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TORTS

By HARDY GREGORY, JR.*

Chief Justice H. E. Nichols of the Supreme Court of Georgia noted in his remarks at the August 22, 1975 meeting of the Board of Governors of the State Bar of Georgia that the supreme court rendered more decisions during the year 1974 than any of the other highest appellate courts in our sister states, and that the Court of Appeals of Georgia ranked sixth in the number of decisions rendered among all the intermediate state appellate courts, although some among the first five other intermediate appellate courts have as many as 22 judges sitting on the court. This case load is particularly remarkable when the many other duties, *e.g.*, administrative, are added to the overall workload of the appellate courts of this state. Merely undertaking to summarize a few of the tort cases decided by these courts is enough to make one aware of the magnitude of the overall effort.

I. GOVERNMENTAL IMMUNITY

It is fashionable, although perhaps not entirely accurate, to assert that the doctrine of governmental immunity from tort liability is being eroded in Georgia. It is more nearly correct to say that the doctrine is being constantly assaulted, but bearing the attack quite well. As will be seen, the possibility of drastic change now exists. One of the most significant developments in recent years was the 1968 case of *Town of Ft. Oglethorpe v. Phillips*.¹ Very briefly the facts were that a traffic light indicated a green light in all four direction and brought about a collision. This sort of thing had been going on for two weeks without effective correction by the municipality. The trial court sustained a general demurrer. The court of appeals reversed upon the principle that the operation of the traffic light was a ministerial function and therefore no governmental immunity existed.² The supreme court on certiorari upheld the court of appeals but on a different theory. It held that the maintenance of the light in the defective condition for two weeks, with notice thereof, was the maintenance of a nuisance. The claim being based on the operation of a nuisance and not upon negligence was not barred by governmental immunity irrespective of whether or not the function performed by the municipality was ministerial or governmental. Practically every lawyer who has filed a suit against a governmental entity since 1968 has attempted to come within *Town of Ft. Oglethorpe*. Some made the attempt during the survey period. At least one case made an unsuccessful head-on assault against the entire doctrine of

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1. 224 Ga. 834, 165 S.E.2d 141 (1968). For an excellent analysis of *Town of Ft. Oglethorpe* and the concept of nuisance versus governmental immunity, see Sentell, *Municipal Liability in Georgia-The "Nuisance" Nuisance*, 12 GA. ST. B.J. 11 (1975).

2. *Phillips v. Town of Ft. Oglethorpe*, 118 Ga. App. 62, 162 S.E.2d 771 (1968).

governmental immunity. Then, there is an acknowledgement by the court of the passage of a constitutional amendment creating legislative power to waive governmental immunity. A state court of claims is authorized to try cases but only under circumstances where the General Assembly has waived immunity.³ The following brief discussion outlines these several developments.

In *Sheley v. Board of Public Education*⁴ a mother sued the school board for the wrongful death of her eight year old child who fell into a septic tank located on the school grounds. The permanent cover for the tank had been removed by vandals. The court in one of the last opinions written by Judge Ebehardt expressly held that the principle of *Town of Ft. Oglethorpe* did not apply and that the board was immune from liability. Three reasons were given: First, there was no nuisance. As soon as the open tank was discovered, it was covered by a temporary cover. No other person had been injured. In *Town of Ft. Oglethorpe*, six others had been injured before plaintiff was injured. In other words, the short time interval and the corrective action taken, differentiate this case. Second, a municipality does not enjoy the same degree of immunity as other governmental subdivisions. That is, the school board is more analogous to a county. Third, the funds in possession of a school board are under control of the Minimum Foundation Program and must be used for educational purposes only. Payment of plaintiff's claim would not constitute an educational purpose and would be unlawful. A dissenting opinion written by Judge Evans and joined in by Judges Deen and Quillian pushes all these points aside and finds *Town of Ft. Ogelthorpe* in point. Next consider *Azizi v. Board of Regents of the University System*.⁵ The claim arose out of an injection in the region of the sciatic nerve while plaintiff was hospitalized in a hospital operated in conjunction with the Medical College of Georgia. Paralysis resulted. A direct attack was made on governmental immunity and the court was asked to abolish the doctrine by court decree. Judge Webb wrote the opinion in which the history of the doctrine is briefly outlined, its constitutional status is acknowledged, and the court's lack of power to abolish it is thereby demonstrated. Judge Webb notes that he was a member of the General Assembly in 1973 when a proposed constitutional amendment was enacted to be submitted to the electorate in 1974.⁶ In addition to the head-on attack seeking to abolish the doctrine, the usual attempts to circumvent the problem, such as a contention that the operation of the hospital was a ministerial function, were made, but rejected by the court. Certiorari was granted both in *Azizi* and in *Sheley* and the supreme court considered them together in one opinion.⁷ Certiorari was granted for the avowed pur-

3. Ga. Laws, 1973, p. 1489.

4. 132 Ga. App. 314, 208 S.E.2d 126 (1974).

5. 132 Ga. App. 384, 208 S.E.2d 153 (1974).

6. Ga. Laws, 1973, p. 1489.

7. *Sheley v. Savannah Bd. of Educ.*, 233 Ga. 487, 212 S.E.2d 627 (1975).

pose of "reassessing the rule of immunity of the state, its agencies, and sub-divisions from liability for tort claims" ⁸ It is noted that a previous decision held that the doctrine was judicially created (this being in conflict with the assertion made in *Azizi* by the court of appeals) and therefore could be likewise abrogated. ⁹ But, because of the 1974 constitutional amendment ¹⁰ the General Assembly now has the sole power to effectuate changes in the immunity rule. At page 488, the following hopeful note is sounded:

The enactment of statutes by the General Assembly pursuant to this constitutional provision can, in a fair and orderly manner eliminate the inequities and injustices that have become apparent in our modern day society because of the rigid immunity rule.

For those interested in applications of *Town of Ft. Oglethorpe* during the survey period, see *Hutcheson v. City of Jesup* ¹¹ for a case where plaintiff prevailed in applying the approach of *Town of Ft. Oglethorpe* but lost before a jury. Also see *City of Atlanta v. Roberts* ¹² where plaintiff failed to have the approach applied altogether, the result being a divided opinion in the court of appeals.

II. LANDLORD AND TENANT

Generally a criminal act is sufficient to constitute an intervening independent cause so as to insulate the original ordinary negligence of a tortfeasor from liability to an injured plaintiff. The abrogation of this general rule in certain circumstances surrounding the landlord-tenant relationship in two cases makes for a noteworthy development in tort law in Georgia. In one case a tenant was raped by a man who entered her apartment. ¹³ In another a burglar broke into the plaintiff's apartment, set a fire and caused damages. ¹⁴ the crucial point in both these cases, and the point which enabled the court to distinguish the cases from the general rule that criminal conduct of another insulates the original negligent tortfeasor, was that the landlord could be charged with knowledge of the likelihood (foreseeability) that such an even might occur on account of the landlord's negligent act. In the rape case, the landlord had knowledge that some third party had a passkey. Other apartments had previously been entered in the same fashion. In the burglary and fire case, the tenant complained that the door lock was inadequate as was shown by break-ins in other apartments. The landlord agreed but failed to furnish a more adequate lock. Both opinions

8. *Id.* at 487, 212 S.E.2d at 627.

9. See *Crowder v. Dept. of State Parks*, 228 Ga. 436, 185 S.E.2d 908 (1971).

10. Ga. Laws, 1973, p. 1489.

11. 132 Ga. App. 84, 207 S.E.2d 547 (1974).

12. 133 Ga. App. 585, 211 S.E.2d 615 (1974).

13. *Smith v. General Apt. Co.*, 133 Ga. App. 927, 213 S.E.2d 74 (1975).

14. *Warner v. Arnold*, 133 Ga. App. 174, 210 S.E.2d 350 (1974).

recognized the general rule, of course, but go further to hold that the general rule does not apply where the defendant had reasonable grounds to apprehend such a criminal act would be committed.¹⁵ In the burglary and fire case, analogy is made to other cases involving intervening criminal acts, such as where the defendant left plaintiff's car on a busy street with the key in the ignition and the car was stolen,¹⁶ and where a railroad company negligently carried a 19-year-old girl past her destination so that she left the train in a dangerous neighborhood and was raped.¹⁷ The point is made that insofar as the scope of defendant's duty goes, it should make no difference whether the intervening act be negligent, intentional, or criminal. The question is whether or not defendant had reasonable grounds for apprehending that such an act would be committed. Then, it is not the particular act which must be apprehended, but the likelihood of similar acts. The point is well made in a quote adopted from a Florida opinion where an arsonist set fire in a hotel damaging a guest's property and the landlord had been warned of the dangerous condition:

The scope of defendant's duty to maintain reasonably safe premises does not include a duty to foresee a particular fire but it does include a duty to reasonably guard against risk of fire. Viewed from this standpoint it is not important . . . whether the fire started in one way or another. It was reasonably foreseeable that there would, even under modern conditions, be a likelihood of fire and it was the duty of the defendant to provide a reasonably safe place in anticipation of that danger.¹⁸

It has been said that "[t]he landlord is no insurer of his tenants' safety, but he is certainly no bystander."¹⁹ According to Judge Stolz who wrote the opinion in the burglary and fire case, this means, as applied to the circumstances of the burglary and fire case, that "[t]he immediacy of the connection between the inadequate (although functioning) lock, the landlord's notice of the inadequacy, either actual or constructive, and the burglary and arson" requires that a jury pass on the issues which in the burglary and fire case included "agency, notice, foreseeability, intervening causation, assumption of the risk, as well as the suitability of the lock in question."²⁰

Suppose the intervening act can be classified as an "act of God." This circumstance shifts the focus of attention from the area of foreseeability to the questions of notice and of the duty of the landlord to take corrective action. The 1973 ice storm in Atlanta gave rise to a case in point.²¹ A tenant

15. *Id.* at 177, 210 S.E.2d at 352.

16. Suppose the plaintiff was not the owner of the car suing for its loss, but a pedestrian negligently run down by the car thief. What then?

17. *Hines v. Garrett*, 131 Va. 125, 108 S.E. 690 (1921).

18. *Mozer v. Semenza*, 177 So.2d 880, 883 (Fla. 1965).

19. *Kline v. 1500 Massachusetts Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970).

20. 133 Ga. App. at 179, 210 S.E.2d at 354.

21. *Phelps v. Consolidated Equities Corp.*, 133 Ga. App. 189, 210 S.E.2d 337 (1974).

slipped and fell on landlord's premises due to the accumulation of ice. These type cases have not always fared so well in Georgia courts²² However, this opinion written by Judge Clark holds that a jury issue is raised and the trial court erred in granting defendant landlord's motion for summary judgment. It was established and even conceded by defendant that defendant had notice of the ice storm and the dangerous condition of the walkways. The point was that the defendant made unsuccessful attempts to correct the situation, to obtain sand to cover the ice, and to use salt to remove the ice. The defendant said there was nothing else to be done, but the court said this must be decided by a jury.

III. DOG OWNERS

A situation exists in Georgia tort law which needs correction either by the courts or the General Assembly. Few plaintiffs have recovered in "dog-bite" cases although numerous suits have been filed. Many cases have reached the appellate courts and only a guess could suggest how many injuries have been caused by attacks on humans by dogs. We have come a long way in our society since the days when "man's best friend" was his bird dog or coon hound, kept out on the farm with miles and miles of open fields and woods to roam. At that time, the rule requiring the proof of scienter on the part of the owner as to the vicious propensities of the dog, or the rule of "every dog is entitled to one bite" made some sense. Now man's best friend has evolved into a wild assortment of poodles, German shepherds and doberman pinschers and such which roam the streets of our cities, prowl through shopping centers, stalk in and out of apartment complexes, frolic on our beaches, and in general occupy our land spaces. Dog food fills a large part of the shelf space in our supermarkets and advertisements for dog food fill a substantial part of commercial T.V. time. Some municipalities have leash laws and some do not. Some owners have the good sense to keep dangerous dogs under strict control, some do not. Some dogs would not harm a baby, and some would scar a child for life. We do not need to restrict the right of people to own dogs any more than we need to restrict the right of people to own motor vehicles. Both are potentially dangerous to life and limb and the users of the one and the owners of the other need to be held responsible for damages done. Some would probably suggest that strict liability be imposed. This may be the best solution, but it is not likely to soon be adopted in Georgia. A more likely approach is to modify or abolish the rule of scienter. This is the rule which virtually assures dog owners immunity from tort liability. We do not even have to completely do away with this rule. We could simply follow *Caldwell v. Gregory*²³ which establishes that prior knowledge of the owner as to the dog's propensity to be vicious may not be proved where the dog was in a

22. See, e.g., *Auerbach v. Padgett*, 122 Ga. App. 79, 176 S.E.2d 193 (1970).

23. 120 Ga. App. 536, 541, 171 S.E.2d 571, 574 (1969).

place where he did not rightfully belong (was wrongfully in that place) when he did the mischief. The courts have limited this rule too severely. Because of the decisions since *Caldwell*, it is difficult to imagine a situation where the case could be relied upon by a plaintiff.²⁴ However, "wrongfully in that place" might be much more broadly interpreted, thus limiting the scienter rule. Of course, the legislature might adopt a state wide leash law or it might adopt a strict liability rule for dog owners. In fact, such a rule has already been enacted, but it was, strangely enough, limited to damages the dog might do to a landowners "livestock or fowl."²⁵ If it is appropriate to protect cows and chickens in this manner, surely it is also appropriate to protect children to the same extent.

With the foregoing thoughts in mind, two decisions rendered during the survey period are of interest. In *Sullivan v. Goss*²⁶ the defendant's dog went upon the plaintiff's land on two occasions and killed plaintiff's game chickens or "slasher" birds. The trial court directed a verdict for defendant as to the first occasion, apparently on the basis that scienter was not proved. The appellate court pointed out the livestock and fowl law and reversed, saying that knowledge by the owner as to the dangerous propensity of the dog had no application. A concurring opinion would prefer that the court base its decision on *Caldwell* in that the dog was wrongfully in the place where the mischief was done. A dog owner was made a third party defendant in *Jett v. Norris*²⁷ which was a vehicle collision case. The third party complaint alleged that the dog crossed a street in the path of defendant's car and thereby caused the collision. The owner contended that he had no knowledge that his dog had ever before crossed a road in front of a car. The opinion went further to hold that even if there was an applicable leash law which was breached, without scienter, the owner was not liable. The dissenting opinion would rely on the dog having been "wrongfully in the place where the harm was done" to eliminate the need to prove knowledge on the part of the owner. The dissenting opinion presents a collection of cases dealing with both sides of the issue.

Well, maybe the General Assembly will do something to help the situation. Apparently, the courts will not.

IV. PRODUCTS LIABILITY

An interesting development has occurred in products liability. Georgia may be embarked upon a piecemeal adoption of the rule of strict liability in products cases. Some legislation, previously adopted, has been judicially recognized as having that effect. *Ellis v. Rich's, Inc.*²⁸ was first con-

24. See, e.g., *Connell v. Bland*, 122 Ga. App. 507, 177 S.E.2d 833 (1970),

25. GA. CODE ANN. §62-2004 (Supp. 1974).

26. 133 Ga. App. 217, 210 S.E.2d 366 (1974).

27. 133 Ga. App. 596, 211 S.E.2d 639 (1974).

28. 233 Ga. 573, 212 S.E.2d 373 (1975).

sidered in the court of appeals.²⁹ Plaintiff was injured when a defective fondue pot spilled hot oil on her legs. The pot was manufactured in Taiwan, imported into this country by Westwood Imports Company, Inc., sold to Richway, Inc., where it was sold to a customer who made a Christmas gift thereof to the plaintiff. The suit was brought on a theory of strict liability in addition to theories of negligence and breach of warranty. The court of appeals opinion, citing an earlier court of appeals case, held at page 432:

Georgia has not adopted the doctrine of strict liability, a doctrine under which plaintiff need not prove negligence, a doctrine under which the highest degree of care by a manufacturer is no defense.

The supreme court granted certiorari to test the validity of that statement and found that Georgia does have a limited area of strict liability. Basically, strict liability eliminates questions of negligence in tort cases and it eliminates privity in contract cases.³⁰ The extent to which strict liability is to be applied is a matter of public policy. The public has a right to expect protection from defective products. The court acknowledges that the General Assembly, when it enacts legislation, enacts the public policy of this state. The court then points out that the Uniform Commercial Code, in effect in Georgia, has expanded privity to include members of the buyer's household and his guests.³¹ A 1968 statute eliminates privity altogether in the case of the *manufacturer* of personal property sold as new property which is not merchantable and reasonably suited for the purpose intended.³² The court recognizes this as an area of strict liability but cautions that the legislature has now spoken on the subject and thereby limited the doctrine of strict liability in Georgia. Of course, the problem with the present status is that it is too limited. The matter of privity has caused problems in the past. This situation has now been only partially remedied in that only where a manufacturer of a new product is involved has there been a change. Furthermore, the even more difficult problem of proof of negligence has not even been considered. The door has been cracked and that is all.

To illustrate the difficulty of proof of negligence, see *Eyster v. Borg-Warner Corp.*³³ where a heating and cooling unit caused a fire. The plaintiff sought to prove the negligence of the manufacturer by showing that he gave no warning that one should not use aluminum connectors with the heating and cooling unit, which allegedly caused the fire, and that copper connectors were necessary. It was shown that the specific danger of the use of aluminum connectors was commonly known to those in the trade. No duty to warn exists under these circumstances.

29. *Ellis v. Rich's, Inc.*, 132 Ga. App. 430, 208 S.E. 2d 331 (1974).

30. RESTATEMENT OF TORTS (SECOND) §402A (1966).

31. GA. CODE ANN. §109A-2-318 (Rev. 1973).

32. GA. CODE ANN. §105-106 (Rev. 1968).

33. 131 Ga. App. 702, 206 S.E.2d 668 (1974).

V. DEFAMATION

Too many times an attorney is forced to advise a client that the client has a right without any effective remedy. Usually this is because the amount in controversy is not sufficiently large to justify the cost of the pursuit of the remedy. Society has provided some partial solutions to this problem outside the courts. One such solution is found in the news media and generally called "action-line" or some such catch word. These devices usually operate by making public some complaint of a consumer against a business organization. Obviously, the purpose is to cause public pressure or embarrassment to come to bear on the business organization so that an alleged wrong will be corrected. The news media necessarily operates right on the verge of defamation at best. A notable example was *Pacific & Southern Co. v. Montgomery*,³⁴ a supreme court decision which was first considered in the court of appeals.³⁵ A fairly complete statement of the facts is necessary to an understanding of the holding made by both appellate courts. Mrs. King owned a ten year old Volkswagen. When it would not run, she had the engine repaired by Montgomery at a cost of \$234.00. The repair work was given a three month warranty and after eight months, the engine broke down. Mrs. King asked Montgomery to make the repairs again without additional charges. Montgomery refused. She then contacted Southern Company's Action-Line, a TV production. Action-Lines's agent interviewed Montgomery and stated he was going to air the controversy. Montgomery requested that this not be done. An offer was made by Montgomery to give Mrs. King a discount on any new parts he might use in making additional repairs. Obviously, this was a tactical error. The controversy was aired three separate times resulting in an alleged loss of business for Montgomery. The broadcast never suggested that Montgomery might be in the right. The opinion at page 176 quotes the final statement of the broadcast: "This man has agreed now to do the work for her again, he says on a cash basis and the best he will come up with is a discount on some of the parts. Mrs. King, a Volkswagen can be expensive." At the trial, the court directed a verdict for the defendant. The court of appeals reversed and the supreme court agreed. This case is not notable because it announces any new rule of law, but because it is probably indicative of a trend toward finding a given set of facts to require submission to a jury. It is noteworthy because it is a warning to the news media that a great deal of responsibility must accompany the broadcast of "action-line" stories. If a matter is aired not because it is newsworthy, but in order to illustrate that one of the parties is at fault, then the broadcaster should take warning from this case. The rules of law in defamation cases are complicated enough but when it comes to fitting these rules to a statement of facts, a division of opinion is almost bound to result. For instance,

34. 233 Ga. 175, 182, 210 S.E.2d 714, 718 (1974).

35. *Montgomery v. Pacific & Southern Co.*, 131 Ga. App. 712, 206 S.E.2d 631 (1974).

in *Pacific & Southern Co.*, the majority opinion was specially concurred in by Justice Nichols and there was a dissenting opinion³⁶ written by Justice Undercoffer, joined in by Justice Jordan and Justice Hall. This was a very divided court. Subsequent to the survey period, another interesting "action-line" opinion was rendered,³⁷ further indicating the truth of the supposition put forth here.

A public official cannot recover in a defamation action relating to his official conduct unless he proves the statement was made with actual malice.³⁸ On the other hand, the defendant cannot "automatically insure a favorable verdict by testifying that he published with a belief that the statements were true."³⁹ To produce direct evidence of actual malice would be most difficult in the usual circumstances. The plaintiff could hardly be expected to produce a witness who heard the defendant say he acted with malice, and the defendant isn't likely to testify that he acted from malice. Therefore, the circumstantial evidence and the totality of the facts must be considered by the jury. These propositions were all considered in the two public official defamation cases during the survey period. One dealt with a superior court judge⁴⁰ and the other a member of the Georgia General Assembly.⁴¹ The difficult problem both opinions deal with to some extent is defining what is fair comment regarding a public official. Judge Eberhardt quotes President Harry Truman on the subject as having said "if you can't stand the heat, get out of the kitchen."⁴² When does a comment go beyond mere "heat in the kitchen" and become actionable? *New York Times v. Sullivan* requires that actual malice be shown with convincing clarity, and *Garrison v. Louisiana*⁴³ holds that the false statement must have been made with a high degree of awareness of this probable falseness. These cases are difficult and the bar will be anxious to read additional opinion from the courts of Georgia applying the principles of the *New York Times* case and of *Garrison*.

VI. MEDICAL MALPRACTICE

It is particularly interesting at this time to watch for developments in

36. 233 Ga. 175, 182, 210 S.E.2d 714, 718 (1974).

37. *Prairieland Broadcasters of Georgia, Inc. v. Thompson*, 135 Ga. App. 73, ___ S.E.2d ___ (1975). In this case the mayor of Macon sued a broadcaster, an announcer and "one unknown Hotline woman." The broadcast had attributed acts of public nudity to the mayor. The case went up on appeal following the trial court's grant of plaintiff's motion to strike a counterclaim. The appellate court held that actual malice was an issue for a jury to decide. The jury must also decide whether or not the defendant's broadcast was defamatory in charging a public official with public nudity.

38. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

39. *St. Amant v. Thompson*, 390 U.S. 727 (1968).

40. *Thibadeau v. Crane*, 131 Ga. App. 591, 206 S.E.2d 609 (1974).

41. *Finish Allatoona's Interstate Right, Inc. v. Burruss*, 131 Ga. App. 572, 206 S.E.2d 679 (1974).

42. 131 Ga. App. at 594, 206 S.E.2d at 611.

43. 379 U.S. 64 (1964).

the field of medical malpractice. The attention being focused on the subject in the news media has come about because of the dramatic increase in the premiums charged doctors and others in the medical field for malpractice insurance. Whether or not all the clamor is justified in the state of Georgia is questionable.⁴⁴ There is no doubt but what legislation will be offered in the next session of the General Assembly which will be designed to restrict medical malpractice suits in one way or another.

An area of considerable difficulty is that of assigning responsibility for the actions of the hospital personnel. Ordinarily, nurses, aids, technicians and orderlies are employees of the hospital, but they are given instructions by the doctors from time to time who themselves most often are not employees of the hospital. The matter was considered in *Su v. Perkins*⁴⁵ where a doctor and the hospital were sued by a patient who suffered damage when a nurse employed by the hospital gave an injection to the patient upon orders from the doctor. The patient was obese, therefore requiring a longer needle to properly inject the fluid. The nurse did not use a longer needle and injury resulted. The doctor moved for a summary judgment which was denied by the trial court, but the court of appeals reversed. This situation was considered in a similar factual circumstance in *Porter v. Patterson*⁴⁶ and the rules laid down there were reasserted in *Su v. Perkins*. The basic rule is that a hospital is liable for acts of nurses and other hospital employees if that act is administrative or clerical. It is the nature of the act which is determinative. Is the exercise of medical skill or judgment required? Here the court declares that the act was, as a matter of law, administrative. There was no jury question involved. The doctor is released. This appeal did not raise the issue, but it is assumed that the hospital is liable for the nurse's act provided that act is found by a jury to amount to negligence.

What about the relationship of the doctor to the hospital? Of course, the hospital is liable for the acts of the doctor if he is an employee of the hospital, but not if he is an independent contractor. The areas to look into are such things as: Does the doctor receive a salary? Does the doctor spend all his working hours under the direction of the hospital staff? Does the doctor maintain a practice of his own? In *Newton County Hospital v. Nickolson*,⁴⁷ where the doctor worked in the emergency room, the plaintiff was at least able to make a jury issue out of the facts surrounding the above questions.

44. Information gathered by the Governor's Medical Malpractice Advisory Council indicates that 95 per cent of all medical malpractice suits which reach verdicts in Georgia are decided in favor of the defendant.

45. 133 Ga. App. 474, 211 S.E.2d 421 (1974).

46. 107 Ga. App. 64, 129 S.E.2d 70 (1962).

47. 132 Ga. App. 64, 207 S.E.2d 659 (1974).

VII. NEGLIGENCE

The scope of this section is limited to a consideration of a number of cases involving actions brought on the theory of negligence wherein the factual circumstances were out of the ordinary. The cases do not primarily deal with the definition of negligence. They do deal with failure of insurers to make safety inspections; failure of a landlord to register for fire protection from the fire department; failure of an insurance agent to provide sufficient insurance coverage; and, a device in a travelers check which caused the check to become non-negotiable after certain events.

The safety inspection case is one of first impression in Georgia.⁴⁸ The complaint alleged that numerous insurers made safety inspections of a chemical plant pursuant to policy provisions and as a service performed independent of any contract. Plaintiff's deceased was killed in a vapor ignition incident resulting from the insurer's negligent failure to properly perform the safety inspections. The issue was raised as to whether or not a cause of action existed under such circumstances. The court answered in the affirmative, holding specifically that "common law tort liability in Georgia may arise from a negligent safety inspection of premises."⁴⁹ A number of cases involving analogous circumstances and several foreign decisions were considered in the opinion. Also, the Restatement of Torts, Second, was considered. Anyone relying on this opinion for drafting a complaint and proving a claim should also carefully consider all these various authorities for the light they shed on the question apart from the central issue. The problem is probably more nearly a matter of foreseeability than it is a matter of negligence.

In *Hitchcock v. Mayfield*⁵⁰ an apartment was located outside the city of Dallas, Georgia. The landlord had a fire hydrant installed but failed to register with the city as a non-resident user of the city's fire protection service. A fire occurred but the city refused to respond to a call because of the lack of registration. The tenant's property was destroyed and a lawsuit followed. Whether or not the landlord's omission to register for fire protection was negligence was for a jury to determine.

In the third of the cases considered here, an insured purchased business interruption insurance.⁵¹ The agent miscalculated the amount of insurance necessary and caused a policy in an insufficient amount to be issued by the insurer. A loss occurred and the coverage was inadequate. The policy was delivered to the insured prior to the loss but was not examined by the insured. A divided court (four judges in the majority opinion joined in by a special concurrence, as opposed to four dissents) held that the insured's negligence in failing to examine his own policy barred the action as a

48. *Sims v. American Casualty Co.*, 131 Ga. App. 461, 206 S.E.2d 121 (1974).

49. *Id.* at 469, 206 S.E.2d at 127.

50. 133 Ga. App. 546, 211 S.E.2d 612 (1974).

51. *Wright Body Works, Inc. v. Columbus Interstate Ins. Agency*, 132 Ga. App. 307, 208 S.E.2d 111 (1974).

matter of law. The dissenting opinion would have let the issue go to a jury. As pointed out by a special dissenting opinion, the examination of the policy would have helped plaintiff very little because of co-insurance provisions giving rise to complicated formulas for calculating the coverage required. Unless one happened to be versed in these matters, he would be most likely unable to compute the necessary figures.

The fourth case involves facts wherein a traveler purchased travelers checks from the defendant which had a device incorporated therein which caused the word "void" to appear on the face of the checks if the checks became wet.⁵² While traveling, plaintiff was involved in a motorcycle accident wherein he was thrown from the motorcycle into some water, broke his leg and wet the checks. He used one of the checks to purchase an airline ticket. After departure of the aircraft, the agent of the airline company noticed the word "void" on the check, phoned ahead and had plaintiff removed from the aircraft at its first intermediate stop. This resulted in certain losses to plaintiff. At the trial, the verdict was for plaintiff in the amount of \$5,000.00. The court upheld the verdict both on the theory that the defendant owed a duty to warn plaintiff of the danger, and on the theory that it owed a duty not to set up a latent condition which might, without fault on plaintiff's part, destroy the value of his property.

VIII. SLIP AND FALL CASES

So many times in slip and fall cases, the courts have said that this set of facts "clearly raises a jury question," and then again a different set of facts "clearly show as a matter of law" that the defendant is entitled to a judgment in his favor. To the reader of the opinions, the distinction is not so "clear." Two cases will illustrate the point. In *Sears, Roebuck & Co. v. Reid*,⁵³ the jury found for the plaintiff but the court of appeals directed that judgment be entered for the defendant. In *Anderson v. Atlanta University, Inc.*⁵⁴ the trial court granted the defendant's motion for summary judgment but the court of appeals found that a jury issue existed. In the *Sears* case, a customer slipped and fell on a wet spot at the entrance to the store and was injured. It was, or had been, raining. The customer was familiar with the area having been there before. Plaintiff's complaint was predicated on the contention that the defendant negligently maintained the floor so that it was slippery. In the *Atlanta University* case, the plaintiff, a student, fell as the result of tripping over a protruding brick on a walkway of the university after departing from a classroom. She was familiar with the area. The complaint was predicated on insufficient lighting of the walkway, the fall having occurred at night. Answering interrogatories, the university president merely stated that it was the policy to illuminate the

52. *American Express Co. v. Varnedoe*, 133 Ga. App. 437, 211 S.E.2d 392 (1974).

53. 132 Ga. App. 136, 207 S.E.2d 532 (1974).

54. 134 Ga. App. 365, 214 S.E.2d 394 (1975).

campus at night, and to his "best knowledge" this was done at the place and time of the fall. So, in one case the issue was insufficient lighting and in the other case the issue was improper maintenance. The results in the cases were opposite. Of course, as pointed out in the *Atlanta University* case, the university failed to deny that it had insufficient lighting and this is an admission. But, what about the consideration in *Sears* that it was not necessary for plaintiff to show what caused the floor to be slippery inasmuch as the floor was under Sears' absolute control?⁵⁵ This contention having shifted that burden to the defendant, coupled with a jury verdict in favor of plaintiff, makes one wonder about the results when comparing the two cases. It is for sure that the line separating cases of liability of owners and occupiers of premises is a fine line.

IX. MISCELLANEOUS

The following three cases need to be noted although they do not fall within any of the foregoing categories,

In a case of first impression, *Lovett v. Gavin*,⁵⁶ it has now been settled that a cause of action for wrongful death accrues at the time of the death and not at the time the injury was inflicted. The question was raised, not because of a statute of limitations problem as one might suspect, but because the marriage to the deceased occurred after the injury was inflicted. The second case, *Bennett v. Haley*,⁵⁷ was also a case of first impression in Georgia. It establishes that payments made by Medicaid for medical expenses are subject to the collateral source rule and, therefore, evidence of such payments is inadmissible in a tort action for personal injuries. The third case, *Alexander v. Kendrick*,⁵⁸ holds that the family purpose car doctrine applies to circumstances where the mother and father are divorced, the daughter lives with the mother and the father furnishes the automobile to the daughter. The father is liable for the daughter's negligent driving of the automobile resulting in injury to a third party.

X. LEGISLATION

The Georgia Motor Vehicle Accident Reparations Act (No-Fault Insurance)⁵⁹ was amended in several particulars by the 1975 legislature. An interesting change relates to a provision for enforcement of the act. One of the great issues which brought no-fault into being was slow payment of claims by insurers. The idea under no-fault is to have speedy payment of claims. What about those insurers who still delay payments? The original

55. See division three of the dissenting opinion of Judge Evans in the *Sears* case. 132 Ga. App. at 141, 207 S.E.2d at 535.

56. 232 Ga. 747, 208 S.E.2d 838 (1974).

57. 132 Ga. App. 512, 208 S.E.2d 302 (1974).

58. 134 Ga. App. 249, 213 S.E.2d 911 (1975).

59. GA. CODE ANN., ch. 56-34B (Supp. 1974).

act provided that a claim not paid after 30 days from submission of proofs of loss was overdue.⁶⁰ This was to be enforced by giving the insured a cause of action wherein the insurer must prove its good faith, otherwise be subject to 25 per cent penalty and attorney's fees in addition to the principal amount due.⁶¹ Those familiar with actions under Ga. Code Ann. §56-1206 (Rev. 1971) will notice that proof of bad faith (the toughest hurdle in such an action) was a burden put on the insured. So, the placing of the burden to prove good faith on the insurer is a monumental change. Still, the old problem existed that so many such claims were relatively small and 25 per cent of a small sum is hardly worth litigating and it is no threat to an insurer. Under Ga. Code Ann. § 56-1206 (Rev. 1971), the insured may try to recover substantial attorney's fees which can be a deterrent to a slow paying insurer. The 1975 amendment simply adds that an insurer who cannot prove its good faith in delaying a claim 60 days is liable for punitive damages.⁶² With all the publicity and interest in the subject of no-fault, an insurer would be ill-advised to delay a claim for more than 60 days without sufficient cause and thereby subject itself to the possibility of punitive damages. It will be interesting to see what sort of verdicts result from some such cases.

60. GA. CODE ANN. §56-3406b (Supp. 1974).

61. *Id.*

62. Ga. Laws, 1975, p. 1202.