwise correctly stated the burden of proof); *Central of Ga. R.R. v. Mock*, 231 Ga. App. 586, 590, 499 S.E.2d 673, 677-78 (1998) (charge that speculative damages were not recoverable); *Dep’t of Transp. v. Sharpe*, 226 Ga. App. 354, 355-56, 486 S.E.2d 619, 621-22 (1997), *rev’d on other grounds*, 270 Ga. 101, 505 S.E.2d 473 (1998) (same, regarding value of land with mineral deposits); *All-Ga. Dev., Inc. v. Kadis*, 178 Ga. App. 37, 41, 341 S.E.2d 885, 889 (1986) (same, regarding damages for breach of builder’s warranty of workmanlike product); *Walker v. Bishop*, 169 Ga. App. 236, 242-43, 312 S.E.2d 349, 355 (1983) (same, regarding general or punitive damages).

95. *Shaw v. McDonald’s Rests. of Ga., Inc.*, 191 Ga. App. 583, 584-85, 382 S.E.2d 632, 634 (1989) (party’s “slight deviation”).

96. *Barber v. Gillett Communications of Atlanta, Inc.*, 223 Ga. App. 827, 832-33, 479 S.E.2d 152, 156 (1996).

97. See *infra* text accompanying notes 149-55.

98. *Wadkins v. Smallwood*, 243 Ga. App. 134, 139-40, 530 S.E.2d 498, 504 (2000).

99. *Atlanta & W. Point R.R. v. Hudson*, 123 Ga. 108, 109, 51 S.E. 29, 30 (1905); *Savannah, F. & W. R. Co. v. Evans*, 115 Ga. 315, 317-18, 41 S.E. 631, 632 (1902); *Cobb County Kennestone Hosp. Auth. v. Crumbley*, 179 Ga. App. 896, 897-98, 348 S.E.2d 49, 50 (1986) (holding that instruction that nursing home was not required to have a constant attendant was not reversible error because the remainder of instruction explained correct standard of care); *Watson v. Riggs*, 79 Ga. App. 784, 785, 54 S.E.2d 323, 324 (1949).

100. *Stone’s Indep. Oil Distribs. v. Bailey*, 122 Ga. App. 294, 303-04, 176 S.E.2d 613, 620-21 (1970). But see *Hogg v. First Nat’l Bank of W. Point*, 82 Ga. App. 861, 865-66, 62 S.E.2d 634, 638 (1950) (construing charge that mere fact that defendant did X is not evidence of negligence as stating that defendant is not liable if jury does not find negligence in other particulars).

stop his vehicle within the range of his vision" is misleading because the facts and circumstances may justify the jury in concluding that the driver had a duty to stop.¹⁰¹ Elaborations of other general standards of conduct that purport to state what the standard requires under the facts of the case also erroneously invade the province of the jury.¹⁰²

III. REASONS FOR PERSISTENCE OF POOR JURY INSTRUCTIONS

A reader may naturally ask how it is possible that jury instructions could be consistently so poorly understood, confusing, or misleading, given the considerable talents and ample opportunities of judges and lawyers in drafting the instructions for trial, in reviewing them on appeal, and in drafting pattern instructions with every good intention to make them comprehensible to the average juror.¹⁰³ A number of institutional factors contribute to this situation.

A. *The Lawyers' Positions*

The adversarial nature of the trial process leads lawyers to contribute proposed jury instructions that are more favorably slanted toward their clients' interests than toward juror comprehension,¹⁰⁴ and these opposing forces escalate into long, complex instructions. Who benefits most from overly complex instructions is uncertain. Several researchers report a general belief in the legal community that plaintiffs in civil cases and the state in criminal cases benefit most from confusion arising from misunderstood judicial instructions because the instructions

101. *Plyler v. Smith*, 193 Ga. App. 114, 116, 386 S.E.2d 881, 884 (1989). *Accord Fouts v. Builders Transp., Inc.*, 222 Ga. App. 568, 572, 474 S.E.2d 746, 753 (1996) (holding it was error to give instruction because of presence of traffic control device). *But see Willis v. Love*, 232 Ga. App. 543, 544-45, 502 S.E.2d 487, 489 (1998) (holding it was not error to give an abstract principle of law against plaintiff's argument that statute imposed such a duty); *Meeks v. Cason*, 208 Ga. App. 658, 660-61, 431 S.E.2d 407, 409 (1993) (holding it was not error to give this abstract principle of law).

102. *S. R.R. v. Oliver*, 177 Ga. App. 729, 732, 341 S.E.2d 270, 272 (1986) (holding that instruction on mitigation of damages that required the plaintiff to resume gainful employment as soon as she reasonably could was argumentative and erroneous because it took no account of plaintiff's potential discomfort). *But see Shennett v. Piggly Wiggly S., Inc.*, 197 Ga. App. 502, 503, 399 S.E.2d 476, 477-78 (1990) (holding it was not error to instruct that proprietor had no duty to monitor floors constantly).

103. Georgia's Pattern Instructions were designed to satisfy the following four tests: (1) to represent a correct statement of the law, (2) to be a complete statement of the law, (3) to be concise, and (4) to be stated in language that the average juror could understand. Hames, *supra* note 50, at 293. Nevertheless, the committee to create the pattern instructions lacked non-lawyers. *Id.* at 292 n.10.

104. *Steele & Thornburg*, *supra* note 16, at 105 (noting the attorneys' ethical duty to seek first the advantage of the client).

undercut “technical” defenses and, thus, make victory easier for the party with the burden of proof or the one more aligned with the jury’s feelings of justice.¹⁰⁵ Others believe that it benefits the defendant to make the instruction as complex as possible for tactical reasons.¹⁰⁶ In the author’s opinion, complex instructions help the side with the weaker case by increasing the uncertainty of the stronger side’s victory. Whether or not that is the case, the belief that jury confusion may be a tactical desideratum can easily affect the instructions requested and given.

Lawyers who recognize the problem of existing instructions resist rewriting them for reasons of inertia: the ease of using the pattern instructions and the time needed for, and difficulty of, creating new ones. Lawyers may believe they lack the skills needed to draft new charges, or fear that the appellate courts will overturn verdicts based on the new charges.¹⁰⁷

B. *The Trial Judge’s Position*

The readiest sources of authoritative law for a trial judge are pattern instructions, appellate decisions, and statutes. None of them are entirely satisfactory, and a judge may find it difficult to write new instructions for the same reasons lawyers do.

Pattern instructions are written by judges and lawyers who are not necessarily well-qualified to understand cognitive research¹⁰⁸ or to remember imaginatively how persons who lack years of legal training would understand a jury instruction.¹⁰⁹ How lay juries understand legal instructions is a quintessentially empirical issue that can only be

105. Lieberman & Sales, *supra* note 33, at 591; Steele & Thornburg, *supra* note 16, at 99.

106. EDWARD J. IMWINKELREID, *HANDBOOK FOR THE TRIAL OF CONTRACT LAWSUITS* 351-52 (Prentice-Hall 1981). He states that a party who tries to confuse the jury for tactical reasons desires a set of jury instructions that is lengthy and complex, not only to confuse the jurors, but also to set up strawman opposing theories that can be easily destroyed in closing argument. When that party is the defendant, it will seek elaborations of the plaintiff’s burden of proof, and it will endeavor to make the burden sound heavier by submitting negatively worded, lengthy elaborations of what the plaintiff must prove, as in “you cannot find for the plaintiff unless the plaintiff satisfies you by a preponderance of the evidence that a, b, c, d, e, and f occurred.” *Id.*

107. Steele & Thornburg, *supra* note 16, at 79; Lieberman & Sales, *supra* note 33, at 637.

108. Steele & Thornburg, *supra* note 16, at 78 (“Most of the existing research is not easily understood by practicing lawyers and judges who lack a background in statistical analysis or in the science of linguistics”).

109. Eades, *supra* note 20, at 1023 (1996); Tiersma, *supra* note 15, at 41.

resolved by appropriate research,¹¹⁰ but the typical development of pattern instructions omits any empirical research. As a result, the instructions that are given to lay juries today are often those instructions approved many years ago as simply legally accurate statements of law.¹¹¹ Judges persist in delivering these instructions to jurors because they have survived on appeal to a higher court, not because they are demonstrably successful in conveying legal knowledge to juries.¹¹² The benefits of pattern instructions in terms of ease of presentation and protection on appeal lead judges to ignore an attorney's attempts to improve on them.¹¹³

Furthermore, appellate decisions, and the pattern instructions modeled on them, were written by judges specifically for other judges, not for jurors,¹¹⁴ and they were written to be read by others, not read aloud to others.¹¹⁵ Thus, they may be argumentative, and Georgia courts regularly assert that a trial judge may not rely upon an appellate opinion on legal issues in an earlier case for the jury's use in resolving different contentions with different facts in the present case, citing a number of legally significant reasons.¹¹⁶ Apart from legal objections,

110. Tiersma, *supra* note 15, at 41.

111. Lieberman & Sales, *supra* note 33, at 591.

112. English & Sales, *supra* note 30, at 383.

113. Brown, *supra* note 21, at 1109-10 (noting that judges are only concerned with the legal accuracy of the instruction, but lawyers fight over the wording of equally accurate instructions out of recognition that different wording may lead to different verdicts, though they are forced to conduct the fight in terms of legal accuracy).

114. Tiersma, *supra* note 15, at 53 (arguing that trial judges need to translate the concepts of appellate texts into ordinary lay language, but observing that appellate courts tend to discourage such innovations).

115. Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 708, 737 (2000) (arguing that if they are given, they should be given in writing to the jury).

116. *Bishop v. State*, 271 Ga. 291, 293, 519 S.E.2d 206, 209 (1999) (jury instructions should not include explanations of appellate decisions); *Atlanta & W. Point R.R. v. Hudson*, 123 Ga. 108, 109, 51 S.E. 29, 30 (1905) ("A Justice of the Supreme Court, in giving reasons for a judgment rendered, often uses argumentative language which would be wholly inappropriate for use in a charge by a judge of a trial court."); *Ellerbee v. State*, 215 Ga. App. 102, 105, 449 S.E.2d 874, 878 (1994). "Sometimes the language is argumentative, and sometimes it merely expresses the opinion of the judge delivering the opinion, where it is not precisely upon an issue presented in the record." *Id.*; *Cont'l Research Corp. v. Reeves*, 204 Ga. App. 120, 126, 419 S.E.2d 48, 54 (1992). "An unadjusted instruction may in view of the other charges given appear ambiguous and mislead the jury as to its application in view of the attendant facts." *Id.*; *Dep't of Transp. v. Hillside Motors, Inc.*, 192 Ga. App. 637, 640-41, 385 S.E.2d 746, 749 (1989) (charge not tailored to evidence and potentially misleading); *Beal v. Braunecker*, 185 Ga. App. 429, 431, 364 S.E.2d 308, 311 (1987) (explanation of appellate decision may be ambiguous to a jury); *Gibbs v. State*, 174 Ga. App. 19, 20, 329 S.E.2d 224, 225 (1985) (noting that appellate opinion may properly argue

text from appellate opinions may simply be incomprehensible to juries: just because they have withstood appellate scrutiny as legally accurate for fifty years does not imply that jurors today will understand them.¹¹⁷

The same considerations apply to statutes as sources of jury instructions: they were not written for that purpose; therefore, a trial judge need not use the exact language of the statute in framing a charge.¹¹⁸ Strangely, Georgia courts often hold that a charge in the exact language of the statute is not error, regardless of the issues of fact at trial.¹¹⁹ Nevertheless, even that rule has some narrow exceptions.¹²⁰

C. *The Jury's Position*

Another problem results from the combined effect of the timing, medium, and content of the instructions. Trials lasting from several hours to several months have required the jury to learn large, sometimes massive, amounts of often conflicting information and opinion about the underlying events and the accompanying areas of expert testimony on medical conditions, economic conditions, damages, and so forth. Then comes the charge, and in the next hour or so, the jury must learn all about preponderances and burdens, elements of the cause of action, defenses, and damages, all difficult and unfamiliar.¹²¹ The jury takes this information from an assemblage of excerpts of appellate court decisions and synthesizes it into a composite understanding of the law. The circumstances make it difficult to teach a complex of legal concepts in such rapid fashion to lay jurors. The jury may be mentally tired at the end of the lengthy trial, incapable of paying more attention to the new subject, unable to digest more information, or perhaps they are

for the soundness of its ultimate holding, but jury instruction should be plain and nonargumentative); *Citizens Bank of Swainsboro v. Hooks*, 173 Ga. App. 865, 868, 328 S.E.2d 755, 758 (1985) (appellate text does not address an important issue in the instant case).

117. Tiersma, *supra* note 15, at 66.

118. *Ward v. State*, 271 Ga. 648, 654, 520 S.E.2d 205, 211 (1999); *Buford v. State*, 264 Ga. 479, 479, 448 S.E.2d 215, 216 (1994); *Biggers v. Biggers*, 250 Ga. 248, 249, 297 S.E.2d 257, 258-59 (1982).

119. See, e.g., *Trzepacz v. State*, 240 Ga. App. 410, 411, 523 S.E.2d 599, 600 (1999); *Moore v. State*, 207 Ga. App. 892, 894, 429 S.E.2d 335, 337 (1993).

120. *Hall v. State*, 254 Ga. App. 131, 133, 561 S.E.2d 464, 466 (2002) (holding charge on entire section error if it is reasonably probable that defendant was convicted in a manner not charged in the indictment); *Brown v. State*, 232 Ga. App. 787, 789-90, 504 S.E.2d 452, 455 (1998) (holding charge on lesser included offense must be tailored to greater offense in order to avoid confusion).

121. *Lieberman & Sales*, *supra* note 33, at 597.

anxious to begin deliberating.¹²² Of course, these considerations are true even if the charge is free of the problems listed above, but they are aggravated by the presence of those problems in the charge.

D. Appellate Court Rules

The appellate review process affects the presentation of jury instructions in several ways. First, it focuses almost exclusively on the accuracy of jury instructions rather than on their comprehensibility.¹²³ The author has found no reversals for incomprehensibility alone, let alone the standards to be applied to such claims of error or to explorations of the record that must be developed to sustain such claims.¹²⁴ However, the appellate courts have shown great concern for issues of jury confusion when the jury seeks a clarification or recharge and have required the trial judge to provide further explanation in clarifying language.¹²⁵ In effect, the appellate courts are devoting their attention to treating the symptoms rather than the disease.

Second, as noted above, the fear of appellate reversal discourages lawyers and judges from innovating to increase juror comprehensibility.¹²⁶ Further, fear of reversal causes longer, more disjointed instructions. According to many post-1965 cases, a judge's refusal to give a requested charge is error if the charge is a correct statement of the law and applicable to the issues involved.¹²⁷ The test for whether a

122. Dattu, *supra* note 1, at 74.

123. Steele & Thornburg, *supra* note 16, at 79; Lieberman & Sales, *supra* note 33, at 637.

124. Indeed, the law prevents jurors from impeaching their own verdicts to show lack of comprehension, a prohibition that is deemed essential to preserve the integrity of the trial process. O.C.G.A. § 9-10-9 (1982); *Lewis v. State*, 249 Ga. App. 812, 814-15, 549 S.E.2d 732, 736 (2001); *Ross v. State*, 231 Ga. App. 506, 509, 499 S.E.2d 351, 354 (1998), *overruled on other grounds by* *Vogleson v. State*, 250 Ga. App. 555, 552 S.E.2d 513 (2001). As a result, it may not be possible to develop evidence to prove confusion.

125. See, e.g., *Long Leaf Indus., Inc. v. Mitchell*, 252 Ga. App. 343, 345-46, 556 S.E.2d 242, 244-45 (2001); *Matheson v. Stilkenboom*, 251 Ga. App. 693, 694-95, 555 S.E.2d 73, 74-75 (2001); *Miller v. State*, 236 Ga. App. 825, 831 n.13, 513 S.E.2d 27, 32 (1999); *Brown v. City of Fitzgerald*, 177 Ga. App. 859, 860, 341 S.E.2d 476, 477-78 (1986).

126. Lieberman & Sales, *supra* note 33, at 591.

127. See, e.g., *Bishop v. State*, 271 Ga. 291, 291, 519 S.E.2d 206, 208 (1999) (holding it was error to refuse to give requested instruction that the state has the burden to disprove affirmative defenses beyond a reasonable doubt, even if there is a general instruction on the state's burden); *Blankenship v. W. Ga. Plumbing Supply, Inc.*, 213 Ga. App. 275, 277-78, 444 S.E.2d 596, 598 (1994) (holding charge on defendant's right to make preferential transfer to his wife in payment of debt should have been given); *McDevitt & Street Co. v. K-C Air Conditioning Serv.*, 203 Ga. App. 640, 647, 418 S.E.2d 87, 94 (1992) (holding instruction that specific remedy in contract was not the sole remedy under the contract and the plaintiff could seek another remedy should have been given); *Smoky, Inc.*

request is “applicable” to the facts is broad. There need not be overwhelming evidence going to a point; it suffices that there is some evidence from which inferences can be drawn that would make the rule applicable,¹²⁸ even if the evidence supporting it is “slight”¹²⁹ or if there is substantial evidence to the contrary.¹³⁰ Although such cases have been distinguished on grounds that the trial court did not give any instruction on the same point,¹³¹ or held inapplicable when the trial judge gave “the substance” of the request in other instructions,¹³² the trial judge must still consider the possibility that an appellate court may disagree and find that the general charge did not cover the subject of the requested charge.¹³³ Moreover, because of the adversarial nature of proposing jury instructions, a trial judge may have a duty to give some instructions simply in order to “balance” the instructions of the opponent.¹³⁴ Whether sufficient balance has been obtained in the escalating battle of charges is not an easy question.¹³⁵

v. McCray, 196 Ga. App. 650, 655-57, 396 S.E.2d 794, 800-01 (1990) (instruction on “legal accident” in tort cases); Dep’t of Transp. v. Hillside Motors, Inc., 192 Ga. App. 637, 641, 385 S.E.2d 746, 750 (1989) (rule stated).

128. Thrash v. Rahn, 249 Ga. App. 351, 352, 547 S.E.2d 694, 695 (2001); Sapp v. Johnson, 184 Ga. App. 603, 605, 362 S.E.2d 82, 85 (1987).

129. Sapp, 184 Ga. App. at 605, 362 S.E.2d at 85; Dep’t of Transp. v. Bales, 197 Ga. App. 862, 864, 400 S.E.2d 21, 23-24 (1990).

130. Lawson v. S. R.R., 186 Ga. App. 159, 160-61, 366 S.E.2d 801, 803 (1988).

131. Dep’t of Transp. v. Dalton Paving & Constr., Inc., 227 Ga. App. 207, 224, 489 S.E.2d 329, 343 (1997).

132. E.g., Mortensen v. Fowler-Flemister Concrete, Inc., 252 Ga. App. 395, 397, 555 S.E.2d 492, 494 (2001); S. R.R. v. Hand, 216 Ga. App. 370, 373-74, 454 S.E.2d 217, 221 (1995).

133. McDevitt & Street Co., 203 Ga. App. at 647, 418 S.E.2d at 94 (holding that the trial judge was mistaken in thinking that general charge on remedies under the contract covered requested instruction that one remedy under the contract was not the sole remedy); Tallman Pools v. Fellner, 160 Ga. App. 722, 724, 288 S.E.2d 46, 48-49 (1981) (holding that because trial judge did not instruct on duty in construction contract to finish work subject to “weather permitting” clause, it should have given defendant’s instruction on impossibility of performance).

134. S. R.R. v. Ga. Kraft Co., 188 Ga. App. 623, 624, 373 S.E.2d 774, 776 (1988), *overruled on other grounds*.

135. See, e.g., Spearman v. Ga. Bldg. Auth., 224 Ga. App. 801, 803, 482 S.E.2d 463, 465 (1997) (holding that the trial judge properly rejected plaintiff’s instruction that expert testimony about the standard of care could rely upon or go beyond published industry standards and defendant could be found culpable without a violation of the standards because the request omitted an instruction that a violation of industry standards does not establish negligence); Michelin Tire Corp. v. Crawford, 170 Ga. App. 359, 359-60, 317 S.E.2d 336, 337 (1984) (holding it was error to instruct that manufacturer is not responsible for abnormal use of tire without adding that it is responsible to warn of dangers of foreseeable misuse).

Third, appellate courts employ a standard of review that looks at the charge "as a whole" in determining whether a problematic instruction is error: a "charge, torn to pieces and scattered in disjointed fragments, may seem objectionable, although when put together and considered as a whole, it may be perfectly sound."¹³⁶ This idea makes a great deal of sense when a potentially ambiguous term is clarified by immediately surrounding text.¹³⁷ When instructions seem to conflict on one hearing, however, it is less satisfactory to imagine whether several instances of the correct standard in the "charge as a whole" would lead the jury to believe that the judge meant something other than what she said in delivering the incorrect statement.¹³⁸ The problem is that the jury does not hear the charge "as a whole,"¹³⁹ it hears the charge in sequence. When an appellate court attains an understanding of the charge "as a whole," it is synthesizing the various instructions into a coherent whole from a writing in which it can jump around at will on its own schedule and in accordance with its prior understanding of the law. However, in assimilating a sequential oral discourse, the jury lacks the luxury of control over the order in which the discourse occurs and the training to synthesize it as coherently as an appellate court can.

Fourth, because appellate courts will summarily reject an appeal based on the trial judge's refusal to give a proposed charge that is not "perfect"¹⁴⁰ and longer charges tend to allow imperfections to creep in, lawyers typically submit numerous instructions in the form of short statements of law, typically avoiding a single, comprehensive instruction that addresses issues in a consistent style that is internally coherent, logical, faithful to the law, and applicable to the factual issues in the case. This appellate rule and the resulting practice of attorneys, are holdovers from the law before 1965, which required a trial judge to give any proposed correct instruction in the exact language proposed by the

136. *Dep't of Transp. v. Lawrence*, 212 Ga. App. 72, 73, 441 S.E.2d 81, 81 (1994); *Dixie Ohio Express, Inc. v. Brackett*, 106 Ga. App. 862, 866, 128 S.E.2d 641, 646 (1962).

137. *Sanders v. Hughes*, 183 Ga. App. 601, 603, 359 S.E.2d 396, 398 (1987). This is the rationale of the "as a whole" rule. *Sabree v. State*, 195 Ga. App. 135, 140, 392 S.E.2d 886, 891-92 (1990); *Ford v. State*, 9 Ga. App. 851, 852-53, 72 S.E. 442, 443 (1911).

138. For examples of this misuse of the "as a whole" rule, see *Levine v. Choi*, 240 Ga. App. 384, 387, 522 S.E.2d 673, 676 (1999); *Flint v. Dep't of Transp.*, 223 Ga. App. 815, 818, 479 S.E.2d 160, 163 (1996); *Worn v. Warren*, 191 Ga. App. 448, 450, 382 S.E.2d 112, 114-15 (1989).

139. *Pace, Weathers v. Cowan*, 176 Ga. App. 19, 23, 335 S.E.2d 392, 396 (1985) (Beasley, J., concurring).

140. *E.g.*, *Berman v. Berman*, 253 Ga. 298, 299-300, 319 S.E.2d 846, 848 (1984); *Ford's & Gantt Co. v. Wallace*, 249 Ga. App. 273, 277, 548 S.E.2d 31, 34 (2001); *McDonald v. Dep't of Transp.*, 247 Ga. App. 763, 764, 544 S.E.2d 747, 748 (2001).

lawyer and which the courts sought to ameliorate by imposing the requirement that the request be "perfect."¹⁴¹

IV. THE PROPOSED SOLUTION

This Article proposes to improve the jury instruction process in Georgia by adopting a system similar to that in place in Kentucky.¹⁴² This system looks first to the controlling fact issues in the case, those that directly control the verdict, and supplies the law governing those issues alone. It is not oriented toward providing the jury an education in various fields of law, but rather it states the controlling standards in balanced form without elaborations. This is not a novel approach in Georgia. 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 anything, 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.¹⁴³

Other Justices have expressed similar thoughts.¹⁴⁴

141. *Tucker v. Mapping*, 149 Ga. App. 847, 850-51, 256 S.E.2d 135, 138-39 (1979) (McMurray, J., concurring).

142. This reorientation of jury instructions has also recently begun in Massachusetts. PETER M. LAURIAT, *JURY TRIAL INNOVATIONS IN MASSACHUSETTS* 83-84 (2000) (quoting the recommendations in *JURY TRIAL INNOVATIONS* 163-64 (G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead, eds., 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."

143. *Haynes v. State*, 17 Ga. 465, 483 (1855).

144. *See, e.g., S. Cotton Oil Co. v. Thomas*, 155 Ga. 99, 99, 117 S.E. 456, 459 (1923) (Russell, C.J.) ("If possible, the instructions of a trial court should fit the particular evidence like a skillful tailor fits a suit to a human form."); *Ransone v. Christian*, 56 Ga. 351, 357-58 (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 [sic] is a clear explanation of the law of the case at bar, and its plain application to the facts. If

Kentucky instructions focus on the contentions and facts of the case rather than the law.¹⁴⁵ "The instructions in every case should be as specific and concrete as possible . . . [and] confined to the issues made by the pleadings, to which the parties direct and develop their evidence which tends to support their respective theory."¹⁴⁶ The instruction should be a "bare-bones" presentation of simple factual questions for the jury to answer, and the lawyers are left to explain the issues and law in argument.¹⁴⁷ Occasionally, Georgia courts have also recognized that the jury does not need the court to elaborate on its central instructions because the argument of counsel in the context of the evidence presented may adequately inform the jury of any elaborations they need.¹⁴⁸ Because Kentucky instructions closely track the ultimate issues in the case without straying, the Kentucky Approach imposes a clear structure and organization on jury instructions that prevents them from becoming disjointed. Georgia should adopt this approach for several reasons.

A. *Fact Finding as the Jury's Exclusive Role*

A useful jury instruction is one that helps the jury perform its function correctly; otherwise, it is not a useful instruction and should be avoided. Whether a jury instruction is useful thus turns on what the proper role of the jury is in Georgia.

A jury's role in Georgia is simply to decide issues of fact. "[I]t is the province of the jury, in civil cases, to pass upon questions of fact, and a trial by jury in such cases presupposes an issue of fact; so if there be no such issue, there is nothing for a jury to pass on."¹⁴⁹

It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of

they believe such and such facts to exist, then such is the law.

Id. See also Justice Bell's comments *supra* at note 52.

145. See Eades, *supra* note 20, at 1027.

146. *Nehi Bottling Co. v. Flannery*, 94 S.W.2d 297, 299 (Ky. 1936).

147. *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503, 506 (Ky. 1989).

148. *Smaha v. Moore*, 193 Ga. App. 23, 24, 387 S.E.2d 13, 14 (1989); *Robert & Co. Assoc. v. Tigner*, 180 Ga. App. 836, 842, 351 S.E.2d 82, 88 (1986). Only thus can one make sense of cases holding that a court may instruct the jury on various statutory ways in which a defendant may commit a crime when only one is presented by the evidence. See, e.g., *Hogan v. State*, 210 Ga. App. 122, 124, 435 S.E.2d 494, 496 (1993). The facts and argument clarify that only one way to commit the crime is in issue.

149. *Harry v. Glynn County*, 269 Ga. 503, 505, 501 S.E.2d 196, 199 (1998) (upholding constitutionality of summary judgment procedure against assertion that it deprived litigants of the right to trial by jury) (quoting *Tilley v. Cox*, 119 Ga. 867, 871, 47 S.E. 219, 221 (1904) (upholding constitutionality of directed verdict procedure against same assertion)).

witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.¹⁵⁰

This is true in spite of language in Georgia law asserting that jurors are the “judges of the law and the facts,”¹⁵¹ which has been construed to mean that jurors have a duty to take the law from the trial judge’s instructions and apply it to the facts, which they determine from the evidence adduced at trial; that they are “judges of the law” only in the sense that they are the sole judges of the facts of the case; and that jurors have no proper law-making function.¹⁵²

It is emphatically *not* the province of juries to harmonize normative texts, whether a series of instructions taken from appellate decisions or the terms of a contract. Although the Lecture Approach treats the jury as competent to perform this task after hearing a charge one time only, the law plainly recognizes their incompetence to do so with regard to a written contract discussed during trial that they can read and re-read at will during deliberations. When construing contracts, the court does not instruct the jury on rules of contract construction.¹⁵³ Instead, the court resolves the meaning of the text and harmonizes conflicting provisions in accordance with normal rules of construction.¹⁵⁴ The

150. *Serv. Merch., Inc. v. Jackson*, 221 Ga. App. 897, 898, 473 S.E.2d 209, 211 (1996).

151. GA. CONST. art. I, § 1, para. 11(a) (“In criminal cases, . . . the jury shall be the judges of the law and the facts.”); O.C.G.A. § 17-9-2 (1997) (“The jury shall be the judges of the law and the facts in the trial of all criminal cases and shall give a general verdict of ‘guilty’ or ‘not guilty.’”).

152. *Parker v. State*, 270 Ga. 256, 258-59, 507 S.E.2d 744, 747 (1998); *Harris v. State*, 190 Ga. 258, 260, 9 S.E.2d 183, 185 (1940); *McGee v. State*, 172 Ga. App. 208, 208-09, 322 S.E.2d 500, 501 (1984). For this reason, it is not error to refuse to instruct that the jury is the “judge of the law” because it would misleadingly suggest that the jury may determine what the law is. *Cornwell v. State*, 246 Ga. App. 686, 687-88, 541 S.E.2d 101, 102 (2000) (holding that when jury expressed disagreement with the law, court did not err in refusing this instruction, but correctly instructed that the jury’s duty is to find the facts and apply the law given by the judge); *Young v. State*, 225 Ga. App. 208, 210, 483 S.E.2d 636, 638 (1997) (harmless error to give charge); *Drummond v. State*, 173 Ga. App. 337, 338, 326 S.E.2d 787, 788 (1985).

153. *Ga. Ass’n of Educators, Inc. v. Paragon Prods., Inc.*, 238 Ga. App. 681, 682, 520 S.E.2d 37, 39 (1999) (holding it was error to instruct the jury to determine the intent of the parties and to consider parole evidence without the court’s first determining that the contract was ambiguous); *Ga. Farm Bureau Mut. Ins. Co. v. Burnett*, 167 Ga. App. 480, 482-83, 306 S.E.2d 734, 736 (1983) (holding it was error to instruct that insurance contracts are construed most favorably to the insured).

154. *See Boardman Petroleum, Inc. v. Federated Mut. Ins. Co.*, 269 Ga. 326, 328, 498 S.E.2d 492, 494 (1998) (“The contract is to be considered as a whole and each provision is to be given effect and interpreted so as to harmonize with the others.”); *L & B Constr. Co.*

court submits to the jury only narrow factual issues about the meaning or application of contractual terms if they remain ambiguous after the judge construes them.¹⁵⁵ The net result is that the court harmonizes the text to the extent that it can and puts specific fact issues that remain to the jury. The court does not simply provide the various relevant portions of contractual text to the jury and ask them to determine which provision controls. A fortiori, in an oral charge, a court should interpret the law and put only narrow factual issues before the jury.

Because the jury resolves fact issues only, the focus of all jury instructions should rest on the controlling issues of fact.¹⁵⁶ Identifying the fact issues is a matter of law, based upon the contentions of the parties, the evidence presented, and the burden of proof. A useful jury instruction will therefore determine what the fact issues are and provide the legal rules for deciding those fact issues.

Focusing on the controlling fact issues, useful jury instructions will be the same as those the trial judge must give even without request,¹⁵⁷ namely, the essential elements of all theories of liability raised by the

v. Ragan Enters., 267 Ga. 809, 813, 482 S.E.2d 279, 283 (1997) (preferring construction that harmonizes all provisions of subcontract); *Friedman v. Friedman*, 259 Ga. 530, 532, 384 S.E.2d 641, 643 (1989) ("In ascertaining the intent of the parties, the court should do so after considering the whole agreement and interpret each of the provisions so as to harmonize with the others."), *disapproved on other grounds by Duckworth v. State*, 268 Ga. 566, 569, 492 S.E.2d 201, 203 (1997)); *Versico, Inc. v. Engineered Fabrics Corp.*, 238 Ga. App. 837, 841, 520 S.E.2d 505, 509 (1999) (court properly resolved conflict between contract terms by giving effect to specific provisions rather than contrary general provisions).

155. *Travelers Ins. Co. v. Blakey*, 255 Ga. 699, 700, 342 S.E.2d 308, 309 (1986) (rejecting submission to jury of construction of ambiguous language in contract—only fact issue is what the parties intended by specific obscure text); *Allstate Ins. Co. v. Brannon*, 214 Ga. App. 300, 301, 447 S.E.2d 666, 668 (1994) (holding it was error to instruct that exclusion must be strictly construed against insurer—only issue was whether facts came within exclusion); *Lineberger v. Williams*, 195 Ga. App. 186, 188, 393 S.E.2d 23, 25-26 (1990) (holding it was error to instruct jury to determine whether contract was ambiguous using rules of construction—contract was ambiguous as to duration of employment and jury should have been directed to determine the intended duration); *Travel Agency Group, Inc. v. Henderson Mill Travel, Inc.*, 193 Ga. App. 882, 886, 389 S.E.2d 511, 515 (1989) (no jury issue about meaning of contract—the only issue for the jury is whether the parties performed those duties); *Cal. Ins. Co. v. Blumburg*, 101 Ga. App. 587, 592, 115 S.E.2d 266, 269-70 (1960) (holding it was error to instruct jury that insurance contracts should be liberally construed—the fact issue is whether a particular number of trips would constitute "regular or frequent trips").

156. *Harmon v. State*, 253 Ga. App. 140, 142, 558 S.E.2d 733, 735 (2001).

157. The authority for enforcing the trial judge's duty to instruct without request is O.C.G.A. § 5-5-24(c) (1995), which authorizes appellate review of jury instructions when there has been "a substantial error in the charge which was harmful as a matter of law" regardless of any other procedural obstacle to review. *Id.*

pleadings and evidence,¹⁵⁸ affirmative defenses,¹⁵⁹ and the elements and measures of damages.¹⁶⁰ These controlling fact issues are sometimes called the "law of the case."¹⁶¹ The duty to charge without request is narrow; it requires no elaborations on a substantially complete charge.¹⁶² This constitutes the minimum jury instruction in Georgia.

Under the Kentucky Approach, it would also constitute the maximum. Kentucky judges give relatively minimal instructions, and if any

158. *Bloom v. Doe*, 214 Ga. App. 90, 90-91, 447 S.E.2d 72, 73-74 (1994) (holding that jury instruction on negligent entrustment of vehicle should have included element of actual knowledge of driver's incompetence); *Phelps v. State*, 192 Ga. App. 193, 195, 384 S.E.2d 260, 262 (1989) (elements of crime); *Hager v. O'Neal*, 147 Ga. App. 808, 809, 250 S.E.2d 555, 555 (1978) (no instruction given); *Southeastern Plumbing Supply Co. v. Lee*, 133 Ga. App. 470, 211 S.E.2d 418 (1974) (method of committing fraud by making promises with present intent not to perform); *Gober v. Atlanta Baking Co.*, 128 Ga. App. 679, 681, 197 S.E.2d 769, 771 (1973) (rules of the road governing defendant's conduct); *Carter v. Hutchinson*, 106 Ga. App. 68, 72-73, 126 S.E.2d 458, 461-62 (1962) (same); *S. Cotton Oil Co. v. Brownlee*, 26 Ga. App. 782, 785-86, 107 S.E. 355, 356 (1921) (partnership by estoppel); *King v. Luck Illustrating Co.*, 21 Ga. App. 698, 699-701, 94 S.E. 890, 891 (1918) (noting that court should interpret contract to determine and instruct on the delivery duties of supplier and liability for product specimen); *Glaze v. State*, 2 Ga. App. 704, 708-09, 58 S.E. 1126, 1128 (1907) (criminal intent was sole issue in case).

159. *Pritchett v. Anding*, 168 Ga. App. 658, 663, 310 S.E.2d 267, 272 (1983) (comparative negligence); *Fowler v. Gorrell*, 148 Ga. App. 573, 577, 251 S.E.2d 819, 821-22 (1978) (accord and satisfaction); *Horne v. Neill*, 70 Ga. App. 602, 605-06, 29 S.E.2d 275, 277 (1944) (comparative negligence); *Cnty. Loan & Inv. Corp. v. Bowden*, 64 Ga. App. 175, 180, 12 S.E.2d 421, 423 (1940) (contract invalidity due to insanity); *Harris v. State*, 51 Ga. App. 227, 227-28, 179 S.E. 845, 845 (1935) (self-defense); *Awbrey v. Johnson*, 45 Ga. App. 663, 664, 165 S.E. 846, 847 (1932) (rules of the road regarding plaintiff's conduct).

160. *Gardner v. Dep't of Transp.*, 165 Ga. App. 300, 302, 299 S.E.2d 741, 743 (1983) (how to determine consequential damages); *Hager v. O'Neal*, 147 Ga. App. 808, 809, 250 S.E.2d 555, 555 (1978) (no instruction given); *Porter v. Bland*, 105 Ga. App. 703, 709, 125 S.E.2d 713, 717 (1962) (duty to give the measure of each item of damages).

161. *E.g.*, *Clyde v. Peterson*, 232 Ga. App. 589, 590, 502 S.E.2d 524, 525 (1998).

From an early date the Supreme Court has uniformly held that the law of the case must be given the jury to the extent of covering the substantial issues made by the evidence, whether requested or not, or attention be called to it or not; otherwise the verdict will be set aside.

Id.; *Tempo Mgmt., Inc. v. Lewis*, 210 Ga. App. 390, 391, 436 S.E.2d 98, 99 (1993); *Hager*, 147 Ga. App. at 809, 250 S.E.2d at 555. "The reason and logic of such a requirement is manifest, for without such information there are no guidelines for the jury in deciding the issues presented to them for decision." *Id.*; *Cnty. Loan & Inv. Corp.*, 64 Ga. App. at 180, 12 S.E.2d at 424. "The ship is at sea without chart or pilot, and can never reach the port to which it is bound without their guidance. The verdict can never be a legal verdict unless instructions on the law of the case be given by him who presides for that purpose." *Id.*

162. *Royal v. Davis Hauling Co.*, 164 Ga. App. 409, 410-11, 297 S.E.2d 333, 334 (1982), *overruled on other grounds by Herr v. Withers*, 237 Ga. App. 420, 515 S.E.2d 174 (1999).

elaborations are to be made on them, that is the role of counsel.¹⁶³ All instructions are given in written form¹⁶⁴ and are often combined with special interrogatories on the controlling issues, so that the jury instruction and verdict are one document. Special interrogatories focus on the factual issues by asking "a series of specific questions that relate directly to the facts offered into evidence. The jury then provides answers to the narrowly drawn factual questions. After the jury has completed the task of answering the questions, the judge applies the law to the facts to reach a final judgment."¹⁶⁵ Instructions on law are limited to those that set the standard for deciding the ultimate issues, translating legal terms into common language, and the jury is asked whether the facts come within the standard.¹⁶⁶ This approach submits only the issues that the jury needs to resolve, lessens the chances that the jury will consider immaterial issues,¹⁶⁷ minimizes misunderstandings of the law because there is almost no law given, and controls any urge by the jury to "do justice" apart from the law.¹⁶⁸

B. *Improving Comprehension*

Following the Kentucky Approach will improve jury comprehension in a number of ways. Jargon will disappear or be translated into common terms that lay jurors can understand.¹⁶⁹ The controlling text will be

163.

Contrary to the practice in some jurisdictions, where the trial judge comments at length to the jury on the law of the case, the traditional objective of our form of instructions is to confine the judge's function to the bare essentials and let counsel see to it that the jury clearly understands what the instructions mean and what they do not mean.

Collins v. Galbraith, 494 S.W.2d 527, 531 (Ky. 1973).

164. Due to technological advances, it is now feasible to send written instructions to the jury for its deliberations. The Georgia appellate courts have expressly endorsed this procedure. *Anderson v. State*, 262 Ga. 26, 27-28, 413 S.E.2d 732, 733-34 (1992); *Stubbs v. Ray*, 245 Ga. App. 785, 787, 539 S.E.2d 179, 181 (2000). *But see Spritzberg v. State*, 233 Ga. App. 848, 850, 506 S.E.2d 143, 145 (1998) (citing an earlier case for the proposition that the accepted practice in Georgia is not to allow written instructions to go into the jury room).

165. Eades, *supra* note 20, at 1023-24 (footnotes omitted).

166. *Id.* at 1025.

167. *Hanson v. Am. Nat'l Bank & Trust Co.*, 865 S.W.2d 302, 307 (Ky. 1993).

168. Eades, *supra* note 20, at 1024.

169. "[I]n presenting a legal proposition to the minds of unprofessional men, the utmost plainness and painstaking in its elucidation are desirable, and for the most part necessary." *Long v. State*, 12 Ga. 293, 329 (1852) (holding that instructions should be in plain language). *See Kimmel v. State*, 261 Ga. 332, 335, 404 S.E.2d 436, 439 (1991); *Colquitt v. Thomas*, 8 Ga. 258, 271 (1850); *Motes v. State*, 192 Ga. App. 302, 305, 384 S.E.2d 463, 466 (1989), *overruled on other grounds by Smith v. State*, 268 Ga. 196, 486 S.E.2d 819 (1997);

written, not just oral. It will be short,¹⁷⁰ limited to the controlling issues in objective, neutral terms.¹⁷¹ Its structure will preclude conflicting instructions. The jury will understand how to use it because it will be tailored to the contentions in the case before them, rather than random abstract knowledge.

In addition to the improvement that will result from reorienting the practice of jury instructions, linguistic researchers have observed a number of drafting do's and don't's that will improve the comprehensibility of jury instructions,¹⁷² and these are distilled below. Applying psycholinguistic principles to the rewriting of jury instructions has yielded significant improvement in comprehension scores.¹⁷³

A judge should provide a "roadmap" or preview of the overall instruction so the jury will know how to piece the detailed instructions together. Naturally, the structure of the charge should be coherent and logical. Organizing jury instructions to tell the jury what to do one step at a time increases the quality of jury deliberations. Legal and uncommon terms should not be used when there is a sufficient common equivalent term. Contractions can be used. Abstract terms can be explained to a jury by giving examples, brief narrative descriptions, or

Gibbs v. State, 174 Ga. App. 19, 20, 329 S.E.2d 224, 225 (1985) ("Metaphor, epigram, and unique felicities of expression are not usually desirable in a charge. Plainness, clearness, and a proper statement of the law relevant to the issues in the case in hand are rather to be sought").

170. B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1257 (1993) (stating that "the volume of instructions should be reduced to the absolute minimum"). See Hames, *supra* note 37, at 295 (stating, "There is no scientific finding as to the attention span of jurors, but it must stand on the footing of a sermon in church—that after a sermon has lasted for more than twenty-five minutes, the pastor has lost his audience."). This author would suggest that twenty-five minutes is too long for any jury instruction.

171. Bishop v. State, 271 Ga. 291, 293, 519 S.E.2d 206, 209 (1999). "Jury instructions should set forth objective legal principles to be applied by the jury in making its determination." *Id.*

172. Tiersma, *supra* note 15, at 48-51; Dumas, *supra* note 115, at 729-37; Steele & Thornburg, *supra* note 16, at 85; Dattu, *supra* note 1, at 75-80. For an excellent review of comprehensibility issues involving specific legal instructions, see Lieberman & Sales, *supra* note 33, at 597-616 (addressing proof beyond a reasonable doubt; presumptions and burden of proof; limiting instructions generally and specifically concerning prior convictions, prior acquittals, joinder of criminal defendants, and pretrial publicity; eyewitness testimony; entrapment; the "dynamite" charge; damage awards; and the death penalty).

173. English & Sales, *supra* note 30, at 383 (surveying the results of seven studies in which jury comprehension was improved by rewritten instructions and by procedural changes in the delivery of instructions).

even illustrations.¹⁷⁴ Instructions should be made case-specific, as in "Defendant John Doe . . ." The judge should use verbs instead of nominalizations. The judge should retain relative pronouns rather than deleting them ("the issues that are submitted to you" is superior to "the issues submitted to you"). The judge should use modal verbs ("you must" or "may") rather than more passive phrasing ("it is your duty").

The judge should avoid misplaced phrases by identifying all modifying phrases and properly linking those phrases to the text that they modify. The judge should not use sentences that have complex multiple clauses, but should break them up into smaller, simpler sentences. The judge should avoid common legal constructions such as "as to" (as in "as to the issue of negligence I charge you . . ."). The judge should avoid double and multiple negatives, including semantically negative terms (many beginning with "mis-" or "un-"). The judge should avoid the passive voice when an active construction is available, particularly in subordinate clauses; passive constructions do not cause significant comprehension problems in main clauses. The judge should not over-condense the instructions: although brevity in a charge increases understanding, the text can become so compact that it is harder to understand than longer, simpler text.

C. *Improving Structure and Content*

As shown above, the Kentucky Approach to jury instruction is fully consistent with the best traditions of Georgia trial practice and with Georgia's understanding of the role of the jury solely as fact finder. The Lecture Approach assumes the wrong function for the jury and frequently fails to accomplish the purposes of the jury system. Adopting the Kentucky Approach, or something similar, on a broad scale would not involve a great change in Georgia legal theory. A trial judge must already instruct on the "law of the case," the controlling factual issues.¹⁷⁵ Limiting the charge to the controlling factual issues *should* survive appellate review under the doctrine that a trial judge may refuse any proposed jury instruction on a subject that is already covered by the court's general instructions.¹⁷⁶ "When it can be determined that the

174. Although the structural changes suggested in this article are inconsistent with the use of illustrations or other elaborations in a jury instruction, lawyers may use them in argument.

175. See *supra* text accompanying notes 157-61.

176. *Parker v. R & L Carriers, Inc.*, 253 Ga. App. 628, 630, 560 S.E.2d 114, 115 (2002) (noting that instruction on running red light renders unnecessary instruction on duty not to drive while fatigued); *Quiktrip Corp. v. Childs*, 220 Ga. App. 463, 464, 469 S.E.2d 763, 765-66 (1996) (noting that instruction on plaintiff's duty to use eyesight and contributory

charge actually given conveys correctly the intent of the law and is so framed as to be applied with understanding to the fact situation, denial of a request for a specific charge is not reversible error.”¹⁷⁷ If

the point at issue was presented in substantially as clear and understandable a manner as that requested, keeping in mind that a jury is a lay audience, there should be no reversal where the language conveys correctly the intent of the law and is so framed as to be applied with understanding to the fact situation.¹⁷⁸

The following sections will critique Georgia jury instruction practice in three areas, the “general instructions” on evidence, proximate cause, and medical malpractice and show how easily and comprehensibly the charges can be simplified under the approach advocated here.

1. “General” Instructions (Evidence)

Jury instructions in Georgia typically begin with several minutes of discussion about the burden of proof, rules of evidence, the difference between direct and circumstantial evidence, the nature of expert opinion testimony, the weight of the evidence, and other peripheral matters. Commonly taken from the *Suggested Pattern Jury Instructions*,¹⁷⁹ the instructions say almost nothing of substance about how the jury should resolve the case, and usually, five minutes pass before the court gets to the point and discusses the law that applies to the actual dispute.

a. Introduction. If a trial judge followed each suggested instruction, as frequently occurs, the judge would begin by reminding the jury of the parties’ names, the case number, the county, and the contentions of the parties and would advise them on the nature of pleadings filed in the case.¹⁸⁰ At best, this introductory discussion seems to be verbal throat clearing before actually instructing the jury on the law. There is nothing wrong with an introduction that explains what the court is about to do and what the jury should expect, but the details in this standard introduction give useless information. In particular, the parties will

negligence preempts redundant charge on open and obvious dangers); *Morris v. State Farm Mut. Auto. Ins. Co.*, 203 Ga. App. 839, 840, 418 S.E.2d 119, 121 (1992) (noting that instructions on good faith and bad faith in insurance made the proposed instruction that identified conduct that would be evidence of bad faith unnecessary).

177. *S. R.R. v. Hand*, 216 Ga. App. 370, 374, 454 S.E.2d 217, 221 (1995).

178. *Jackson v. Miles*, 126 Ga. App. 320, 322, 190 S.E.2d 565, 567 (1972).

179. COUNCIL OF SUPERIOR COURT JUDGES, *SUGGESTED PATTERN JURY INSTRUCTIONS-VOLUME I: CIVIL CASES*, Chapter II “General Instructions,” at 10-19 (3d ed. 1991).

180. *Id.* at 10.

make their contentions clear during the evidence and argument. The judge cannot improve on their exposition, but can misstate it.

b. *Burden of Proof.* The trial judge would then state that the plaintiff has a burden to prove the case "by what is known as a preponderance of the evidence, that is, evidence upon the issues involved which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other."¹⁸¹ The pretrial instruction on the preponderance standard elaborates with the example of the scales of justice, stating that the burden of proof requires a "definite tilt" of the scales.¹⁸² If a counterclaim had been pleaded, the court would state the defendant's contentions and the defendant's burden of proof.¹⁸³ If a party must prove a point by the heightened standard of clear and convincing evidence, the court would then define that standard as "a different and higher burden of proof than a mere preponderance of the evidence."¹⁸⁴

Leaving aside the verbose, complex, and opaque definition of the preponderance standard, one may ask whether the jury is supposed to learn something from this instruction. That is, are the jurors supposed to decide whether Jones ran the red light, or are they supposed to decide whether reasonable and impartial minds would tend to incline toward the side that says that Jones ran the red light? Because a rational person answers the former question prior to answering the latter, answering the latter question at all becomes pointless. Therefore, it follows that an instruction on reasonable and impartial minds inclining is, likewise, pointless.

This is not to say that the burden of proof is unimportant. Instead, the burden should be presented to the jury based on what it actually is. It is not an abstraction, such as the "preponderance" of evidence causing "reasonable minds" to "incline." It is not a metaphor, such as a "burden" that has a certain "weight," and if the evidence has sufficient strength, the burden is "carried," the "scales of justice tilt," and the "football crosses midfield." It is a rule for jury deliberations, for deciding whether to give a verdict for one party or the other. If this much is conceded, it

181. *Id.* at 11.

182. *Id.* at 12.

183. *Id.* at 11-12.

184. *Id.* Later, another definition is given that clear and convincing evidence "cause[s] the jury to firmly believe each essential element of the claim to a high degree of probability," which is "a level of proof greater than a preponderance of the evidence, but less than beyond a reasonable doubt." See *supra* text accompanying notes 82-88 for a critique of this instruction.

follows that the best exposition of the instruction is not as an abstraction or a metaphor, but as a rule governing the jury's ultimate decision. Such a rule, as used in the Kentucky Approach, is simply and comprehensively stated in a formula such as this: "If you believe from the evidence that the essential elements of the plaintiff's claim are true, then you should find for the plaintiff; otherwise you should find for the defendant." Similar expressions are used for the reasonable doubt standard and the heightened, or clear and convincing, standard.¹⁸⁵ No metaphors or abstractions are used, and none are needed. The instruction simply asks whether the essential elements of a claim are true; if so, they should decide the issue in favor of the party with the burden to prove the claim, and if not, they should decide the issue for the other party. The structure of the instruction enforces the burden of proof without mentioning and defining it.

Georgia courts recognize that instructing on the burden of proof is unnecessary by holding that the trial judge has no duty to charge on the topic unless requested by the parties.¹⁸⁶ It is clearly unnecessary to instruct on the burden of coming forward with evidence because the failure to produce evidence will result in a directed verdict.¹⁸⁷ Yet, current law states that an instruction on the burden of proof should be given if requested in writing.¹⁸⁸

Georgia courts also recognize the danger of altering the burden of proof by elaborating on the instruction. The *Suggested Pattern Jury Instructions's* preliminary instruction that describes the preponderance standard as requiring a "definite tilt" in the scales of justice¹⁸⁹ has been disapproved by the supreme court because it can be misunderstood as imposing a substantial burden.¹⁹⁰ In criminal cases, the trial judge

185. "You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that . . ." is the burden instruction in Kentucky criminal cases. *Hardin v. Savageau*, 906 S.W.2d 356, 358 (Ky. 1995) (holding that all of these phrases are understandable by a lay jury and not subject to amplification by the court or the lawyers). Perhaps the heightened standard could be re-phrased, "if you believe the evidence is clear and convincing that . . ."

186. *Hubert v. City of Marietta*, 224 Ga. 706, 710, 164 S.E.2d 832, 835 (1968); *DeKalb County v. Daniels*, 174 Ga. App. 319, 322, 329 S.E.2d 620, 624 (1985); *Whitman v. Burden*, 155 Ga. App. 67, 67-68, 270 S.E.2d 235, 236 (1980).

187. *Macon-Bibb County Hosp. Auth. v. Ross*, 176 Ga. App. 221, 225, 335 S.E.2d 633, 637 (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. *Id.*

188. *Meacham v. Barber*, 183 Ga. App. 533, 536, 359 S.E.2d 424, 427 (1987) (burden on defendant to prove affirmative defenses).

189. See *supra* note 182.

190. *Dyer v. Souther*, 274 Ga. 61, 62, 548 S.E.2d 1, 1-2 (2001).

should not include the potentially confusing alternative standard of proof to a "moral and reasonable certainty."¹⁹¹ Likewise, the trial court should not instruct that a reasonable doubt does not mean the possibility that a defendant may be innocent.¹⁹² It is also error to explain the reasonable doubt standard as requiring conviction if the jury honestly believes that the defendant is guilty.¹⁹³

The appellate courts have usually resisted partisan efforts to overemphasize the burden of proof by submission of the "equal theories" or "evenly balanced evidence" charge, holding that it is applicable (not that it should be given) only when the case is based solely on circumstantial evidence.¹⁹⁴ A court need not repeat an instruction on the burden of proof with each charge on the substantive law.¹⁹⁵ Even when it is applicable, the instruction must not intimate that circumstantial evidence is weak or overemphasize the defendant's contention that the plaintiff's case is based on conjecture, speculation, or guess.¹⁹⁶ A fortiori, an instruction 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" is suspect and should not be given.¹⁹⁷ A related instruction advises the jury to find against the party with the burden of proof if it has any doubt about where the preponderance lies¹⁹⁸ and should not be given for the same reasons. The Kentucky Approach eliminates these instructions and their potential to be misunderstood, to bewilder,

191. *Mallory v. State*, 271 Ga. 150, 152, 517 S.E.2d 780, 783 (1999).

192. *Mangum v. State*, 274 Ga. 573, 577-78, 555 S.E.2d 451, 456 (2001).

193. *Jones v. State*, 252 Ga. App. 332, 334, 556 S.E.2d 238, 241 (2001).

194. *Kyler v. State*, 270 Ga. 81, 84, 508 S.E.2d 152, 156 (1998), *abrogated on other grounds by Mann v. State*, 273 Ga. 366, 541 S.E.2d 645 (2001); *Pressley v. Jennings*, 227 Ga. 366, 374, 180 S.E.2d 896, 903 (1971) (holding that 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"); *S. R.R. v. Hand*, 216 Ga. App. at 373-74, 454 S.E.2d at 220-21; *Langston v. State*, 208 Ga. App. 175, 177, 430 S.E.2d 365, 367-68 (1993) (noting that the gist of this concept historically, and the only proper instruction, is that when the criminal case relies upon circumstantial evidence, the evidence must be such as to exclude every hypothesis but guilt); *Pope v. Witter*, 205 Ga. App. 101, 105, 421 S.E.2d 725, 729-30 (1992).

195. *Mortensen v. Fowler-Flemister Concrete, Inc.*, 252 Ga. App. 395, 396-97, 555 S.E.2d 492, 493-94 (2001).

196. *Parks v. Fuller*, 100 Ga. App. 463, 471-72, 111 S.E.2d 755, 762-63 (1959) (finding four separate elaborations on the burden of proof subject to these criticisms).

197. *Maurer v. Chyatte*, 173 Ga. App. 343, 346, 326 S.E.2d 543, 546 (1985).

198. *Brown v. Macheers*, 249 Ga. App. 418, 421-22, 547 S.E.2d 759, 763 (2001) (finding the charge not erroneous as against contention that it confused the preponderance standard with the the reasonable doubt standard).

and to suggest that the trial judge has an opinion about who should prevail.

c. *Credibility.* Next in the typical charge, the trial judge would advise the jury to determine the credibility of the witnesses and tell them that in doing so they may consider all the facts and circumstances of the case, itemizing a number of factors that the jury may consider.¹⁹⁹ Noteworthy is that the instruction singles out “the number of witnesses on each side” as something to consider, but that is not necessarily decisive.²⁰⁰ A statutory rule for the credibility of witnesses, sometimes given to juries, is that

[t]he existence of a fact testified to by one positive witness is to be believed, rather than that such fact did not exist because many other witnesses who had the same opportunity of observation swear that they did not see or know of its having existed. This rule shall not apply when two parties have equal facilities for seeing or hearing a thing and one swears that it occurred while the other swears that it did not.²⁰¹

Instructing on credibility is also unnecessary in order to prevent a miscarriage of justice.²⁰² By its own terms, it is not an instruction to the jury (the jury “shall”), but simply a listing of factors noted in the nineteenth century that “may” or may not have relevance to the facts of the case presented to the present jury. By reference to “all the facts and circumstances of the case,” it is logically equivalent to instructing the jury that they may consider anything they have been given to consider, which highlights its pointlessness. By following this general language with a list of factors that the jury “may” consider, it singles those factors out. The instruction gives undue prominence to the itemized factors and may thereby give undue prominence to certain evidence described by

199. COUNCIL OF SUPERIOR COURT JUDGES, *supra* note 179, at 12. The following charge on the credibility of witnesses is a modified version of O.C.G.A. § 24-4-4 (1995):

In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, the probability or improbability of their testimony, their interest or want of interest, and their personal credibility so far as the same may legitimately appear from the trial. The jury may also consider the number of the witnesses, though the preponderance is not necessarily with the greater number.

200. COUNCIL OF SUPERIOR COURT JUDGES, *supra* note 179, at 12.

201. O.C.G.A. § 24-4-7 (1995).

202. *Camphor v. State*, 272 Ga. 408, 413-14, 529 S.E.2d 121, 126 (2000). Credibility of the witnesses, and how the jury should consider the testimony of the witnesses, is a collateral matter and need not be given in order to avoid a miscarriage of justice. *Id.*

those factors, which may make the judge appear to favor the side that presented the emphasized evidence. This is especially problematic because the jury is the sole judge of credibility,²⁰³ and an instruction on this topic invades their province to decide credibility in the manner they choose. For example, the supreme court has held that instructing on the number of witnesses is error,²⁰⁴ at least in criminal cases.²⁰⁵ Charging that a "positive witness" is to be believed is dangerous for the same reason.²⁰⁶ An instruction on credibility is inherently argumentative; it is for counsel to argue which facts and circumstances the jury should consider in crediting or discrediting a witness. If some of the factors the judge instructs the jury to consider are not present, jury confusion can result. Therefore, an itemization of factors for the jury to consider has no positive benefit that is not better provided by the argument of counsel and the common sense of jurors. Further,

203. O.C.G.A. § 24-9-80 (1995); *Barlow v. State*, 229 Ga. App. 745, 747, 494 S.E.2d 588, 590 (1997), *rev'd on other grounds*, 270 Ga. 54, 507 S.E.2d 416 (1998); *Wilson v. Prof'l Ins. Corp.*, 151 Ga. App. 712, 714, 261 S.E.2d 450, 451 (1979).

204. *Brinson v. State*, 268 Ga. 227, 229, 486 S.E.2d 830, 833 (1997); *Clifford v. State*, 266 Ga. 620, 621, 469 S.E.2d 155, 157 (1996).

205. *Clifford*, 266 Ga. at 621 n.3, 469 S.E.2d at 157 n.3; *Johnson v. State*, 251 Ga. App. 455, 458 n.1, 554 S.E.2d 587, 589 n.1 (2001). The distinction asserted is that the number of witnesses may be pertinent to the "quantum of evidence" in a civil case that may show where the preponderance lies, but not to the criminal standard under which guilt must be proved beyond a reasonable doubt from the evidence. *Clifford*, 266 Ga. at 621 n.3, 469 S.E.2d at 157 n.3; *Johnson*, 251 Ga. App. at 458 n.1, 554 S.E.2d at 589 n.1. Although it is true that a jury could decide a civil case based on the great number of witnesses on one side and the paucity of witnesses on the other, it does not follow that a judge should emphasize this feature of the evidence in civil cases.

206. *Green v. State*, 253 Ga. 693, 694, 324 S.E.2d 181, 182 (1985); *Warrick v. State*, 125 Ga. 133, 142, 53 S.E. 1027, 1031 (1906).

The section of the code does not mean that the jury is bound to believe the positive evidence of one whose credibility is little or nothing, or who may have been successfully impeached or shown to be a perjurer, in preference to the evidence of many honest, upright witnesses of unquestionable credibility who had equal opportunity of observation, though their testimony may be negative. The rule does not mean that a witness must be credited, regardless of anything else, if he swears positively. If so, hard swearing would necessarily import truth. The rule as to positive and negative evidence has reference to the nature of the evidence; but the jury consider not only what a witness swears, but also what credit is to be given to him as a witness.

S. R.R. v. O'Bryan, 119 Ga. 147, 151, 45 S.E. 1000, 1001 (1903) (finding instruction permissible with qualification that all other things are equal and the witnesses are of equal credibility); *Atlanta & W. Point R.R. v. Twedell*, 70 Ga. App. 812, 818, 29 S.E.2d 668, 672 (1944). "The jury could well have taken into consideration the fact that the so-called 'positive' witnesses were employees of the defendant, and that the 'negative' witnesses, for the most part, were disinterested persons." *Id.*

itemization risks invade the province of the jury to determine the credibility of witnesses on its own.

d. Experts. After addressing credibility, the trial judge will then define “experts,” state that the law permits them to give opinions “because of their training and experience,” and tell the jury it is not required to accept their testimony, but only to give it such weight and credit as the jury thinks it deserves.²⁰⁷ Consistently, the jury may be instructed that it need not accept the testimony of any expert because the testimony, once received, is to be treated as any other evidence in the case.²⁰⁸ The courts have authorized trial judges to emphasize the expertise of certain witnesses by charging that the jury should consider a witness’s testimony as an expert.²⁰⁹

This instruction is also unnecessary to avoid a miscarriage of justice.²¹⁰ The jury does not need a definition of “experts” or to be told that the law permits them to give opinions because the jury was present when the experts were identified and allowed to give opinions. The final sentence of the *Suggested Pattern Jury Instructions* instruction is logically equivalent to telling the jury they should give the expert’s testimony the credit they give it, which is pointless. The explanation of why expert testimony is allowed gives undue weight to the expert’s testimony. The lawyer who presents the expert does not need the judge to remind the jury that the witness was found to be an “expert” or that the witness had “training and experience.” Nor should the trial judge instruct that the jury need *not* accept the expert’s testimony when, under the jury’s view of the facts, they decide that they must accept it. Such an instruction is not needed to protect the other party, whose lawyer may seek to have the ruling accepting the witness as an “expert” made outside the presence of the jury,²¹¹ attack the expert testimony on cross-examination, and argue the weakness of the expert’s testimony in summation.

207. COUNCIL OF SUPERIOR COURT JUDGES, *supra* note 179, at 12-13. See *Johnson v. Watson*, 228 Ga. App. 351, 353-54, 491 S.E.2d 827, 830 (1997) (approving this instruction).

208. *Packer v. Gill*, 193 Ga. App. 388, 389, 388 S.E.2d 338, 340 (1989).

209. *Werner v. State*, 246 Ga. App. 677, 680, 538 S.E.2d 168, 171 (2000) (noting that police officer’s testimony should be considered as expert testimony); *Wiley v. State*, 238 Ga. App. 334, 335, 519 S.E.2d 10, 12 (1999) (holding it was proper to instruct on expert witnesses because police officer testified, even if the officer was not tendered as an expert); *Kimbrough v. State*, 215 Ga. App. 303, 303, 450 S.E.2d 457, 458-59 (1994) (undercover agent as expert); *Melvin v. State*, 203 Ga. App. 108, 109, 416 S.E.2d 149, 151 (1992) (crime lab as expert).

210. *Hesler v. State*, 208 Ga. App. 495, 496-97, 431 S.E.2d 138, 140 (1993).

211. *In re C.W.D.*, 232 Ga. App. 200, 208 n.2, 501 S.E.2d 232, 239 (1998).

The appellate courts have rejected argumentative elaborations about expert testimony. It is error to instruct that "the value of that [expert] testimony, . . . is dependent upon the degree of the experience and honesty and the impartiality of the witnesses who testified, . . . and where these elements are undoubted, their testimony is entitled to great weight and consideration," because "a court should not instruct the jury what particular testimony before them is, or is not, entitled to great weight or consideration."²¹² A trial judge may properly refuse an instruction that "if the salient facts of a hypothetical question . . . are not admitted into evidence," an expert's answer to the question is not proof of any fact in the case because it "create[s] a fair risk of confusing or misleading the jury when examined in light of the other charges and the evidence."²¹³

e. Conflicts. The trial judge will next instruct that conflicts in the evidence are to be reconciled if possible, that witnesses are presumed to speak the truth, and that false statements should not be attributed to any witness if possible. However, if this is not possible, then the jury is to believe the evidence that is most reasonable and believable, and again, they should decide the case by the preponderance of the evidence.²¹⁴ Instructions such as this have been upheld against the contention that the jury has the option to disbelieve the more reasonable testimony.²¹⁵ On the other hand, the supreme court has repeatedly urged against instructing that witnesses are presumed to speak the truth.²¹⁶ A presumption of truthfulness directed by the judge to the

212. *Merritt v. State*, 107 Ga. 675, 680, 34 S.E. 361, 363 (1899). *Accord* *Hitchcock v. Key*, 163 Ga. App. 901, 904, 296 S.E.2d 625, 628 (1982).

213. *Blun v. Redd's Commercial Refrigeration & Air Conditioning, Inc.*, 228 Ga. App. 42, 43, 491 S.E.2d 113, 115 (1997). *But see* *Flint v. Dep't of Transp.*, 223 Ga. App. 815, 818, 479 S.E.2d 160, 163 (1996) (holding no error to charge opinion based on false facts should not be considered because it rests on an improper basis on grounds that the charge "as a whole" told the jury that it decided what to believe and disbelieve).

214. COUNCIL OF SUPERIOR COURT JUDGES, *supra* note 179, at 13.

215. *Daniels v. State*, 207 Ga. App. 689, 691, 428 S.E.2d 820, 821 (1993).

216. *Blackmon v. State*, 272 Ga. 858, 859-60, 536 S.E.2d 148, 149-50 (2000) (not reversing because 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, 349 S.E.2d 175, 177 (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"). The federal courts mentioned in *Noggle* objected to the charge on grounds that it diluted the defendant's presumption of innocence, shifted the burden from the prosecution, or invaded the province of the jury to determine credibility. *Cupp v. Naughten*, 414 U.S. 141, 145 (1973).

jury conflicts with the proposition that the jury may believe or disbelieve all or part of the testimony of any witness, lay or expert.²¹⁷ For this reason, it is error to instruct that unimpeached witnesses should be believed.²¹⁸ Likewise, the court has condemned amplifications that the jury need not believe inherently incredible or improbable testimony, except in those cases in which the testimony is contrary to natural law or the universal experience of humankind, because such an instruction can mislead the jury into believing that there was such testimony and to discredit the witness's testimony in the eyes of the jury.²¹⁹ As with prior pattern instructions on credibility and experts, this instruction is not needed. It is logically equivalent to telling the jury that they should believe what is most believable. For these reasons, the instruction should not be given.

f. Circumstantial Evidence. Next, the trial judge would address the difference between direct and circumstantial evidence, and the *Suggested Pattern Jury Instructions* gives two versions of the difference. In one, direct evidence "immediately points to the question at issue," whereas circumstantial evidence "only tends to establish a fact," but "must be such as to reasonably establish that fact rather than anything else."²²⁰ In the other, direct evidence is the testimony of a person that, if believed, is sufficient to prove what the person says, whereas circumstantial evidence is sufficient to prove *other* facts based on the jury's experience, at least if the evidence "reasonably establishes" the other fact or theory.²²¹ The charge would conclude by pointing out that the comparative weight of direct and circumstantial evidence is for the jury to decide.²²² In criminal cases, if any part of the state's case is based on circumstantial evidence, the court must give an instruction on request

217. *Johnson v. Watson*, 228 Ga. App. 351, 353-54, 491 S.E.2d 827, 830 (1997).

218. *Miller v. State*, 174 Ga. App. 703, 704, 331 S.E.2d 616, 618 (1985). *See also* *Mize v. State*, 173 Ga. App. 368, 368, 326 S.E.2d 785, 786 (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, 40 S.E.2d 715, 728 (1946) (holding that a 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").

219. *Tolver v. State*, 251 Ga. App. 297, 298, 554 S.E.2d 271, 273 (2001); *Stephens v. State*, 245 Ga. App. 823, 825-26, 538 S.E.2d 882, 884-85 (2000); *Brandon v. State*, 241 Ga. App. 887, 888-89, 528 S.E.2d 809, 811 (2000); *Dixie Ohio Express, Inc. v. Brackett*, 106 Ga. App. 862, 872-74, 128 S.E.2d 641, 650 (1962).

220. COUNCIL OF SUPERIOR COURT JUDGES, *supra* note 179, at 13.

221. *Id.* at 14.

222. *Id.* at 13.

that the proved facts must be consistent with guilt and must exclude every other reasonable hypothesis.²²³

A juror hearing this instruction must wonder, "Why am I hearing this?" Why such definitions should be given to the jury is as difficult to explain as the difference between the two categories has been for the appellate courts.²²⁴ The difference between the two categories is significant only for purposes of determining whether to submit the fact issue to the jury. Whether the evidence "reasonably establishes" the contested fact is a question for the judge of the sufficiency of the evidence. Once the circumstantial evidence passes that threshold, it is exclusively for the jury to determine whether the evidence suffices to prove the proponent's contention.²²⁵ No instruction is required for the same reason that it was not necessary to instruct the jury to consider all of the facts and "circumstances" in rendering its verdict.²²⁶

g. Failure to Produce Evidence. The charge will then proceed to a consideration of whether the parties have produced all of the evidence, or the best evidence, they should have, and if not, whether they are to be penalized with a presumption that the claim against them is well founded, which will depend on whether the witness or evidence is accessible to both parties or under the control of one party.²²⁷ The failure to produce a significant witness or document is an instance of a "circumstance" that the attorneys may argue and the jury may properly consider, but there is no need for the trial court to give undue emphasis to it, and it is often error.²²⁸ The supreme court has challenged the

223. O.C.G.A. § 24-4-6 (1995); *Massey v. State*, 270 Ga. 76, 77, 508 S.E.2d 149, 151 (1998). If the case is based wholly on circumstantial evidence, the instruction must be given even without request. *Yarn v. State*, 265 Ga. 787, 788, 462 S.E.2d 359, 360 (1995).

224. *Mims v. State*, 264 Ga. 271, 272 n.2, 274, 443 S.E.2d 845, 847, 848 (1994) (Hunt, J., concurring). Concurring in *Mims*, Justice Hunt noted that direct and circumstantial evidence must satisfy the same requirements to sustain a guilty verdict beyond a reasonable doubt and suggested a simpler, consolidated, instruction as follows: "You would be authorized to convict only if the evidence proves the guilt of the accused beyond a reasonable doubt and the evidence excludes all reasonable theories of innocence. It is the state's burden to produce such evidence." *Id.*

225. *S. R.R. v. Ga. Kraft Co.*, 258 Ga. 232, 233, 367 S.E.2d 539, 540 (1988); *S. R.R. v. Hand*, 216 Ga. App. at 373, 454 S.E.2d at 220.

226. See *supra* text accompanying notes 202-03.

227. COUNCIL OF SUPERIOR COURT JUDGES, *supra* note 179, at 15. The source statute is O.C.G.A. § 24-4-22 (1995).

228. *Floyd v. Colonial Stores, Inc.*, 121 Ga. App. 852, 863 n.2, 176 S.E.2d 111, 119 (1970).

need for instructions on missing witnesses from an early date²²⁹ and has held it unconstitutional and inapplicable in criminal cases.²³⁰ 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.”²³¹ The law does not require a party to account for every witness who has knowledge of the facts pertinent to the case.²³² Likewise, it is improper to give the similar instruction on having “more certain and satisfactory” evidence but producing only “weaker and inferior” evidence when it would have the erroneous effect of confusing and misleading the jury as to the weight of evidence properly admitted.²³³

h. Admissions. The *Suggested Pattern Jury Instructions* next provides a section on the use of admissions in pleadings.²³⁴ This is rarely given, perhaps because admissions are not frequently used at trial. In any case, such admissions in pleadings, like all other contentions, are best stated by the parties. Admissions introduced in evidence will be considered just as any other evidence, and a jury instruction is not needed to give them undue prominence.

i. Impeachment. In the final “general instruction” on evidence, the jury would again hear that witnesses are presumed to speak the truth²³⁵ unless impeached in some legal manner, and the court would itemize the ways in which a witness may be impeached. Then the jury would learn that the credibility of the witnesses was to be determined

229. *Richmond & Danville R.R. v. Mitchell*, 92 Ga. 77, 83-84, 18 S.E. 290, 292 (1893). In *Richmond* the court noted that “[n]o harm would have been done by an instruction merely to reconcile conflicts in the evidence, if any existed, and if the jury could reconcile them; but to put the jury on the lookout for other witnesses, witnesses not introduced or accounted for, was rather a dangerous thing.” *Id.*

230. *Radford v. State*, 251 Ga. 50, 53, 302 S.E.2d 555, 559 (1983); *Sokolic v. State*, 228 Ga. 788, 790-91, 187 S.E.2d 822, 824 (1972).

231. *Johnson v. Riverdale Anesthesia Ass’n*, 249 Ga. App. 152, 154, 547 S.E.2d 347, 349-50 (2001).

232. *Bakery Servs., Inc. v. Thornton Chevrolet, Inc.*, 224 Ga. App. 31, 33, 479 S.E.2d 363, 366 (1996).

233. *Meacham v. Barber*, 183 Ga. App. 533, 538-39, 359 S.E.2d 424, 428 (1987) (jury might discount deposition testimony rather than live testimony).

234. COUNCIL OF SUPERIOR COURT JUDGES, *supra* note 179, at 15.

235. See *supra* text accompanying notes 216-17.

by them.²³⁶ All the methods of impeachment are often given, even if they are not all involved in the case.²³⁷

The only effect of impeachment is that the witness's credibility is for the jury to decide,²³⁸ as it is for unimpeached witnesses.²³⁹ Therefore, the only significance of impeachment is that the parties may introduce particular evidence to discredit the witness. Impeachment, therefore, is significant only as a rule for the admissibility of evidence, a rule of law for the judge and not for the jury. As the sole judges of credibility, the jury will have to decide whether the witness would be believed based on all the evidence; whether that evidence is presented under normal rules of relevance or under rules for impeachment is not significant. The courts have consistently recognized that instructions on impeachment by contradiction, for example, are adequately covered in the court's general charge on credibility.²⁴⁰ By commenting upon impeachment, the trial judge gives undue prominence to the fact that a witness was challenged and may be perceived as siding with the side challenging the witness.

On the issue of credibility, parties have often sought elaborative instructions that a plaintiff may not recover if her testimony is self-contradictory, vague or equivocal.²⁴¹ This instruction is erroneous if there is other evidence to corroborate the party's weak testimony,²⁴² and if not, a directed verdict should be granted. 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

236. COUNCIL OF SUPERIOR COURT JUDGES, *supra* note 179, at 16.

237. *Hardy v. State*, 240 Ga. App. 115, 119-20, 522 S.E.2d 704, 708-09 (1999). "Giving 'an unauthorized charge on an unavailable method of impeachment is generally harmless error.'" *Id.* (quoting *Francis v. State*, 266 Ga. 69, 72, 463 S.E.2d 859, 861 (1995)). The court may of course refuse to instruct on inapplicable means of impeachment. *Randolph v. State*, 246 Ga. App. 141, 145, 538 S.E.2d 139, 143-44 (2000).

238. O.C.G.A. § 24-9-85(a) (1995); *Cartin v. Boles*, 155 Ga. App. 248, 254, 270 S.E.2d 799, 806 (1980) (holding that trier of fact may believe witness no matter how well impeached).

239. O.C.G.A. § 24-9-80 (1995). *Tate v. State*, 264 Ga. 53, 56, 440 S.E.2d 646, 649 (1994). "The trier of fact is not obligated to believe a witness even if the testimony is uncontradicted and may accept or reject any portion of the testimony." *Id.*

240. See, e.g., *Sharp v. Fagan*, 215 Ga. App. 44, 46, 449 S.E.2d 648, 650-51 (1994).

241. Though normally stated as a rule against plaintiffs, a variation of the instruction would require a verdict against defendants in similar circumstances. *Rigg v. New World Pictures, Inc.*, 183 Ga. App. 446, 446-47, 359 S.E.2d 207, 208-09 (1987).

242. *Weathers v. Cowan*, 176 Ga. App. 19, 22, 335 S.E.2d 392, 395 (1985) (holding it was error because it violates O.C.G.A. § 24-4-4 (1995), which authorizes the jury to consider all facts and circumstances in determining where the preponderance of the evidence lies).

ignores other evidence on the same point.²⁴³ An instruction that the testimony of an impeached witness should be disregarded unless it is corroborated is error.²⁴⁴

j. Presumptions. There is no "general instruction" on presumptions, but the issue arises often enough to be addressed here. Unfortunately, the law in Georgia is quite inconsistent on whether instructions about presumptions may be given. On some subjects, the presumption vanishes upon the presentation of any contrary evidence and it is error to instruct on it, for example: the presumption that injury caused by the operation of a railroad was the result of the negligence of the railroad's employees,²⁴⁵ the similar presumption from the operation of public transportation,²⁴⁶ the presumption from livestock running free that the owner was negligent,²⁴⁷ the presumption that the driver of a vehicle is a servant of the owner of the vehicle,²⁴⁸ the presumption of driving under the influence from breathalyzer tests,²⁴⁹ the presumption arising from a ceremonial marriage that a prior marriage was properly terminated,²⁵⁰ and the presumption of receipt of a properly mailed

243. *Shennett v. Piggly Wiggly S., Inc.*, 197 Ga. App. 502, 503, 399 S.E.2d 476, 477 (1990); *Kane v. Cohen*, 182 Ga. App. 485, 488, 356 S.E.2d 94, 97 (1987); *Weathers*, 176 Ga. App. at 20-22, 335 S.E.2d at 394; *Maurer v. Chyatte*, 173 Ga. App. 343, 343-44, 326 S.E.2d 543, 544-45 (1985).

244. *Berry v. State*, 267 Ga. 476, 479-80, 480 S.E.2d 32, 35-36 (1997) (holding that error was not reversible because other instructions stated that credibility is exclusively for the jury); *James v. State*, 180 Ga. App. 7, 9-10, 348 S.E.2d 502, 505 (1986).

245. *Wall v. S. R.R.*, 196 Ga. App. 483, 483-85, 396 S.E.2d 266, 266-67 (1990); *Houston v. Ga. Northeastern R.R.*, 193 Ga. App. 687, 688, 388 S.E.2d 762, 763 (1989); *S. R.R. v. James*, 170 Ga. App. 73, 73-74, 316 S.E.2d 159, 159-60 (1984); *Seaboard Coast Line R.R. v. Wroblewski*, 138 Ga. App. 793, 796, 227 S.E.2d 438, 439 (1976).

246. *Booker v. MARTA*, 166 Ga. App. 271, 271, 304 S.E.2d 446, 446 (1983); *Gillem v. MARTA*, 160 Ga. App. 393, 394, 287 S.E.2d 264, 265 (1981); *Ga. Ry. & Power Co. v. Shaw*, 40 Ga. App. 341, 149 S.E. 657 (1929).

247. *John Hewell Trucking Co. v. Brock*, 239 Ga. App. 862, 863-64, 522 S.E.2d 270, 272 (1999). *But see* *Pouncey v. Adams*, 206 Ga. App. 126, 128, 424 S.E.2d 376, 378 (1992) (holding it was permissible to instruct on this principle as a permissive inference rather than a presumption of fact).

248. *Allen Kane's Major Dodge, Inc. v. Barnes*, 243 Ga. 776, 783, 257 S.E.2d 186, 191 (1979). The court overruled prior decisions that held that "the facts arising from the presumption, although rebutted by uncontradicted evidence, must be determined by a jury." *Id.* (citing *Pest Masters, Inc. v. Callaway*, 133 Ga. App. 123, 210 S.E.2d 243 (1974)); *Lindsey v. Fitzgerald*, 157 Ga. App. 124, 125, 276 S.E.2d 275, 276 (1981). *But see* *Reliance Ins. Co. v. Bridges*, 168 Ga. App. 874, 879, 311 S.E.2d 193, 201 (1983).

249. *Brown v. State*, 174 Ga. App. 470, 470, 330 S.E.2d 408, 409 (1985).

250. *Mayo v. Owen*, 208 Ga. 483, 488, 67 S.E.2d 709, 713 (1951).

letter.²⁵¹ These cases reason that a presumption is "merely a general rule of law that under some circumstances, in the absence of any evidence to the contrary, a jury is compelled to reach a certain conclusion of fact," but the presumption "is only raised by the absence of any real evidence as to the existence of the ultimate fact in question" and "give[s] way to reality when facts opposing presumptions are presented,"²⁵² as "all presumptions must yield to the truth."²⁵³ In these cases, Georgia law agrees with Kentucky law that it is never proper to instruct on presumptions of law and fact, that presumptions are simply procedural devices directed to the judge for shifting the burden of producing evidence or ultimate persuasion.²⁵⁴

But on other subjects, Georgia courts hold that the presumption does not disappear until the jury rejects it in the jury room, and the trial judge may properly instruct on the presumption, for example: the presumption that medical services are performed with ordinary care,²⁵⁵ the presumptions of sanity generally and of insanity after an adjudication of insanity,²⁵⁶ the presumption of validity of a marriage,²⁵⁷ and the presumption that death results from accident rather than suicide.²⁵⁸ The cases holding that the presumption may be charged argue that the court should instruct on the consequences that the law draws from facts proven,²⁵⁹ and because the presumption survives into jury deliberations, it is "helpful . . . to acquaint the jury with the effect of the presumption or, at least, with the effect of proof of the fact which gives

251. *Menke v. First Nat'l Bank of Atlanta*, 168 Ga. App. 495, 498, 309 S.E.2d 835, 837-38 (1983).

252. *Floyd v. Colonial Stores, Inc.*, 121 Ga. App. 852, 857-58 n.1, 176 S.E.2d 111, 116 (1970).

253. *Chrison v. H & H Interiors, Inc.*, 232 Ga. App. 45, 48, 500 S.E.2d 41, 44 (1998) (quoting *Edwards v. Fireman's Fund Ins. Co.*, 147 Ga. App. 27, 28, 248 S.E.2d 2, 3 (1978)).

254. *Lowe v. McMurray*, 412 S.W.2d 571 (Ky. 1967); *Pacific Mut. Life Ins. Co. v. Meade*, 134 S.W.2d 960, 965 (1939). The Kentucky rule is subject to exceptions mandated by the Supreme Court of the United States in criminal procedure. *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) (charge on presumption of innocence required). *But see Kentucky v. Whorton*, 441 U.S. 786, 788-90 (1979) (holding that charge was required in *Taylor* based on happenings at trial and not universally).

255. *Wilson v. Muhanna*, 213 Ga. App. 704, 705-06, 445 S.E.2d 540, 542-43 (1994); *Overstreet v. Nickelsen*, 170 Ga. App. 539, 542-43, 317 S.E.2d 583, 586-87 (1984). This presumption is critiqued *infra*, in the text accompanying notes 288-90.

256. *Nagel v. State*, 262 Ga. 888, 891, 427 S.E.2d 490, 492 (1993).

257. *Fisher v. Toombs County Nursing Home*, 223 Ga. App. 842, 844, 479 S.E.2d 180, 183 (1996).

258. *Templeton v. Kennesaw Life & Accident Ins. Co.*, 216 Ga. 770, 773-74, 119 S.E.2d 549, 551-52 (1961).

259. *Overstreet*, 170 Ga. App. at 544, 317 S.E.2d at 588; *Hagar v. State*, 71 Ga. 164, 167 (1884).

rise to the presumption."²⁶⁰ In these cases, if the presumption changes the burden of proof, the court must instruct in the language of presumption rather than permissive inference.²⁶¹ Absent a change of law, one must recognize that there are two kinds of rebuttable presumptions of law and that no comprehensive theory of presumptions can be maintained.

The courts have made almost no effort to harmonize these lines of cases, and the classification of some presumptions as "vanishing" or "bursting bubble" presumptions and others as durable evidentiary presumptions appears to be a series of arbitrary historical accidents. In any case, charging on presumptions is problematic at best. That they are in fact needless is proved by one of the early decisions relied upon by the cases allowing the instruction, in which the court stated that

[t]o instruct [the jury] that they are legally authorized to infer one thing from another, or from certain others, but that they are to decide for themselves both whether the given premises are true, and whether the inference can and ought in fact to be made, is only to say that the law *permits* them to reason in the manner indicated, if they determine that the evidence and the ordinary test of human experience warrant them in so doing.²⁶²

In other words, such an instruction singles out one particular conclusion that the jury may, or may not, draw from the evidence in its exclusive discretion. It is therefore not an *instruction*. It is a comment on the evidence and the conclusions that may be drawn from it, and selectively omits other ways the jury may reason and other conclusions it may reach. This instruction is, therefore, an *argument*. In related contexts, the supreme court has pointed out that the trial judge should not emphasize particular circumstances in instructing on permissive inferences that the jury may draw unless the jury seeks the clarification²⁶³ and has begun to reverse trial judges who do so.²⁶⁴ Some additional reasons for rejecting instructions on presumptions have been addressed above in connection with the presumptions that witnesses

260. *Miller v. Miller*, 258 Ga. 168, 170 n.6, 366 S.E.2d 682, 684 (1988).

261. *White v. Regions Bank*, 275 Ga. 38, 39, 561 S.E.2d 806, 808 (2002).

262. *Kinnebrew v. State*, 80 Ga. 232, 239, 5 S.E. 56, 59 (1887) (emphasis added).

263. *Clark v. State*, 265 Ga. 243, 246, 454 S.E.2d 492, 495 (1995), *overruled on other grounds by Wall v. State*, 269 Ga. 506, 500 S.E.2d 904 (1998) (holding that the trial court should not elaborate on a general instruction that jury may infer that a person intends the natural and probable consequences of his actions with an instruction that if a person uses a deadly weapon, the jury may infer an intent to kill); *Wood v. State*, 258 Ga. 598, 599 n.2, 373 S.E.2d 183, 184 (1988) (same).

264. *Harris v. State*, 273 Ga. 608, 609-10, 543 S.E.2d 716, 717-18 (2001).

speak the truth and against parties who do not bring the best evidence to court.²⁶⁵ The instructions can easily be confusing. Charges of the form "the law presumes . . ." are susceptible to being understood by a rational trier of fact as establishing *mandatory* presumptions and should be replaced by instructions on permissive inferences.²⁶⁶ It is error to instruct on presumptions without stating that they are rebuttable.²⁶⁷

These cases present strong reasons for refusing to instruct on presumptions in any case. Assuming that some presumptions of law deserve to retain evidentiary value even after contradictory evidence has been admitted, it does not follow that the court should instruct on them and jeopardize its impartiality. It is the lawyers who should argue inferences from the evidence during summation, not the judge during jury instructions. To give effect to the evidentiary value of presumptions, counsel should be permitted to state, without contradiction, that the jury may assume the presumed fact based on the existence of the facts that trigger the presumption, but the judge should not comment in any fashion about whether the jury may or should draw the inference.

k. Summary. The only "general instruction" that the jury needs is the burden of proof stated in the form of a rule governing their verdict. It is adequately covered in civil cases by an instruction of the form, "If you believe from the evidence that . . ., you should find for the plaintiff; otherwise you should find for the defendant." Many of the other rules stated in the *Suggested Pattern Jury Instructions's* general instructions are rules for the sufficiency of the evidence (circumstantial evidence) or rules for the admissibility of evidence (experts, impeachment), which are properly addressed to the judge, not the jury. Rules governing the admissibility of evidence are not pertinent for jury consideration.²⁶⁸ Instead of abstract rules on admissibility, a jury instruction should tell the jury what to do with evidence that has been admitted.²⁶⁹ Other

265. See *supra* text accompanying notes 216-17, 227-33.

266. *Williamson v. State*, 248 Ga. 47, 58-59, 281 S.E.2d 512, 521 (1981).

267. *Merrell v. Beckwith*, 263 Ga. 779, 782, 439 S.E.2d 488, 490 (1994) (stating it is "incomplete and misleading absent more elaborate instructions pertaining to legal presumptions, how they may be rebutted, and the jury's duty as it relates to such presumptions"); *Godwin v. Caldwell*, 231 Ga. App. 523, 525, 500 S.E.2d 49, 50 (1998); *Bakery Servs., Inc. v. Thornton Chevrolet, Inc.*, 224 Ga. App. 31, 35-36, 479 S.E.2d 363, 368 (1996).

268. *Ike v. Kroger Co.*, 248 Ga. App. 531, 533, 546 S.E.2d 903, 905-06 (2001) (noting there was no need to instruct on the admissibility of testimony that was admitted); *Blume v. Richmond County*, 190 Ga. App. 366, 367, 378 S.E.2d 694, 695 (1989).

269. *Maulding v. Hous. Auth. of Marietta*, 223 Ga. App. 158, 160, 477 S.E.2d 317, 319 (1996).

rules in these instructions invade the province of the jury by presuming to tell the jury, even if vaguely, what it should or should not consider or believe (credibility, conflicts, failure to produce evidence, impeachment). The Kentucky Approach avoids all of these failings and tells the jury precisely what they need to know in comprehensible terms. It also gets immediately to the point, rather than wasting the jury's patience.

2. Proximate Cause

Another problematic jury instruction relates to the "proximate cause" concept. The *Suggested Pattern Jury Instructions* gives 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.²⁷⁰

Judge Mikell has described this mind-numbing language as "an affront to communication."²⁷¹ Justice Weltner stated, "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.)"²⁷² The fact that "proximate cause" is often misunderstood is well illustrated by the frequent misinterpretation of the term to mean "probable" or "approximate cause."²⁷³ The word "proximate" carries notions of temporal or spatial proximity which are not dispelled by the "not necessarily" clause and are certainly not clarified by the notion of "nearness in causal relation," a phrase that is probably unique in English language texts. Moreover, instructions concerning the "dominant cause" have been criticized as suggesting that there can be only one proximate cause of an injury.²⁷⁴

270. COUNCIL OF SUPERIOR COURT JUDGES, *supra* note 179, at 231.

271. Mikell, *supra* note 38, at 61 (noting that 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).

272. Atlanta Obstetrics & Gynecology Group, P.A. v. Coleman, 260 Ga. 569, 571 n.3, 398 S.E.2d 16, 19 (1990) (Weltner, J., concurring). A paraphrase of the second sentence was held to be confusing in T.J. Morris Co. v. Dykes, 197 Ga. App. 392, 395-96, 398 S.E.2d 403, 405 (1990).

273. Winslow, *supra* note 30, at 468.

274. Joiner v. Lane, 235 Ga. App. 121, 122-23, 508 S.E.2d 203, 206 (1998); Whitley v. Gwinnett County, 221 Ga. App. 18, 24, 470 S.E.2d 724, 730 (1996); Locke v. Vonalt, 189 Ga. App. 783, 788, 377 S.E.2d 696, 702 (1989). For the same reason, instructions on

Kentucky does not instruct juries using the term "proximate cause." Instead, after its judges resolve issues of law, the only issue remaining for the jury is whether the results of the challenged conduct were reasonably foreseeable, and that issue is presented to the jury in this form: "If you find defendant failed to comply with one or more of those duties and if such failure was a substantial factor in causing plaintiff's injuries, then"²⁷⁵ Various courts have also found an instruction on "proximate cause" faulty and replaced it with a "substantial factor" instruction, particularly where there is more than one causal factor.²⁷⁶

Georgia courts should abolish this standard instruction, which is simply incomprehensible. They have already held that it is not error to refuse to give this definition of causation issues.²⁷⁷

After abolishing the standard instruction, the courts should simplify the concept for the jury *contextually*, and the following measures will do so. First, issues of law should be treated as such. Cases recognize that proximate cause is "'a policy decision . . . that, for a variety of reasons, e.g., intervening act, the defendant's conduct and the plaintiff's injury are too remote for the law to countenance a recovery' . . . to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent."²⁷⁸

finding the defendant liable if it is the "sole proximate cause" are erroneous. *Armstrong v. Bailey*, 114 Ga. App. 269, 269, 150 S.E.2d 693, 694 (1966).

275. *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328 (Ky. 1987); *Collins v. Galbraith*, 494 S.W.2d 527 (Ky. 1973).

276. See, e.g., *Conklin v. Weisman*, 678 A.2d 1060 (N.J. 1996); *Busta v. Columbus Hosp. Corp.*, 916 P.2d 122 (Mont. 1996); *Mitchell v. Gonzales*, 819 P.2d 872 (Cal. 1991); *Fussell v. St. Clair*, 818 P.2d 295 (Ida. 1991); *Knodle v. Waikiki Grand Hotel*, 742 P.2d 377 (Haw. 1987); *Morris v. Farley Enter., Inc.*, 661 P.2d 167 (Alaska 1983); *Busko v. DeFilippo*, 294 A.2d 510 (Conn. 1972). Cf. *Jackson v. Ray Kruse Constr. Co.*, 708 S.W.2d 664 (Mo. 1986) (fact inquiry is whether acts "directly caused or contributed" to injury).

277. *Hancock v. Bryan County Bd. of Educ.*, 240 Ga. App. 622, 627-28, 522 S.E.2d 661, 667 (1999) (holding that an instruction applied to the contentions in the case suffices—here, whether the wreck caused plaintiff's back injury or whether the injury pre-existed the wreck; the *SPJI* instruction would be "merely elaborative," though it "would have been better" if the court gave some instruction on proximate cause); *Gray v. Elias*, 236 Ga. App. 799, 802-03, 513 S.E.2d 539, 542 (1999).

As appellate judges, we are not required to set aside our common sense; nor do we underestimate the intelligence of the jury. Under the particular facts of this case, we find it unlikely that [the above instruction] would have so greatly increased the jury's understanding of its duty that the failure to give such charge deprived Gray of the right to a fair trial.

Id.

278. *Atlanta Obstetrics & Gynecology Group, P.A. v. Coleman*, 260 Ga. 569, 569, 398 S.E.2d 16, 17 (1990) (quoting *McAuley v. Wills*, 251 Ga. 3, 7, 303 S.E.2d 258, 261 (1983)); *Black v. Ga. S. & Fla. Ry. Co.*, 202 Ga. App. 805, 807, 415 S.E.2d 705, 707 (1992)

[A] holding that a defendant's conduct is not the proximate cause of the plaintiff's injury does not constitute a determination that the defendant's conduct is not a cause in fact of the plaintiff's injury, but rather is in the nature of a policy decision by the court that, for a variety of reasons, *e.g.* intervening act, the defendant's conduct and the plaintiff's injury are too remote for the law to countenance a recovery [T]he proximate-cause rubric has been used as another way of saying, among other things, that the defendant was under no duty to protect the plaintiff from the injury which in fact occurred.²⁷⁹

Issues of the legal limits on liability are questions of law and should be disposed of by directed verdict or narrowing the fact issues to be submitted to the jury; the jury need not be instructed on legal rules that the judge must apply in deciding the issues to submit to the jury. The jury's role is not to make the policy decisions that "proximate cause" entails; that is a legal function that belongs exclusively to the court.

After removing legal causation issues, the court should determine what causation questions actually exist in the case and instruct on those questions alone. For example, the parties may contest whether an injury was reasonably foreseeable. If so, the issue may be framed in terms of the defendant's duty to foresee and avoid (prevent, guard against, warn against) possible results. The parties may contest whether a medical operation was needed on account of the tort or because of a pre-existing condition. An instruction on damages that allows recovery of medical expenses incurred as a result of the tort (or of the injuries sustained in the tort) will suffice. If the parties contest whether the patient would have died even if the defendant doctor had diagnosed the ailment in a timely fashion, it may be somewhat confusing to present the issue as whether the doctor's breach of duty was a substantial factor in causing the death, but the issue could be presented in a form like this: "If you believe from the evidence that [the doctor was negligent] and that the patient's death from this disease would have been prevented if the doctor had complied with his duty, then" Unless the actual issues raise such special causation questions, an instruction in the following form will suffice as the default instruction on causation: "If you believe from the evidence that defendant failed to comply with [one or more of the previously enumerated duties] and that such failure was a substantial

(recognizing that this policy decision of law is "usually left to a jury," without commenting on the anomaly of leaving issues of legal policy to untrained fact-finders).

279. *McAuley v. Wills*, 251 Ga. 3, 7, 303 S.E.2d 258, 261 (1983). *Accord* *Gray v. Elias*, 236 Ga. App. 799, 802, 513 S.E.2d 539, 541 (1999).

factor in causing plaintiff's injuries, then you should find for plaintiff; otherwise you should find for defendant."

In some cases, it should not be necessary to instruct on causation at all. For example, if there is no factual dispute that defendant's driving killed a pedestrian, there is no issue of fact about causation, only an issue regarding negligence.²⁸⁰ Nevertheless, some cases hold that a proximate cause instruction must be given even without request.²⁸¹ By simplifying the causation issues to those fact questions that the parties actually dispute, rather than attempting to cover all possible causation disputes in one definition that lacks meaning for any single dispute, the courts will help jurors perform their fact finding task.

3. Medical Malpractice

Cases of medical negligence should be among the simplest of tort cases to submit to a jury. There is almost never an issue of comparative negligence.²⁸² There is almost never a specific standard of care defined by law, just the general standard of care elaborated and specified by the often conflicting testimony of medical experts.²⁸³ There may be some complications involving causation issues or multiple defendants, but in general, the liability issues can be submitted on a single instruction of the general standard of care and a question asking whether the defendant came within the standard or not. Adding instructions on the measure of damages, the entire instruction could fit on a single sheet of paper, double spaced.²⁸⁴

The complexity of jury instructions in actual medical malpractice cases cannot be attributed to the law, but only to the intensity with which

280. For Georgia cases in which the appellate court upheld a charge that omitted a definition of proximate cause, see *Hancock*, 240 Ga. App. at 627-28, 522 S.E.2d at 666-67 (holding that the trial judge adequately instructed that issue was whether plaintiff's injuries were connected with the wreck or pre-existed the wreck, but did not define proximate cause); *Gray*, 236 Ga. App. at 802-03, 513 S.E.2d at 541-42 (trial judge adequately instructed that plaintiff could not recover unless wreck proximately caused injuries, but did not define proximate cause).

281. *Taft v. Taft*, 209 Ga. App. 499, 501, 433 S.E.2d 667, 668 (1993) (stating that "in every jury determination involving damages which result from negligence (both in regular and special jury verdicts), it is essential that the trial judge instruct the jury 'as to the legal meaning of proximate cause and its application to the facts'" (quoting *Cline v. Kehs*, 146 Ga. App. 350, 352, 246 S.E.2d 329, 331 (1978)). But see *Gray*, which distinguishes the rule in *Taft* as applicable only if the factual causation issues are complex. 236 Ga. App. at 803, 513 S.E.2d at 542.

282. *Overstreet v. Nickelsen*, 170 Ga. App. 539, 540-41, 317 S.E.2d 583, 584-85 (1984).

283. O.C.G.A. § 51-1-27 (2000).

284. See Sample 1 in the Appendix.

such cases are litigated. The Author recently participated in a medical malpractice trial in which one defendant submitted twenty proposed instructions and the other forty-eight. The proposed charges were not organized in any particular order, thereby concealing a significant amount of repetition. There were numerous references to the burden of proof. Almost all the instructions that elaborated on the basic medical malpractice standard ended with one of two phrases, "you should find for the defendant" or "the plaintiff cannot recover." This is typical of such cases.²⁸⁵ Fortunately, not all trial judges have been stampeded by excessive and repetitive proposed instructions.²⁸⁶

The appellate courts have, unfortunately, allowed the jury instruction process to become an additional argument for defendants in medical negligence cases.²⁸⁷ The courts have repeatedly upheld instructing that the law presumes that "medical or surgical services were performed in an ordinarily skillful manner,"²⁸⁸ thereby giving it the status of a durable evidentiary presumption rather than a "bursting bubble" presumption. This is a bizarre rule that does not apply to any other class of tort litigant. There are no standard instructions that, for example, the driver was presumed to enter the intersection with

285. *Lewis v. Emory Univ.*, 235 Ga. App. 811, 820, 509 S.E.2d 635, 644 (1998) (trial court instructed five times that jury could not speculate or guess in reaching a verdict); *Hardy v. Tanner Med. Ctr., Inc.*, 231 Ga. App. 254, 257, 499 S.E.2d 121, 124 (1998) (multiple jury instructions on sympathy and the burden of proof); *Dent v. Mem'l Hosp. of Adel, Inc.*, 227 Ga. App. 801, 810, 490 S.E.2d 509, 516 (1997), *rev'd*, 270 Ga. 316, 317, 509 S.E.2d 908 (1998) (disjointed charge contained thirty-seven instructions); *Crumbley v. Wyant*, 188 Ga. App. 227, 229-30, 372 S.E.2d 497, 499-500 (1988) (lengthy charge, with numerous repetitions excused as more clearly explaining the applicable principles and not as emphasizing them); *Jackson v. Rodriguez*, 173 Ga. App. 211, 213, 325 S.E.2d 857, 859 (1984) (in nineteen pages of instructions, court charged four times that physicians are presumed to be skillful).

286. See *Yuscavage v. Jones*, 213 Ga. App. 800, 803, 446 S.E.2d 209, 213 (1994) (trial judge properly refused many charges on same point as long as the jury charge contained all relevant points); *Kapsch v. Stowers*, 209 Ga. App. 767, 770, 434 S.E.2d 539, 542 (1993) (trial judge combined four proposed charges on unfavorable results).

287. The author has found only one case in which elaborations on the basic standard helped a plaintiff in a medical malpractice case. See *Packer v. Gill*, 193 Ga. App. 388, 389-90, 388 S.E.2d 338, 340 (1989).

288. *Shea v. Phillips*, 213 Ga. 269, 271, 98 S.E.2d 552, 554 (1957) (stating rule, not authorizing instruction); *Crumbley*, 188 Ga. App. at 228-29, 372 S.E.2d at 499 (rejecting challenge that instruction gives malpractice defendants the benefit of a presumption not available to other tort defendants); *Overstreet v. Nickelsen*, 170 Ga. App. 539, 542-44, 317 S.E.2d 583, 586-88 (1984) (rejecting contention that presumption vanishes); *Hopper v. McCord*, 115 Ga. App. 10, 11, 153 S.E.2d 646, 647 (1967) (recognizing that this charge is merely an instruction on the burden of proof); *Summerour v. Lee*, 104 Ga. App. 73, 74, 121 S.E.2d 80, 81 (1961) (stating rule, not authorizing instruction).

ordinary care or that the pedestrian was presumed to cross the street with ordinary care. In all other cases, specific presumptions regarding negligence vanish when contrary evidence is presented,²⁸⁹ and a general presumption that people perform their duties without negligence applies only "in the absence of affirmative proof of negligence."²⁹⁰ This instruction is also in the form, "the law presumes . . .," which has been held to be misleading.²⁹¹ Allowing jury instructions on this presumption seems to be a special privilege for medical defendants.

Further confusing the jury's task in resolving the liability issue in view of the conflicting testimony of experts, defendants have requested, and courts have delivered, an instruction that "the mere difference of views between physicians as to the techniques or as to medical judgment exercised is insufficient to support an action for malpractice where it is shown that the procedure preferred by each or the judgment exercised is an acceptable and customary method of treatment."²⁹² This text is easily susceptible to the understanding that the plaintiff's expert's testimony does not suffice when a defense expert has a "different view," because the different view is also "shown" (by the defense expert) to be "an acceptable and customary method." On the other side of the coin, the court has allowed an instruction that "[i]t is the general law of this state that laymen, even jurors and courts, are not permitted to say what is proper medical diagnosis and treatment."²⁹³ This can suggest that the jury is incompetent to decide which of the experts is more credible because it would necessarily violate this rule to do so. The net result of both charges is that nobody in the courtroom is permitted by law to state that the defendant was negligent.

To reiterate and reinforce defense arguments, the courts have allowed instructions on nonissues such as "a doctor is not an insurer and an

289. See *supra* text accompanying notes 245-47.

290. *Richardson v. Pullen*, 175 Ga. App. 305, 306-07, 333 S.E.2d 130, 131-32 (1985). Accord *Stokes v. Cantrell*, 238 Ga. App. 741, 745, 520 S.E.2d 248, 251 (1999).

291. See *supra* text accompanying note 266.

292. *Crumbley*, 188 Ga. App. at 229, 372 S.E.2d at 499. Accord *Hardy v. Tanner Med. Ctr., Inc.*, 231 Ga. App. 254, 257, 499 S.E.2d 121, 124 (1998) (objection was that charge was not adjusted to the evidence); *Laughridge v. Moss*, 163 Ga. App. 427, 427-28, 294 S.E.2d 672, 674 (1982) (same); *Hayes v. Brown*, 108 Ga. App. 360, 366, 133 S.E.2d 102, 106-07 (1963). But see *Yuscavage*, 213 Ga. App. at 803, 446 S.E.2d at 212-13 (holding that failure to give charge was not error because issue was whether doctor's treatment of patient was an acceptable medical approach at all).

293. *Morrison v. Koornick*, 201 Ga. App. 367, 370, 411 S.E.2d 105, 108-09 (1991) (noting that this merely "reiterates and reinforces" another instruction that the required skill of medical practitioners is solely for experts, not lay jurors).

unintended result does not raise even an inference of negligence,²⁹⁴ “the law does not require that treatment given by a physician to a patient shall obtain nearly perfect, or perfect, results,”²⁹⁵ that “physicians do not guarantee the results of treatment or operation,”²⁹⁶ and that “a physician is not responsible in damages for lack of success, or honest mistakes or errors in judgment.”²⁹⁷ Repetition of such instructions, along with repetitions of the burden of proof and other principles, runs a strong risk of suggesting that the trial judge is taking a great interest in protecting the defendant.²⁹⁸ Instructing that the law does not require perfect or near perfect results is confusing if the jury believes under the evidence that this doctor could have obtained “perfect results” by doing his duty, in which case, the instruction is entirely misleading.²⁹⁹ Instructing that a physician is not liable for honest mistakes and errors in judgment is erroneous for the same reason, in addition to suggesting that the doctor’s intent is a significant matter.³⁰⁰

The courts should eliminate the repetitious and argumentative instructions in medical negligence cases. They have done so in a few

294. *Clemons v. Atlanta Neurological Inst., P.C.*, 192 Ga. App. 399, 400, 403, 384 S.E.2d 881, 882, 884 (1989) (noting that though it raised questions not in issue, instruction was not reversible error because, in the court’s understanding of the surrounding charge as applied to the evidence, “it helps to communicate, although not as crisply as might have been, ‘the principle that a physician is judged by conduct and not by result’”; dissent argued that the instruction confused the standard of care).

295. *Brannen v. Prince*, 204 Ga. App. 866, 871, 421 S.E.2d 76, 80 (1992) (rejecting challenge that it was a negative statement of the standard of care because “stating the negative often increases understanding of the positive”), *overruled on other grounds* by *Gillis v. City of Waycross*, 247 Ga. App. 119, 543 S.E.2d 423 (2000); *Hopper v. McCord*, 115 Ga. App. 10, 11, 153 S.E.2d 646, 647 (1967). Nevertheless, it was deemed error to give this instruction in *Hartman v. Shallowford Community Hospital, Inc.*, 219 Ga. App. 498, 500, 466 S.E.2d 33, 36 (1995), because it confused the jury, which asked whether an error is negligent if it is unknown or unintentional, and the trial judge failed to clarify the confusion.

296. *Brannen*, 204 Ga. App. at 871-72, 421 S.E.2d at 80-81 (rejecting contention that charge was argumentative in stating what the law is not and confusing what the standard is, by noting that it is “in accord with the general principles of negligence law that the occurrence of an unfortunate event is not sufficient to authorize an inference of negligence”); *Campbell v. Hosp. Auth. of Cobb County*, 195 Ga. App. 402, 404, 393 S.E.2d 480, 482 (1990); *Hill v. Hosp. Auth.*, 137 Ga. App. 633, 639, 224 S.E.2d 739, 744 (1976).

297. *Hopper*, 115 Ga. App. at 11, 153 S.E.2d at 647 (rejecting contention that charge was argumentative because it merely clarified the requirements of the law). Nevertheless, it was deemed error to give this instruction in *Hartman* because it confused the jury, which asked whether an error is negligent if it is unknown or unintentional, and the trial judge failed to correct the confusion. 219 Ga. App. at 501, 466 S.E.2d at 36.

298. See *supra* text accompanying notes 89-95.

299. *Blount v. Moore*, 159 Ga. App. 80, 82-83, 282 S.E.2d 720, 722-23 (1981).

300. *Hartman*, 219 Ga. App. at 500, 466 S.E.2d at 36.

cases. For example, it is error to instruct that "medicine is an inexact science at best and all a doctor may do is assist nature in accordance with the present state of medical experience" because this language, though taken from an appellate decision,³⁰¹ is argumentative, inappropriate, and misleading.³⁰² Likewise, it has been found error to instruct that "a defendant cannot be found negligent on the basis of an assessment of a patient's condition which only later in hindsight proves to be incorrect so long as the initial assessment was made in accordance with reasonable standards of medical care," at least without further qualifications that "negligence consists in not foreseeing and guarding against that which is probable and likely to happen, not against that which is only remotely and slightly possible,"³⁰³ and only then if plaintiff contends that the doctor committed malpractice based on after-acquired knowledge.³⁰⁴

Malpractice cases are complicated enough for juries to understand without imposing a barrage of needless and misleading jury instructions upon them. The Kentucky Approach avoids those problems entirely by simply stating the standard of care and asking whether the doctor complied with it.

D. Procedural Changes

Several procedural changes that will improve jury instruction comprehensibility have been stated in or suggested by the preceding text, and others have been mentioned by commentators on this subject. Several of these changes are developed below.

In proposing instructions, lawyers should be encouraged to submit no more than one instruction on any claim or defense for which there is a burden of proof and, in drafting the instruction, to state it in the form, "if you believe [a,b,c], then you should find for the plaintiff; otherwise

301. *Hayes v. Brown*, 108 Ga. App. 360, 363, 133 S.E.2d 102, 105 (1963).

302. *Jackson v. Rodriguez*, 173 Ga. App. 211, 213, 325 S.E.2d 857, 860 (1984); *Blount*, 159 Ga. App. at 82, 282 S.E.2d at 722 (stating that "from an academic and analytical viewpoint, the language . . . is a gratuitous preface to the rule that no inference of malpractice may be drawn from unfavorable treatment . . . but [it] could not possibly enlighten a jury of fact finders on the objective standard of care required of a physician [and] is susceptible of being understood as imposing a lesser standard on physicians than the required degree of skill").

303. *McNabb v. Landis*, 223 Ga. App. 894, 895, 479 S.E.2d 194, 195 (1996) (quoting *Haynes v. Hoffman*, 164 Ga. App. 236, 238, 296 S.E.2d 216, 218 (1982)).

304. *McNabb v. Landis*, 223 Ga. App. 894, 895, 479 S.E.2d 194, 195 (1996); *Horton v. Eaton*, 215 Ga. App. 803, 807, 452 S.E.2d 541, 545 (1994); *Yuscavage*, 213 Ga. App. at 803, 446 S.E.2d at 212-13; *Barnes v. Wall*, 201 Ga. App. 228, 231-32, 411 S.E.2d 270, 273 (1991); *McCoy v. Alvista Care Home, Inc.*, 194 Ga. App. 599, 600, 391 S.E.2d 419, 421 (1990).

you should find for the defendant," without elaborations or explanations. The appellate penalty for slight or partial imperfections in the proposed charge, namely, loss of the right to appeal the failure to give any part of it, should be removed or narrowed. Otherwise, attorneys will be discouraged from submitting single, comprehensive, understandable, relatively neutral instructions, and the proposed instructions will continue to be multiple, one-sided excerpts of appellate decisions.

At trial, jury instructions should be given orally and in writing.³⁰⁵ Georgia's rule that summation precedes jury instruction³⁰⁶ could be reversed to allow the lawyers to argue the significance of the law to the fact issues the jury must decide. Jurors should be allowed and encouraged to ask questions.³⁰⁷ Requests for clarification show that the jury does not understand a point, and instead of simply repeating the instructions, the judge should be required to explain the legal concepts in ordinary language and perhaps to give examples.³⁰⁸ If the jury asks questions about a pattern instruction, those questions should be forwarded to the committee in charge of drafting pattern instructions to be treated as a sign of a possible problem with the pattern charge.³⁰⁹

An appellate court should be tolerant of innovations designed to increase jury comprehension.³¹⁰ The appellate court should be less indulgent toward misleading instructions by referring to the doctrine that the charge is considered as a whole,³¹¹ which relates to explaining ambiguous terms, not to conflicting or misleading instructions,³¹² and excusing the misleading instruction because other instructions allegedly clarified the true meaning of the misleading instruction.³¹³ Appellate courts are quite capable of reading a long, disjointed, arguably conflicting charge consistently with the law of Georgia, but it is too much to expect a jury to be able to hear the charge as a coherent whole, and the jury is certainly not legally qualified to understand it in the same way

305. See *supra* text accompanying note 164.

306. *Griffith v. State*, 264 Ga. 326, 326-27, 444 S.E.2d 794, 795-96 (1994).

307. *Tiersma*, *supra* note 15, at 73-74.

308. *Id.* at 76-77. Georgia cases seem to require this. See *supra* text accompanying note 125.

309. *Id.* at 77-78.

310. *Id.* at 73 (citing a 1992 Brookings Institution report).

311. See *supra* text accompanying notes 136-39 for a discussion of the "as a whole" rule of appellate review.

312. *Sabree v. State*, 195 Ga. App. 135, 140, 392 S.E.2d 886, 891 (1990).

313. *E.g.*, *Beal v. Braunecker*, 185 Ga. App. 429, 433, 364 S.E.2d 308, 312-13 (1987) (excusing instruction that to recover lost future earnings the loss must be "definite" on grounds that remaining charge allegedly clarified that this did not require a "definite amount" but only that they "definitely existed").

that the appellate court understands it.³¹⁴ Perhaps, appellate courts should develop, announce, and enforce their own standards of clarity and comprehension in jury instructions.³¹⁵ The appellate court should also be less indulgent toward repeated instructions by referring to the charge as a whole or to a particular instruction that repetition is not intended to emphasize points but to enable the court to explain the law better.³¹⁶

Regarding pattern instructions, the writers and researchers in this field agree that empirical research is needed to test the comprehensibility of jury instructions. Charges should be in a "marketplace" that constantly picks the clearest charge.³¹⁷ Pattern instructions can be tested for general comprehensibility before they are used in actual cases.³¹⁸ Judge Mikell suggests rewriting our present instructions into simpler language and empirically testing them to ensure that they communicate with potential jurors as the drafters intended.³¹⁹

APPENDIX

Below are some sample instructions in increasingly complex tort cases. Instructions in other cases follow the same basic pattern, applying a logical structure to the basic elements of the claim or defense.

Sample 1. Medical Malpractice. The claim is that the doctor failed to diagnose a condition, thereby causing the patient to suffer, to incur additional medical expenses, and ultimately to die. This is the complete instruction needed.

1. In treating V and diagnosing her condition, Dr. D had a duty to use the degree of care and skill that is ordinarily exercised by members of the medical profession generally under the same or similar circumstances.³²⁰ If you believe from the evidence that³²¹ D failed

314. *Smoky, Inc.*, 196 Ga. App. at 655-56, 396 S.E.2d at 800 (stating that "the charge must be reviewed from the perspective of the average juror, unschooled in law and hence unable to grasp all the shades and nuances which the law may present in an individual case").

315. Dann, *supra* note 170, at 1279.

316. *Thomason v. Harper*, 162 Ga. App. 441, 452-53, 289 S.E.2d 773, 784 (1982).

317. Brown, *supra* note 21, at 1118-19.

318. Dumas, *supra* note 115, at 714 (noting that courts should not presume that jurors understand instructions for the same reason that university professors do not presume that students understand the subject matter, but test them).

319. Mikell, *supra* note 38, at 64.

320. All instructions on liability, here the medical malpractice standard of care, are to be stated without elaboration in the simplest, most factually-specific terms possible, in order to allow the jury to perform its fact-finding function with the least possible confusion.

to comply with this duty and that V's suffering and death would have been prevented if D had complied with this duty,³²² you will find for P; otherwise, you will find for D.

Check one of these: We find for P ____; We find for D ____.³²³

If you found for D, go to Instruction 5.

2. If you find for P, you will determine from the evidence the sum of money equal to the full economic and noneconomic value of the life of V, without deducting her cost of living if she had lived and enter the sum here: \$_____.

3. If you find for P, you will determine from the evidence the sum of money that would fairly and reasonably compensate V for any pain and suffering resulting from D's failure to comply with his duty and enter the sum here: \$_____.

4. If you find for P, you will determine from the evidence the reasonable value of medical services that were needed because of D's failure to comply with his duty and enter the sum here: \$_____.

5. Your verdict must be unanimous. Your foreperson should sign and date the verdict in the spaces below: . . .

Sample 2. Motor Vehicle-Bicycle Accident—Comparative Negligence. The claim is that the driver of the car should have seen the bicyclist proceeding in the same lane ahead in conditions of darkness.

1. In driving his car, D had a duty³²⁴ to use the care that a prudent person ordinarily uses for the safety of other persons on the highway under similar circumstances, and this general duty included the following specific duties:

- (a) to keep a lookout ahead for persons in front of him;
- (b) to keep the vehicle under control;

321. "If you believe from the evidence that . . .", followed by the elements of the claim (or defense) and a yes-no choice, constitutes the entire instruction on the burden of proof and the evidence. See *supra* text at pages 31-44 for a discussion.

322. "[If V's] suffering and death would have been prevented if D had complied with this duty" can replace vague instructions on "proximate cause," especially in cases of "omissions," for reasons given *supra* at pages 44-47.

323. This line allows the jury instruction to double as a special verdict form. If the instructions are given in writing anyway, this makes a great deal of sense. To use the instruction with a general verdict form, this line and subsequent lines for writing the amount of the award would be modified to refer to the general verdict form.

324. The drafter should be cognizant of the controlling fact issues in drafting instructions. For example, if it is disputed whether D was the driver, this sample could not be used as is, but would have to be re-written, e.g., "The driver of D's car had a duty If you believe from the evidence that D was the driver and failed to comply with any of these duties"

(c) to have the vehicle equipped with headlights so aimed and of sufficient intensity to reveal persons and vehicles at a distance of at least 350 feet ahead;

(d) when passing another vehicle proceeding in the same direction, to pass the other vehicle on the left side of the other vehicle at a safe distance.³²⁵

If you believe from the evidence that D failed to comply with any of these duties and that such failure was a substantial factor in causing the accident,³²⁶ you will find for P; otherwise you will find for D.

If you find for D, go to Instruction 5 below.

2. In riding his bicycle, P had a duty to use the care that a prudent person ordinarily uses for his own safety under similar circumstances, and this general duty included the following specific duties:

(a) to have his bicycle under reasonable control;

(b) to ride as near to the right side of the roadway as practicable, except when avoiding hazards to safe cycling;

(c) to have the bicycle equipped with a red reflector that is visible from a distance of 300 feet to the rear when directly in front of the upper beams of headlights on a motor vehicle;

(d) to have the bicycle equipped with reflectors on each pedal that are visible from the front and rear of the bicycle during darkness from a distance of 200 feet.

If you believe from the evidence that P failed to comply with this duty and that such failure was a substantial factor in causing the accident, you will find for D under this Instruction; otherwise you will find for P under this Instruction.

If you find for P under this Instruction, go to Instruction 4 below.

3. If you found for P in Instruction 1 and for D in Instruction 2, you will determine from the evidence and indicate in the following blanks what percentage of the total fault was attributable to each of them, as follows:

P: ____%

D: ____%

Total: 100%

325. This break-down of the defendant's duties replaces separate instructions on common law negligence and negligence per se. Those "specific duties" that arise in statutes should not be taken directly from the statute without first editing them to remove issues that do not arise in the present case and to conform them to the facts of the case and the style of the other instructions. The same approach is used for the plaintiff's duties in the next instruction.

326. "[If D's] failure was a substantial factor in causing the accident" should be the instruction that replaces instructions on the "proximate cause" concept in most cases.

If you find that the percentage of P's fault was 50% or greater, go to Instruction 5 below. If not, go to Instruction 4 and enter the amount(s) that P is entitled to recover if his fault is disregarded.³²⁷

4. [Damages instructions; see Sample 1, Instructions 2-4]
5. [Unanimity, signing and dating]

Sample 3. Motor Vehicle Collision, Counterclaim, Claim by Passenger Against Both Drivers. D attempted to pass P on the left, but P turned left and the cars collided. D claims that P had his right turn signal on and that an emergency situation arose. X, a passenger in P's vehicle, sues both P and D.

1. [Enumeration of D's duties as in Sample 2, Instruction 1]

All of these duties of D being subject to this qualification:³²⁸ that if immediately before the accident the right-turn signal of P's car had been activated and P suddenly and unexpectedly turned his car to the left without signaling his intention to do so, at a point so close in front of D's automobile that it appeared to D in the exercise of reasonable judgment that he was in imminent danger of collision with P's car, and if the emergency thus presented was not caused or brought about by any failure by D to comply with his duties as set forth above, then D was required to exercise only such care as the jury would expect an ordinarily prudent person to exercise in the same conditions and circumstances.

If you believe from the evidence that D failed to comply with this duty and that such failure was a substantial factor in causing the accident, you will find for P and X on their claims against D; otherwise you will find for D on both X's and P's claims against him.

Check one: We find for P and X ____; We find for D ____.

2. [Enumeration of P's duties as in Sample 2, Instruction 2]

If you believe from the evidence that P failed to comply with this duty and that such failure was a substantial factor in causing the accident, you will find for D and X on their claims against P; otherwise you will find for P against the claims of D and X.

Check one: We find for D and X ____; We find for P ____.

3. If you found against D in Instruction 1 and P in Instruction 2, you will determine from the evidence and indicate in the following blanks what percentage of the total fault was attributable to each of them, as follows:

P: ____%

D: ____%

327. The more complex the legal issues, the more important are directions such as this (and throughout this sample), which help the jury step through the instructions in a logical manner that is consistent with the law.

328. In this way, the court would instruct on a general rule of conduct and an exception (sudden emergency) that may apply depending on the jury's view of the facts.

Total: 100%

4. Using the measures of damages set forth in Instruction 7, state the total amount of damages that X is entitled to recover: \$_____.

5. If you found for D in Instruction 1, or if you found that P's fault was 50% or greater in Instruction 3, then go on to Instruction 6. Otherwise, using the measures of damages set forth in Instruction 7, state the total amount of damages that P would be entitled to recover if his contributory fault (if any) is disregarded: \$_____.

6. If you found for P in Instruction 2, or if you found that D's fault was 50% or greater in Instruction 3, then go on to Instruction 8. Otherwise, using the measures of damages set forth in Instruction 7, state the total amount of damages that D would be entitled to recover if his contributory fault (if any) is disregarded: \$_____.

7. [Damages instructions as in Sample 1, Instructions 2-4]

8. [Unanimity, signing and dating]