Jury Charges and Preserving Objections

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Most will agree that jury instructions are an integral part of the trial process; however, many lawyers consider their proposed charges in a given case only when asked by the Court to submit them – usually not until the eve of trial. In our office, we have a practice of drafting jury charges early in the litigation process, so that we are forced to consider from the beginning the law that will ultimately be applied to the case. We can then make sure the evidence that is developed throughout the course of the litigation will meet our burden of proof at trial. At whatever point in time the charges are drafted and reviewed, however, there are three primary considerations for their use: (1) educating the jury on the law applicable to the case and the jury's role in resolving the issues presented; (2) establishing a framework for resolution of the issues that is most favorable to your client and, conversely, not overly weighted toward the opposing party; and (3) compiling an instruction that will stand up to appellate scrutiny.

Unfortunately, the goals for developing proper jury instructions are inherently conflicting. The reality is that jury charges are usually so imbued with complex legal jargon, and are presented in a fashion that make it all but impossible to absorb the information, that the instructions themselves defy comprehension by ordinary persons. A better approach would clearly be to use simple, straight forward terms that very generally set the framework for the jury's deliberations. Yet, because of the nature of appellate review, an instruction must so fully and correctly embody the law that it

necessarily is hyper technical and essentially devoid of common meaning. Add to that the burden of presenting every possible version of a principle of law, and objecting to each and every proposed or actual charge that may be slightly abhorrent – with specificity -- and the process of developing and presenting appropriate instructions to the jury is a daunting task indeed.

In *Atlanta Obstetrics & Gynecology Group v. Coleman*, 260 Ga. 569-570, 398 S.E.2d 16 (1990), the court suggested that jury charges provide examples for the jury. This is an approach that will perhaps solve the conundrum. Where the jury is required to apply complex legal principles to the resolution of civil disputes, it is essential that they not simply be given textbook definitions – definitions that lawyers spend years attempting to understand through their education and experience. Examples can be given in plain English, and still have the blessing of the appellate court. "The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other." *Id.*; *See also John Crane v. Jones*, 262 Ga. App. 531, 533, 586 S.E.2d 26 (2003). Sometimes the court will even provide the example to be given. *E.g. Gilson v. Mitchell*, 131 Ga. App. 321, 328, 205 S.E.2d 421 (1974). The example that is appropriate for any given case will depend on the specific facts of that case, as they relate to the issues the jury must decide.

I. The General Law: A Backdrop

Basically, a jury charge can be in any form, so long as it is submitted in writing. O.C.G.A. § 5-5-24(b). Of course, the charges must be given to opposing counsel, as well as the Court, so as to provide the opposing party an opportunity to object. *Id.* Although the statute does not require it, the charge should cite to appropriate authority for

whatever proposition it stands for. "The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury but shall instruct the jury after the arguments are completed." *Id.*

A jury charge is intended to aid the jury in understanding the law. Thus, a charge that has the effect of confusing or misleading the jury is inherently erroneous. *E.g. Critzer v. McFadden*, 277 Ga. 653, 655, 593 S.E.2d 330 (2004). It is assumed that jurors follow the instructions given them by the trial court. *E.g., Moss v. State*, 275 Ga. 96, 101, 561 S.E.2d 382 (2002).

As a general rule a requested charge should be given where it has been raised by the evidence, embraces a correct and complete principle of law, has not been substantially included in the general instructions given, and is specifically adjusted to the evidence. *See SCM Corp. v. Thermo Structural Prods.,* 153 Ga. App. 372, 379, 265 S.E.2d 598 (1980).

The principle that a party is entitled to a complete charge regarding an applicable principle of law is well explained in *Golden Peanut Co. v. Bass*, 249 Ga. App. 224, 547 S.E.2d 637 (2001). *Golden Peanut* was a breach of contract case resulting in a large verdict for the plaintiff. The defendant raised the defense of accord and satisfaction, and requested two pattern instructions on the subject. The trial court gave only one of the two charges. The failure to give the second requested charge on accord and satisfaction was reversible error.

> It is the duty of the court to charge the jury on the law as to every controlling, material, substantial[,] and vital issue in the case. Where the court fails to give the benefit of a theory of the defense which is sustained by the evidence, a new trial must be granted.

249 Ga. App. at 227 (citing *Pritchett v. Anding*, 168 Ga. App. 658, 663, 310 s.E.2d 267 (1983)).

"It is a fundamental rule in Georgia that jury instructions must be read and considered as a whole in determining whether the charge contained error." *Johnson v. Bruno's, Inc.*, 219 Ga. App. 164, 165, 464 S.E.2d 259 (1995) (noting that if the appellant had filed the trial transcript, the Court could have determined "how the charge request may have been modified, reinforced or contradicted by other charges to the jury.")

The problem with reading instructions as a whole is that the jury often doesn't have the benefit of that approach. While an appellate court, and the trial court initially, can look over the entire charge to ensure that all pertinent concepts are covered, the jury hears the charge as written in a narrative, or didactic manner. If a concept is covered to some degree early in the charge, but is then covered a little differently later, just because it was correct at one point should not make it okay to instruct incorrectly at another point. Or, simply because a concept is covered fully when disjointed portions of the principle are gathered together from different portions of the charge, does not mean that *the jury* will get it. It is therefore incumbent upon counsel to carefully consider how the charge is going to be received by the jury to determine if it is proper and voice any necessary objections.

"A charge containing two distinct propositions conflicting the one with the other is calculated to leave the jury in such a confused condition of mind that they can not render an intelligible verdict, and requires the grant of a new trial." *Clements v. Clements*, 247 Ga. 787, 789(2), 279 S.E.2d 698 (1981).

Many courts are now permitting the jury to take the written charge out after it is read. This will solve some of the problems; but still requires that the jury do some

pretty heavy lifting in analyzing the law in all its parts in order to know how it should be applied.

II. Drafting the Charge

As noted above, many practitioners do not give much thought to jury charges until the eve of trial. This is unfortunate, because the result is that many times the charge is drafted in a hurry, without adequately considering the effect the charge will have in light of the particular facts of the case. The best approach is to dedicate sufficient time to considering your burden of proof, determining all of the issues to be decided by the jury, and then researching the law to support the instructions that you intend to ask the court to give.

The actual charge given will come from three sources: the pattern charge; instructions drafted by the parties; and the Court's own charge. With some combination of the above, the court will come up with a charge after conferring with counsel and considering exceptions to the charge as proposed.

While the pattern charges are a good starting point, do not fall into the trap of assuming that a pattern charge is either good law, or particularly relevant to the facts at issue. Modify the charge as needed and explain to the Court why the pattern is not sufficient in the particular case.

Do not be afraid to proffer charges that are unique to the case. While courts are often more comfortable giving the "boilerplate" type charge, this is not necessarily sufficient in any given case. If a critical issue exists in your case, push to have the law applicable to the issue read to the jury. After all, if they are charged with the duty of resolving the issues, they should be appropriately armed with the means to do so.

When drafting a new or unique charge, however, always make sure the law supporting the proposition is sound. Do not assume that the law cited for a charge you have used for years and years is still valid. This is particularly true if the requested instruction requires the court to think outside of the box a bit. Counsel must certify that all of the proffered charges are supported by good law; and when that is not the case, you will lose a lot of credibility with the court. If the charge is a good one, and would help the jury to understand the issues in the case, the court's failure to give the charge may provide a basis for appeal should the jury not find for your client. However, if there is not valid legal support for the charge, the court should not give it and the verdict will stand.

III. Preservation of Error

O.C.G.A. § 5-5-24 provides a mechanism for correcting erroneous jury charges. The basic purpose is to ensure that the jury is given correct legal instructions to base its findings.

In order to preserve an objection to a jury instruction for appellate review, the objection "need only be as reasonably definite as the circumstances will permit." O.C.G.A. § 5-5-24(a). That Code Section specifically states that the "objection need not be made with the particularity formerly required of assignments of error." *Id*. The purpose of the objection is to allow the correction of errors in the charge when there is still time to do so. *Vaughn v. Protective Ins. Co.*, 243 Ga. App. 79, 81, 532 S.E.2d 159 (2000) (plaintiff's objection to recharge on assumption of the risk adequate to preserve error, despite having agreed to court's original charge on same defense).

The purpose of noting an objection is to put the trial court on notice of the litigant's objection concerning the court's charge so that a correction can be made before

the jury reaches its verdict. Significantly, this may be accomplished without a great deal of specificity. *See Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 16-17, 195 S.E.2d 417 (1973). "[N]o useful purpose could possibly be served by requiring that the grounds upon which counsel contend the charge should be given be repeated after the court has announced to counsel its decision that the requested charge will not be given and had instructed the jury omitting such requested charge." *Id.* at 17. *See also Kres v. Winn-Dixie Stores*, 183 Ga. App. 854, 360 S.E.2d 415 (1987). Thus, the Court of Appeals has expressly overruled cases that required something more than a "minimalist objection" to the trial court's failure to give a proffered charge in order to preserve the issue for appellate review. *Golden Peanut Co. v. Bass*, 249 Ga. App. 224, 547 S.E.2d 637 (2001), *aff'd* 275 Ga. 145, 563 S.E.2d 116 (2002).

The Supreme Court has specifically rejected the idea that certain magic words are required to note a proper objection, as "putting form over substance – [is] a result we should always endeavor to avoid." *Continental Cas. Co. v. Union Camp Corp.,* 230 Ga. at 17.

All that being said, you can find volumes and volumes of case law discussing and critiquing litigants' efforts to make their objections known. Thus, to the extent allowed by a given judge, speak up!

A. When to Object

The simple answer to the question of when to object is that a party must alert the court of any concern regarding a charge in sufficient time for it to have an opportunity to consider the charge and make any correction *before* the jury reaches a result. Specifically, O.C.G.A. § 5-5-24(a) states:

> Except as otherwise provided in this Code section, in all civil cases, no party may complain of the giving or the failure to give an instruction to the jury unless he objects thereto before the jury returns its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

See, e.g. Vaughn v. Protective Ins. Co., 243 Ga. App. 79, 532 S.E.2d 159 (2000) ("The purpose of O.C.G.A. §5-5-24(a) is to allow correction of errors in the charge when there is still time to do so. [cit] The court could have withdrawn the charge and instructed the jury to no longer consider assumption of risk, or it could have revised instructions sufficient to clarity the law applicable to the case."); *Smithson v. Parker*, 242 Ga. App. 133, 528 S.E.2d 886 (2000) (plaintiff waived objection to charge because plaintiff failed to except to the charge before the verdict.)

The more realistic answer is that an objection should be made early and often. In other words, to avoid any question that an objection has been properly preserved, it should be made at the charge conference, when the court indicates what its charge will be, and after the court actually instructs the jury. However, if an objection is not made the first time the charge is discussed, or even given, it can be made at a later time -- for example after a re-charge. *E.g. Vaughn v. Protective Ins. Co.*, 243 Ga. App. 79, 532 S.E.2d 159 (2000).

B. What is the Objection?

An exception to a jury charge can take two forms. You can object to the court *giving* a particular instruction, or you can object to the court's *failure* to give a charge

you've requested. With respect to the charge actually given, you must take exception to what was said after the court instructs the jury. The same is true when the court refuses to give a charge you've asked for. While it might seem obvious that you except to an instruction you've proposed, it is not sufficient to preserve your right to appeal the court's failure to give a charge merely by offering it. You must also except to the court's failure to give it before the jury returns its verdict.

"In order for a refusal to charge to be error, the request must be entirely correct and accurate; adjusted to the pleadings, law, and evidence; and not otherwise covered in the general charge." *Coile v. Gamble*, 270 Ga. 521, 522, 510 S.E.2d 828 (1999).

IV. Appellate Review

Despite the fact that numerous appellate opinions suggest that little is necessary to preserve an error relating to the trial court's charge, the opposite appears to be true. The appellate court will consider an error in the jury charge, but it must find that the error has been properly preserved, *and* it must find that the error made a difference in the case. A great deal of deference is given to the trial court's decision to give or not give a charge, and it can be very difficult to get a case reversed based on an erroneous charge.

A. Plain Error

There are occasions where a proper objection has not been raised at the trial court. Perhaps the intricacies of the Court's charge were not apparent at the time; or perhaps counsel was just not paying attention. In any event, if the charge given was not simply objectionable, but was out and out *wrong*, the appellate court can and should still review the charge. Ensuring the jury instructions embody correct principles of law is so important that O.C.G.A. § 5-5-24(c) permits appellate courts to review and correct erroneous charges even where litigants do not object at trial. "[T]he appellate courts

shall consider and review erroneous charges where there has been a substantial error in the charge which was harmful as a matter of law, regardless of whether objection was made hereunder or not." O.C.G.A. § 5-5-24(c) (emphasis added). *See also Brown v. Garrett*, 261 Ga. App. 823, 584 S.E.2d 48 (2003) (reversing jury verdict where trial court's erroneous recharge was "so blatantly in error as to raise the question whether . . . appellant was deprived of a fair trial," holding that error was a prejudicial error of law because the charge went to a primary issue in the case.)

B. *Invited Error*

The concept of plain error seems to suggest that the ultimate responsibility for instructing the jury properly is on the court irrespective of whatever the parties do; therefore, bad lawyering should not provide the basis for upholding a bad charge. However, that's not how it works. If the court finds that the objecting party did anything to *invite* the error, the court will abandon its review. As the Supreme Court has explained:

> In a civil case, a party may not be heard to complain of the giving or the failure to give a jury instruction unless the party objects before the jury returns its verdict and distinctly states an objection and the grounds for it. The failure to except before verdict, generally is a waiver of any defects in a charge absent a substantial error blatantly apparent and prejudicial, resulting in a gross miscarriage of justice. But, even the review of substantial error under OCGA § 5-5-24(c) is not available when the giving of an instruction, or the failure to give an instruction, is induced during trial by counsel for the complaining party or specifically acquiesced in by counsel.

Moody v. Dykes, 269 Ga. 217, 219-220(3), 496 S.E.2d 907 (1998)(citations omitted).

Typically, the court will find that an error was invited when the litigants either completely failed to object to the charge as given, accepted the charge as given or offered the exact language of the charge complained about -- or all of the above. *E.g. Community Bank v. Handy Auto Parts*, 270 Ga. App. 640, 645, 607 S.E.2d 241 (2004) (finding that "Bank readily admits that it failed to request charges on circumstantial evidence and speculative damages and did not object to the charge given by the trial court."); *Moody v. Dykes*, 269 Ga. 217, 219, 496 S.E.2d 907 (1998) (holding defendant could not complain about verdict form on appeal, as he failed to object to the form used and his own proposed form was structured in the way he claimed was error); *Courier v. State*, 270 Ga. App. 622, 625-626, 607 S.E.2d 221 (2004) (defendant acknowledged that he did not object nor reserve objections to the charge when the court asked for any objections, and had offered the same language of the charge in his own proposed jury instruction); *Queen v. Lambert*, 259 Ga. App. 385, 388, 577 S.E.2d 72 (2003) ("Queen failed to preserve exceptions to the charge. Moreover, the court gave each of the fraud charges Queen requested in writing, the very charges about which he now complains."); and *Thrash v. Rahn*, 249 Ga. App. 351, 352, 547 S.E.2d 694 (2001) (after the charge was given the court specifically inquired about objections; however, the plaintiff simply adopted objections made in charge conference and did not indicate the need to charge further).

C. *Harmless Error*

A party cannot successfully complain about the refusal to give a requested jury charge unless it satisfies its burden of showing that the refusal was both erroneous and harmful. *Buford-Clairmont Co., Ltd. v. Radio Shack Corp.*275 Ga.App. 802, 622 S.E.2d

14 (2005). It can be difficult to establish harm, because an appellate court will not overturn a trial court's decision to give a particular jury instruction if there was any evidence presented at trial to support giving the charge. *E.g. Swanson v. Hall*, 275 Ga.App. 452, 620 S.E.2d 576 (2005).

An example of harmless error is *AT Systems Southeast, Inc. v. Carnes,*272 Ga.App. 671, 613 S.E.2d 150 (2005). There, the court found that even if the trial court erred in giving presumption of evidence jury instruction regarding presumption arising from party's failure to present evidence to repeal any claim against it, the error was harmless. This was an action by the passenger of a minivan against an armored truck operator for injuries the passenger received when the armored truck collided with the minivan. The presumption charge was deemed irrelevant, as the armored truck operator admitted liability in case, and evidence in question went to liability and not damages.

V. Conclusion

Entire treatises address the complexities of drafting and objecting to jury charges. There is no simple approach to putting together a proposed charge that covers all of the issues in a case in a cogent manner. Regardless of what we do to prepare, the ultimate instruction is the court's call, and will undoubtedly amount to a compilation of instructions of varying degrees of understandability. The best advice is simply to dedicate sufficient time to thinking about the charges, preparing instructions that can be understood by the average person, carefully listening to the charge as given, and, finally, noting objections to the charge with as much specificity as possible to preserve any errors for further review.