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Who Owes How Much? Developments in Apportionment and Joint and Several Liability Under O.C.G.A. § 51-12-33

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Special Contribution

Who Owes How Much? Developments in Apportionment and Joint and Several Liability Under O.C.G.A. § 51-12-33

by Thomas A. Eaton*

I. INTRODUCTION

For most of its history, Georgia followed the traditional common law rule of joint and several liability and the equally well-settled principle that negligence could not be compared with intent when apportioning liability. Both of those propositions were dramatically altered by the enactment of the 2005 amendments to the Official Code of Georgia Annotated (O.C.G.A.) section 51-12-33[1] as construed by the Georgia

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1. O.C.G.A. § 51-12-33 (2000 & Supp. 2012).

Supreme Court in two recent opinions. In *McReynolds v. Krebs*,[2] the court held that pursuant to O.C.G.A. § 51-12-33(b): (1) damages must be apportioned among persons who are liable according to percentages of fault of each person even if the plaintiff is not herself at fault; and (2) such apportioned damages are not subject to the rule of joint and several liability.[3] In *Couch v. Red Roof Inns, Inc.*,[4] the court held that under the same statute fault could be apportioned among negligent and intentional tortfeasors.[5] The combination of these two rulings will have a considerable impact on tort litigation in Georgia. Defendants, particularly those in negligent security premises liability cases, will see their liability exposure significantly reduced. They will now be responsible only for the percentage of damages corresponding to their own percentage of fault.[6] Innocent plaintiffs will now bear the burden of the "uncollectible share"[7] of damages, thereby reducing the prospect of securing a full recovery.[8] Moreover, the successful plaintiff will have to collect separately from each individual defendant, thereby increasing the transaction costs of securing recovery.[9]

This Article is divided into three sections. The first section discusses apportionment, *Couch v. Red Roof Inns, Inc.*, and related cases. The focus of this discussion is on to whom fault may or may not be apportioned. The second section discusses joint and several liability, *McReynolds v. Krebs*, and related cases. The focus of this discussion is on from whom can a successful plaintiff collect a damage award. The third section of this Article briefly discusses what lies ahead in light of these recent developments.

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2. 290 Ga. 850, 725 S.E.2d 584 (2012).

3. *Id.* at 852, 725 S.E.2d at 587.

4. 291 Ga. 359, 729 S.E.2d 378 (2012). In the interest of full disclosure, my colleague, Mike Wells, and I co-authored an amicus brief on behalf of ourselves in *Couch* in which we argued that O.C.G.A. § 51-12-33 should not be construed to permit apportionment of fault between negligent defendants and unidentified criminals. Brief of Amici Curiae of Thomas A. Eaton and Michael L. Wells, *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 729 S.E.2d 378 (2012). Our arguments did not prevail.

5. *Couch*, 291 Ga. at 359, 729 S.E.2d at 382.

6. O.C.G.A. § 51-12-33(b).

7. By the term "uncollectible share," I refer to the percentage of damages apportioned to parties or non-parties from whom the plaintiff cannot reasonably expect to collect. An uncollectible share may be apportioned to an unknown and unidentifiable person, or to a person or entity who is immune from liability, or to a person or entity who has no insurance or other assets from which to satisfy a legal judgment.

8. O.C.G.A. § 51-12-33(c)-(f).

9. O.C.G.A. § 51-12-33(a).

II. APPORTIONMENT: TO WHOM MAY FAULT BE APPORTIONED?

A. *Intentional Tortfeasors: Couch v. Red Roof Inns, Inc.*

In order to understand the significance of *Couch v. Red Roof Inns, Inc.*,[10] a little background is needed. Prior to *Couch*, Georgia courts held that comparative negligence is not a defense to an intentional tort.[11] The primary justification for this rule is the notion that intent is "a separate and distinct" type of conduct from negligence.[12] The vast majority of states take the same position: comparative fault is not a defense to an intentional tort.[13] Thus, the long-standing rule in Georgia and elsewhere has been that intent and negligence are not comparable.

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10. 291 Ga. 359, 729 S.E.2d 378 (2012).

11. *E.g.*, Cent. R.R. & Banking Co. v. Newman, 94 Ga. 560, 21 S.E. 219 (1894); Flanagan v. Riverside Military Acad., 218 Ga. App. 123, 126, 460 S.E.2d 824 (1995). *Accord* Gates v. Navy, 274 Ga. App. 180, 183, 617 S.E.2d 163, 167 (2005) ("It [has been] well-settled that the defenses of comparative negligence, negligence per se, assumption of the risk and contributory negligence are not valid defenses to intentional, wilful, or wanton and reckless torts . . . .") (quoting Hopkins v. First Union Bank, 193 Ga. App. 109, 111, 387 S.E.2d 144, 146 (1989)); McEachern v. Moldovon, 234 Ga. App. 152, 505 S.E.2d 495 (1998).

12. *McEachern*, 234 Ga. App. at 157, 505 S.E.2d at 501.

13. *E.g.*, Fitzgerald v. Young, 670 P.2d 1324, 1326 (Idaho Ct. App. 1983) (finding apportionment does not apply to intentional torts); Veazey v. Elmwood Plantation Assoc., Ltd, 650 So. 2d 712, 719-20 (La. 1995) (noting that fundamental differences between negligence and intent preclude comparison of fault); Parret v. Unicco Serv. Co., 127 P.3d 572 (Okla. 2005) (same); Shin v. Sunriver Preparatory Sch., Inc., 111 P.3d 762, 776 (Or. Ct. App. 2005) (attempting to compare negligence with intent is "conceptually incoherent") (quoting Hampton Tree Farms, Inc. v. Jewett, 974 P.2d 738, 748 (Or. Ct. App. 1999) (internal quotation marks omitted)); Turner v. Jordan, 957 S.W.2d 815, 823 (Tenn. 1997) (dicussing negligent and intentional torts are "different in degree, in kind, and in society's view" and thus should not be compared); Welch v. Southland Corp., 952 P.2d 162 (Wash. 1998) (same). *See generally* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 5:02, at 121-22 (5th ed. 2010) ("At common law, contributory negligence was not a defense to liability when the defendant's conduct could be characterized as an intentional wrong. Under comparative negligence, the result is likely to be the same . . . ."); HENRY WOODS & BETH DEERE, COMPARATIVE FAULT § 7:1, at 151 (3d ed. 1996) ("The great majority of cases hold that comparative negligence is not applicable to intentional torts.").

In 2005, the Georgia legislature enacted a comprehensive tort reform package. Amendments to O.C.G.A. § 51-12-33[14] were a part of that package. Subsection (b) § of 51-12-33 provides that:

> the trier of fact . . . shall . . . apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this

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14. O.C.G.A. § 51-12-33 (2000 & Supp. 2012).

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

Id.

> Code section shall be the liability of each person against whom they are awarded, [and] shall not be a joint liability . . . .[15]

The term "fault" is not defined in the statute. The issue presented to the Georgia Supreme Court in *Couch* was whether the undefined term fault contained in O.C.G.A. § 51-12-33 altered the common law definition to now permit apportionment among negligent and unidentified intentional tortfeasors.[16]

The complaint in *Couch* alleged that the plaintiff was a registered guest of a Red Roof Inn hotel in Atlanta which was owned by one defendant and managed by another defendant. The complaint further alleged that while on those premises, the plaintiff was abducted, beaten, and robbed by several individuals. None of the assailants were ever identified, arrested, or prosecuted. The plaintiff filed a premises liability suit against the defendants in the United States District Court for the Northern District of Georgia, alleging that they failed to exercise reasonable care to protect the plaintiff, an invitee, from the foreseeable risk of a criminal assault. The defendants filed a pleading in which they gave notice of their intent to have fault apportioned to the unknown criminal assailants.[17] The plaintiff responded by challenging the applicability and constitutionality of the apportionment statute. The federal district court did not rule on this motion.[18] Instead, it certified the following two questions to the Georgia Supreme Court:

> (1) In a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, is the jury allowed to consider the "fault" of the criminal assailant and apportion its award of damages among the property owner and the criminal assailant, pursuant to [O.C.G.A.] § 51-12-33?
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> (2) In a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, would jury instructions or a special verdict form requiring the jury to apportion its award of damages among the property owner and the criminal assailant, pursuant to [O.C.G.A.] § 51-

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15. O.C.G.A. § 51-12-33(b).

16. *Couch*, 291 Ga. at 359, 729 S.E.2d at 379.

17. *See* Plaintiff/Appellant's Brief Regarding Certified Questions, Couch v. Red Roof Inns, Inc., 291 Ga. 359, 729 S.E.2d 378 (2012) (No. S12Q0625), 2012 WL 377254, at *2. Under O.C.G.A. § 51-12-33(d)(1), a defendant who seeks to have fault apportioned to a nonparty must give notice not later than 120 days prior to the date of trial. O.C.G.A. § 51-12-33(d)(1).

18. Plaintiff/Appellant's Brief, *supra* note 17, at *2.

> 12-33, result in a violation of the plaintiff[']s constitutional rights to a jury trial, due process or equal protection?[19]

Thus, the court was called upon to resolve both a question of statutory construction and a question of constitutional law. The court held that "(1) the jury is allowed to apportion damages among the property owner and the criminal assailant and (2) instructions or a special verdict form requiring such apportionment would not violate the plaintiff's constitutional rights."[20]

The key to the majority's ruling on the statutory construction issue was that it viewed intentional wrongdoing as falling within the "ordinary meaning" of the statutory term "fault."[21] As stated by the court, "the ordinary meaning of 'fault' . . . includes intentional conduct."[22] The court further observed that O.C.G.A. § 51-12-33(d)(1) refers to "[n]egligence or fault," indicating that the term "fault" must necessarily encompass more than simple negligence.[23] The court also noted that had the legislature intended to exclude "intent" from the ambit of fault, it could have done so explicitly.[24]

By characterizing the ordinary meaning of fault to include intent, the court was able to dismiss other concerns. As interpreted by the majority, the ordinary meaning rendered it unnecessary to consider that other states authorizing apportionment among negligent and intentional tortfeasors do so under statutes that expressly define fault to include intent.[25] The ordinary meaning construction also rendered inapplicable the canon regarding strict construction of statutes in derogation of common law.[26]

The majority dismissed the constitutional challenges in a single paragraph. The plaintiff's constitutional right to a jury trial is not violated because the jury still performs its "normal function–it assesses liability, calculates damages, and names the tortfeasors who are responsible."[27] Plaintiffs are not denied due process because the statute is not unconstitutionally vague and it does not destroy a vested property right.[28] Finally, the apportionment statute does not violate

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19. *Couch*, 291 Ga. at 359, 729 S.E.2d at 379.
20. *Id.* Justice Melton authored the majority opinion in which four justices joined. *Id.* Justices Benham and Hunstein dissented. *Id.* at 359, 729 S.E.2d at 384.
21. *Id.* at 361, 729 S.E.2d at 380-81.
22. *Id.*
23. *Id.* at 362, 729 S.E.2d at 381.
24. *Id.* at 362-63, 729 S.E.2d at 381.
25. *Id.* at 363, 729 S.E.2d at 382.
26. *Id.* at 364, 729 S.E.2d at 383.
27. *Id.* at 367, 729 S.E.2d at 384.
28. *Id.*

the principle of equal protection because it is supported by a rational basis.[29]

The majority's analysis of the statutory construction issue is facile at best. The ultimate test of what a statute means is not how the *Webster's New Collegiate Dictionary* defines the word "fault," but it is the legislative intent. Justice Benham properly noted that "there is more to statutory construction when Georgia's common law is at issue than looking through the dictionary of one's choice . . . ."[30] Given the historical refusal of Georgia and other common law courts to compare intent with negligence, the absence of a statutory definition of fault,[31] and the fact that the Georgia comparative *negligence* statute[32] was not amended when the apportionment provisions were enacted, it is not so clear that the legislature intended to permit apportionment among negligent and intentional wrongdoers.

One consequence of *Couch* is to create a de facto comparative fault defense to an intentional tort when the plaintiff is partially at fault–an outcome never before permitted under Georgia law. A simple example will illustrate this point. Assume a plaintiff is attacked in the parking lot of a bar and brings suit against the owner of the premises for negligent security. Assume further that the premises owner alleges that the plaintiff was negligent[33] and seeks to apportion fault to the criminal assailant. Finally, assume that a jury apportions five percent of the fault to the plaintiff, twenty percent to the premises owner, and

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29. *Id.*

30. *Id.* at 367, 729 S.E.2d at 384-85 (Benham, J., dissenting).

31. *Id.* at 368-69, 729 S.E.2d at 385. The majority correctly notes that Colorado courts permit apportionment among negligent and intentional tortfeasors under a statute that refers to "negligence or fault" without a specific definition of fault. *Id.* at 362 n.6, 729 S.E.2d at 381 n.6 (majority opinion). It does not acknowledge that a greater number of states that apportion fault among intentional and negligent tortfeasors do so under statutes that explicitly include "intent." *E.g.*, IND. CODE ANN. § 34-6-2-45 (current through 2012 Legis. Sess.), *available at* www.in.gov/legislative/ic/code/title34/ar6/ch2.html (stating fault includes conduct that is "intentional"); MICH. COMP. LAWS ANN. § 600.6304 (current through 2012 Legis. Sess.); *available at* http://legislature.mi.gov/doc.aspx?mcl-600-6304 (fault includes intentional conduct); ALASKA STAT. ANN. § 09.17.900 (current through 2011-2012 Legis. Sess.) *available at* www.legis.state.ak.us/basis/folio.asp (stating fault includes conduct that is intentional).

32. *See* O.C.G.A. § 51-11-7 (2000). O.C.G.A. § 51-11-7 does not use the term fault. Instead, it refers to "ordinary care" and "consequences . . . caused by the defendant's negligence." *Id.*

33. The defendants in *Couch* raised the defense of comparative negligence against the plaintiff and thus sought to have fault apportioned among the plaintiff, the defendants, and several unknown and unidentified intentional tortfeasors. Plaintiff/Appellant's Brief, *supra* note 17, at *2.

seventy-five percent to the criminal assailant.[34] Applying O.C.G.A. § 51-12-33(b) as construed in *Couch* to these facts, the criminal assailant's liability to the plaintiff would be reduced by five percent notwithstanding the fact that the comparative negligence statute on its face does not appear to apply in the context of intentional torts.[35]

The majority's treatment of the constitutional issues is even more troubling, not so much for its conclusions as for its lack of depth or explanation.[36] The court in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*[37] held that the legislative cap on non-economic damages in medical malpractice cases violated the jury trial provision of the Georgia constitution.[38] The cap on recovery for non-economic damages was part of the same tort reform legislation that produced the apportionment provision of O.C.G.A. § 51-12-33. Given such a recent invocation of the right to a jury trial to invalidate one provision of the 2005 tort reform package, one could reasonably expect at least a modest explanation of why apportionment among intentional and negligent tortfeasors is constitutional, but the cap on non-economic damages is not.

Some of the constitutional challenges were not addressed at all in the court's opinion. A plausible argument exists that apportioning fault to unknown tortfeasors violates the plaintiff's right to due process.[39] The primary vice is the prospect of irreconcilable conflicting determinations of fault. Assume, for example, that the first jury apportions twenty percent of the fault to the known defendant and eighty percent to an

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34. This illustration is based on the facts of an actual case in which the jury made this precise apportionment of fault. *See* Weidenfeller v. Star & Garter, 2 Cal. Rptr. 2d 14 (1991).

35. The court in *Couch*, of course, only addressed apportionment in the context of an allegedly negligent plaintiff, allegedly negligent defendants, and unidentified allegedly intentional tortfeasors. *Couch*, 291 Ga. at 359, 729 S.E.2d at 379. It will be interesting to see if comparisons of negligence and intent are authorized only in this setting or if comparative negligence will now be a recognized defense to an intentional tort when there is not an additional negligent defendant. It would be bizarre to permit intentional tortfeasors to reduce their liability when there are also negligent tortfeasors, but not allow apportionment when there are not negligent tortfeasors.

36. It is difficult to assess the correctness of the substantive conclusions given such a cursory development of the reasoning.

37. 286 Ga. 731, 691 S.E.2d 218 (2010).

38. *Id.* at 738, 691 S.E.2d at 224.

39. Other states have held that apportioning fault to unknown parties violates the plaintiff's constitutional rights. *E.g.*, Newville v. Dep't of Family Servs., 883 P.2d 793 (Mont. 1994) (finding it is a violation of procedural due process); Plumb v. Fourth Jud. Dist. Ct., 927 P.2d 1011 (Mont. 1996) (finding it is a violation of substantive due process); *see also* Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135 (Ark. 2009) (finding it is a violation of separation of powers).

unknown person.[40] The percentage of fault apportioned to the unknown person is not binding on that individual,[41] but it is binding on the plaintiff. If the person who was unknown at the time of the first trial is later identified and sued in a separate second trial, the now-known defendant would be free to argue that the first defendant was actually more responsible for the harm. The first defendant would have no economic incentive to participate in the second trial because the extent of his liability has already been determined. The jury in the second trial could apportion twenty percent of the fault to the now-known defendant and eighty percent to the original defendant. Despite the fact that both juries found the plaintiff to be completely innocent, the conflicting allocations of fault would leave the plaintiff with the potential of recovering only forty percent of her damages. Surely such an outcome would offend traditional notions of fairness that underlie the constitutional right of due process. Given its cursory treatment of the constitutional issues, perhaps the court will deem it appropriate to address them more fully should they be presented in an appropriate future case.

The above criticisms notwithstanding, it is clear that for the first time in the state's history, the trier of fact will be asked to assign percentages of fault to negligent and intentional tortfeasors.

B. Parties with Immunities: Barnett v. Farmer

The case of *Barnett v. Farmer*[42] involved a simple automobile accident. The driver of one vehicle and his wife sued the driver of the other vehicle. The defendant sought an instruction to the effect that insofar as the wife and passenger's claim is concerned, the jury could apportion fault to her husband.[43] The Georgia Court of Appeals held that such an instruction should be given notwithstanding the doctrine of interspousal immunity.[44] The "clear intent of the legislature" was that the negligent driver of one vehicle should not have to bear the damages allocable to the plaintiff's husband's negligence.[45]

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40. Under O.C.G.A. § 51-12-33(c) the "trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, *regardless of whether the person or entity was, or could have been, named as a party to the suit.*" O.C.G.A. § 51-12-33(c) (emphasis added). Pursuant to this provision, the court held in *Couch* that fault could be apportioned to the unidentified assailants. *See Couch*, 291 Ga. at 359, 729 S.E.2d at 379.

41. O.C.G.A. § 51-12-33(f)(2).

42. 308 Ga. App. 358, 707 S.E.2d 570 (2011).

43. *Id.* at 358, 707 S.E.2d at 571.

44. *Id.*

45. *Id.* at 362, 707 S.E.2d at 574.

Apportioning fault to the passenger's husband did not violate the interspousal immunity doctrine because it merely limits the non-immune defendant's liability.[46] It "in no way *requires*" the plaintiff to bring suit against her husband or impose any liability upon him.[47]

This ruling appears to be consistent with the statutory language that fault be apportioned among all persons who contributed to the alleged injury, "regardless of whether the person or entity was, or could have been, named as a party to the suit."[48] The reasoning here would seem to apply to allegedly negligent governments, government officials, charities, employers, or others who may enjoy an immunity. Indeed, an "entity" that could not be named a party in the suit would appear to contemplate all the various forms of governmental and charitable immunities.

C. No Duty = No Fault = No Apportionment: Union Carbide Corp. v. Fields

The case of *Union Carbide Corp. v. Fields*[49] involved a suit brought against a number of defendants for alleged asbestos-related injuries. Each defendant affirmatively pled what the court referred to as "the defense of nonparty fault" seeking to have fault apportioned to a number of non-parties.[50] One of these non-parties was the Georgia Power Company. Georgia Power had been the employer of the father of one of the plaintiffs. The defendants argued that fault should be apportioned to Georgia Power because it was culpably responsible for the asbestos dust left on the plaintiff's father's work clothes, to which the plaintiff was exposed at home, which contributed to her injuries.[51] The court of appeals rejected this argument, holding that since Georgia Power did not owe a duty of care to the plaintiff,[52] it could not be deemed to be at fault for purposes of apportionment.[53] The court noted, "[i]n the absence of a legally cognizable duty, there can be no fault or negligence."[54]

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46. *Id.*
47. *Id.*
48. O.C.G.A. § 51-12-33(c).
49. 315 Ga. App. 554, 726 S.E.2d 521 (2012).
50. *Id.* at 556, 726 S.E.2d at 524.
51. *Id.* at 557, 726 S.E.2d at 525.
52. The proposition that an employer owes no duty of care to a third party who comes in contact with asbestos-tainted work clothing was established in *CSX Transp., Inc. v. Williams*, 278 Ga. 888, 891, 608 S.E.2d 208, 210 (2005).
53. *Fields*, 315 Ga. App. at 559, 726 S.E.2d at 526.
54. *Id.* at 558, 726 S.E.2d at 525 (quoting Ford Motor Co. v. Reese, 300 Ga. App. 82, 84, 684 S.E.2d 279, 283 (2009)). The court also affirmed the granting of the plaintiff's

The court distinguished immunity from no duty.[55] When the non-party is immune, as was the case in *Barnett*, the finder of fact may consider evidence of the non-party's conduct and apportion fault. When the non-party owes no duty to the plaintiff, the non-party's conduct cannot be considered at fault for purposes of the apportionment statute.[56]

D. Derivative Liability is Not Subject to Apportionment: PN Express, Inc. v. Zegel

PN Express, Inc. v. Zegel[57] involved a collision between a tractor-trailer and an automobile. The driver of the automobile was severely injured and brought suit against PN Express. The plaintiff contended that PN Express was a common carrier commercial lessee of the tractor-trailer which would make PN Express the statutory employer of the negligent driver. In the alternative, the plaintiff maintained that PN Express was the actual employer of the negligent driver and could be held liable under traditional principles of respondeat superior.[58] The court of appeals held that there was sufficient evidence in the record to support both theories.[59] PN Express further argued that the trial court erred in failing to instruct the jury to apportion fault.[60] The court of appeals held that it was not error to give the requested charge to the jury because apportionment of damages is not permitted when liability is entirely derivative.[61]

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motion for partial summary judgement regarding fifty-one other non-parties designated by the defendant. *Id.* at 556-64, 726 S.E.2d at 524-29. Fault could not be apportioned to these entities because the "[d]efendants had failed to produce any evidence creating a jury question whether these nonparties were responsible for any asbestos-containing products to which Mrs. Fields was exposed." *Id.* at 556, 726 S.E.2d at 524. For this aspect of *Fields*, see text accompanying *infra* notes 92-107.

55. *Id.* at 557-58, 726 S.E.2d at 525.

56. *Id.*

57. 304 Ga. App. 672, 697 S.E.2d 226 (2010).

58. *See id.* at 672, 697 S.E.2d at 228.

59. *Id.* at 677, 697 S.E.2d at 231.

60. *Id.* at 679-80, 697 S.E.2d at 233.

61. *Id.* at 680, 697 S.E.2d at 233. The court of appeals's opinion is confusing on one point. When discussing the apportionment issue, the court refers to an allegation that a broker, Patterson Freight Systems, negligently supervised the driver. *Id.* The plaintiff's complaint did contain such an allegation. The plaintiff dropped that claim, however, and neither the plaintiff nor PN Express presented any evidence that Patterson Freight Systems was in fact negligent. Thus, the refusal to submit an apportionment instruction as to Patterson is better explained in terms of a deficiency of evidence. *See* text accompanying *supra* note 52, and *infra* note 92.

This holding makes a great deal of sense. When an employer is held vicariously liable under the doctrines of statutory employer or respondeat superior, the only fault is that of the employee. There is no fault on the part of the employer to be apportioned. In such situations, the jury can determine the fault of the employee for which, as a matter of law, the employer is responsible.

III. JOINT AND SEVERAL LIABILITY: HOW MUCH DOES EACH PERSON OWE?

Apportionment concerns to whom may fault be allocated. Joint and several liability concerns how much each person owes. Joint liability means that if there are two or more tortfeasors whose wrongful conduct caused a single indivisible injury to the plaintiff, each tortfeasor is responsible for the entire harm.[62] Thus, the successful plaintiff could enforce the entire judgement against any one defendant. The defendant who paid the judgement could seek contribution from the other defendants,[63] but that defendant would have no recourse should the other defendants lack the resources to pay. Thus, the practical impact of joint liability is to place the risk of tortfeasor insolvency on the other tortfeasors.

For most of the state's history, Georgia followed the common law rule of joint and several liability.[64] If two or more persons were liable for the plaintiff's injury, she could recover the entire amount of her damages from any of them and the defendant who paid the judgement could seek contribution from the other defendants.[65]

This structure was modified in 1987 with the enactment of O.C.G.A. § 51-12-33.[66] That statute abrogated the application of joint liability in actions where "the plaintiff is to some degree responsible" for her own injuries.[67] In such cases, each defendant was legally obligated to pay

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62. *See* RESTATEMENT (SECOND) OF TORTS § 875 (1979).

63. Contribution is the right of a tortfeasor who pays more than his appropriate share of a joint liability to secure payments from the other joint tortfeasors. *See generally* DAN B. DOBBS, THE LAW OF TORTS §§ 386 & 387 (West 2000). Contribution is authorized in Georgia by O.C.G.A. § 51-12–32 (2000 & Supp. 2012).

64. For a concise history of Georgia law on this point see Emily Ruth Boness, Note, *The Effect (Or Noneffect) of the 2005 Amendments to O.C.G.A. Sections 51-12-31 and 51-12-33 on Joint Liability in Georgia*, 44 GA. L. REV. 215, 224-27 (2009).

65. *Id.* at 226.

66. *Id.* at 227.

67. O.C.G.A. § 51-12-33(a). O.C.G.A. § 51-12-33(a), as enacted in 1987, provided that in actions where the plaintiff is to some degree responsible for the injury, any damages apportioned by the trier of fact "shall not be a joint liability . . . and shall not be subject to any right of contribution." O.C.G.A. § 51-12-33(a) (2000 & Supp. 2012).

no more than their percentage share of the plaintiff's damages.[68] The innocent plaintiff, however, could still avail herself of the rule of joint and several liability. The post-1987 rule in Georgia placed the risk of tortfeasor insolvency on co-defendants when the plaintiff was innocent and wholly on the plaintiff when she was also at fault.[69]

In 2005, the legislature extensively amended O.G.G.A. § 51-12-33. Subsection (b) states that when damages are apportioned "among the persons who are liable . . . the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution."[70] This language clearly indicates that liability under subsection (b) is not joint. The big question that emerged following the enactment of the 2005 amendment was whether subsection (b) applies only to cases in which the plaintiff is at fault or whether it abolishes joint liability even when the plaintiff is innocent.

The argument that the 2005 amendments did not abolish joint liability when the plaintiff was not at fault goes as follows: (1) subsection (b) states that apportionment of damages should be done "after a reduction of damages pursuant to subsection (a)";[71] and (2) subsection (a) deals with cases where "the plaintiff is to some degree responsible for the injury or damages claimed."[72] Thus, the argument goes, a fair reading of the statute is that subsection (b) was intended to provide in detail how to apportion fault in cases where the plaintiff was at fault. An additional point pertains to O.C.G.A. § 51-12-32. This statute authorizes contribution and was not repealed with the passage of the 2005 amendments.[73] Contribution is available only in cases of joint liability.[74] If the 2005 amendments to O.C.G.A. § 51-12-33 abolished joint liability generally, the contribution statute would be superfluous. By not repealing O.C.G.A. § 51-12-32, the legislature indicated that there must still be situations in which contribution applies. The most logical way to harmonize the two statutes would be to limit the apportionment provision and the corresponding abrogation of joint liability contained in O.C.G.A. § 51-12-33(b) to cases in which the plaintiff is at fault.

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68. *See, e.g.*, Turner v. New Horizons Cmty. Serv. Bd., 287 Ga. App. 329, 651 S.E.2d 473 (2007).

69. O.C.G.A. § 51-12-33.

70. O.C.G.A. § 51-12-33(b).

71. *Id.*

72. O.C.G.A. § 51-12-33(a).

73. O.C.G.A. § 51-13-32(a).

74. O.C.G.A. § 51-12-32(b).

The counterargument is grounded in the "if any" language found in § 51-12-33(b). Subsection (b) states that apportionment among defendants should take place after a reduction has been made to account for the plaintiff's fault, "if any."[75] The phrase "if any" signifies that the legislature envisioned cases in which the plaintiff was not at fault, but the apportionment and corresponding abrogation of joint liability would nonetheless apply.

The issue of the scope of subsection (b) was first addressed in *Cavalier Convenience, Inc. v. Sarvis.*[76] Sarvis was injured in an automobile accident. He sued Jeremi Bath, the seventeen-year-old driver of the other vehicle who was allegedly intoxicated at the time of the accident. Sarvis also sued the convenience store that allegedly sold intoxicating beverages to Bath. Sarvis filed a motion seeking a ruling from the trial court precluding the apportionment of fault between Bath and the convenience store. Sarvis argued that O.C.G.A. § 51-12-33(b) only applied when the plaintiff was at fault. The trial court granted the plaintiff's motion but certified the issue for interlocutory appeal.[77] The court of appeals held that the plain language of O.C.G.A. § 51-12-33(b) requires apportionment of fault among multiple wrongdoers even when the plaintiff is not at fault.[78] A necessary implication of this holding is that when damages are apportioned according to percentages of fault, the liability is not joint. Each party is responsible only for their share of the damages. The Georgia Supreme Court granted certiorari to hear this case, but the petition was later withdrawn by the plaintiff.

A second case raising the same issues, *McReynolds v. Krebs,*[79] did find its way to the Georgia Supreme Court. The facts and context in which the apportionment/joint liability issues were raised are a bit unusual.[80] The litigation grew out of an automobile accident in which the plaintiff, Lisa Krebs, was injured. She sued the driver of the other vehicle (McReynolds) and General Motors (GM), the manufacturer of the automobile in which Krebs was a passenger. McReynolds cross-claimed against GM for contribution and set off. Krebs settled with GM for an undisclosed sum. After the settlement, the trial court dismissed McReynold's cross-claims, reasoning that O.C.G.A. § 51-12-33 had

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75. *Id.*

76. 305 Ga. App. 141, 699 S.E.2d 104 (2010).

77. *Id.* at 141-42, 699 S.E.2d at 105.

78. *Id.* at 145, 699 S.E.2d at 107.

79. 290 Ga. 850, 725 S.E.2d 584 (2012) (*"McReynolds I"*).

80. What makes this case unusual is that it was the plaintiff—not a defendant–who was arguing that O.C.G.A. § 51-12-33 abolished joint and several liability. *McReynolds I*, 290 Ga. at 850, 725 S.E.2d at 586.

effectively abolished joint liability and replaced contribution and set off with a process of apportionment among multiple tortfeasors. The case went to trial and a jury awarded the plaintiff $1,246,000.42 in damages.[81] The trial court entered a judgment against McReynolds for the full amount,[82] which was affirmed by the court of appeals.[83]

In affirming the lower courts, the Georgia Supreme Court issued four important rulings. First, it held that "in applying [O.C.G.A.] § 51-12-33, the trier of fact must 'apportion its award of damages among the persons who are liable according to the percentage of fault of each person' even if the plaintiff is not at fault for the injury or damages claimed."[84] In reaching this conclusion, the court emphasized the "if any" phrase of subsection (b) and concluded that the legislature intended subsection (b) to apply even when the plaintiff was not at fault.[85] The second holding was that there was no error in dismissing the cross-claim for contribution.[86] Subsection (b) of the statute expressly states that apportioned damages "shall not be subject to any right of contribution" and "shall not be a joint liability among the persons liable."[87] In light of this clear language, there could be no claim for contribution.[88] In further support of this ruling, the court invoked the well-settled principle that "contribution will not lie in the absence of joint or joint and several liability."[89] The third major holding was that it was not error to dismiss the cross-claim for set off because McReynolds presented no evidence to establish that GM was at least partially liable for the plaintiff's injury.[90] Fourth, McReynolds was also not entitled to have her liability reduced by apportioning fault to GM since she presented no evidence from which a jury could find GM was liable to the plaintiff.[91]

The central lesson of *McReynolds* is that when fault is apportioned pursuant to § 51-12-33(b), joint liability does not apply even when the plaintiff is not at fault. The practical importance of this ruling is that the risk of tortfeasor insolvency now lies squarely on the shoulders of the plaintiff, even if innocent.

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81. McReynolds v. Krebs, 307 Ga. App. 330, 330-32, 705 S.E.2d 214, 215-16 (2010) ("*McReynolds II*").
82. *Id.* at 332, 705 S.E.2d at 216.
83. *Id.* at 337, 705 S.E.2d at 219.
84. *McReynolds I*, 290 Ga. at 852, 725 S.E.2d at 587; *see also* O.C.G.A. § 51-12-33(b).
85. *McReynolds I*, 290 Ga. at 852, 725 S.E.2d at 587.
86. *Id.*
87. O.C.G.A. § 51-12-33(b).
88. *McReynolds I*, 290 Ga. at 852, 725 S.E.2d at 587.
89. *Id.* (quoting Weller v. Brown, 266 Ga. 130, 130, 464 S.E.2d 805, 806 (1996)).
90. *Id.* at 853, 725 S.E.2d at 588.
91. *Id.*

A second, and perhaps less obvious, lesson is that apportionment under subsection (b) is not self-executing. A defendant seeking to have fault apportioned to others must do more than simply file notice or bring them into the lawsuit. The burden lies on the person seeking apportionment to prove that the party or non-party upon whom it seeks to apportion fault is liable to the plaintiff.[92] In other words, the party seeking apportionment must prove the same elements as the plaintiff would have to prove if she were suing directly. As the facts of *McReynolds* illustrate, that burden may sometimes be expensive and difficult. The plaintiff's claim against GM was essentially one sounding in products liability for an allegedly defective design. In such cases, expert witnesses are often needed to testify regarding the risks and utility of the design, the availability of a reasonable alternative design, and issues of causation.[93] Thus, to meet her burden of proving that GM was at least partially liable to the plaintiff, McReynolds would have to bear the expense of mounting a successful products liability case against GM.

IV. IMPLICATIONS AND UNANSWERED QUESTIONS: WHAT LIES AHEAD?

A. Implications

McReynolds creates a strong incentive for defendants to bring in as many parties and non-parties as feasible among whom fault can be apportioned. The abrogation of joint liability means that every percentage of fault allocated to someone else reduces the liability of a defendant. Thus, *McReynolds* will serve to reduce a defendant's liability exposure. A defendant's ability to avail itself of this strategy is limited by its ability to prove that the co-defendants and non-parties are at least partially liable to the plaintiff. As illustrated in *McReynolds* and *Fields*, this may not always be easy.[94]

From the plaintiff's perspective, *McReynolds* reduces the chances of securing a full recovery. The elimination of joint liability when fault is apportioned to parties and non-parties effectively places the risk of the

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92. This holding reinforces the court of appeals's ruling in *Union Carbide Corp. v. Fields* that the defendant could not have fault apportioned to fifty-one non-parties when the defendant failed to present evidence from which a jury could find that these non-parties were liable to the plaintiff. Union Carbide Corp. v. Fields, 315 Ga. App. 554, 556, 726 S.E.2d 521, 524 (2012).

93. "Products liability actions today almost always require the testimony of expert witnesses to prove concepts of science, engineering, industrial design, and other technical fields .... Expert testimony may be necessary to establish a defect in the product or causation." J. KENNARD NEAL, GEORGIA PRODUCTS LIABILITY § 12:8, at 265 (4th ed. 2012).

94. *See* text accompanying *supra* note 54, and *supra* note 90.

uncollectible share to the innocent plaintiff. The innocent plaintiff will not be able to secure compensation for the percentage of damages corresponding to the fault apportioned to unknown non-parties, those protected by immunities, or those who are uninsured or otherwise lack assets from which a judgment can be paid.

The risk of the uncollectible share will be a particularly difficult problem for plaintiffs in premises liability cases involving negligent security. In *Couch*, the Georgia Supreme Court held that fault can be apportioned among the negligent premises owner and unidentified criminal assailants.[95] Every percentage of fault apportioned to the unidentified criminals is a percentage of damages for which even an innocent plaintiff will not likely receive compensation. As other courts have observed, it is reasonable to expect that as between a negligent premises owner who fails to protect an invitee from foreseeable criminal assaults and the criminal assailant, the "lion's share" of fault will be apportioned to the criminal.[96] If the criminal is unknown, as in *Couch*, or known and insolvent, the innocent plaintiff is not likely to receive compensation for the lion's share of her injuries.[97]

Another concern is the impact of reduced liability exposure on incentives to take reasonable precautions. Reducing a defendant's liability exposure in general necessarily reduces the liability incentive to take reasonable precautions. This concern is amplified in the premises liability/negligent security context as fault can now be apportioned to known and unknown criminals. If the lion's share of fault will be apportioned to the criminal assailant, as other courts have predicted, the premises owner's liability incentive will be correspondingly reduced.[98]

The majority in *Couch* dismissed this concern with the observation that "a property owner must still keep his premises safe or face potential liability for an amount of damages commensurate with its responsibility

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95. Couch v. Red Roof Inns, Inc., 291 Ga. 359, 359, 729 S.E.2d 378, 379 (2012).

96. Veazey v. Elmwood Plantation Assoc. Ltd., 650 So. 2d 712, 719 (La. 1994) ("[A]ny rational juror will apportion the lion's share of the fault to the intentional tortfeasor when instructed to compare the fault of a negligent tortfeasor and an intentional tortfeasor."); *see also* Turner v. Jordan, 957 S.W.2d 815, 822 (Tenn. 1997) ("[J]uries will likely allocate most if not all fault to the intentional actor . . . .").

97. *E.g.*, *Veazey*, 650 So. 2d at 729 (Lemmon, J., dissenting).

98. The prospect of tort liability may not be the only incentive a property owner has to make the premises safe. Market forces and government regulations may encourage landlords, hotels, and others to take reasonable precautions to protect their invitees from the risk of foreseeable crimes. But whatever incentive is created by potential tort liability is necessarily reduced when tort liability is reduced.

for a plaintiff's harm."[99] Such a cavalier comment is either naively simplistic or perhaps disingenuous. The court fails to even acknowledge that a premises owner's liability exposure has been reduced, and probably by a significant margin. While one might debate just how much potential tort liability shapes premises owners' conduct, it is beyond debate that the extent of that incentive has been reduced. Similar criticism can be leveled at the court's treatment of the impact of its ruling on the property owner's duty to keep the premises reasonably safe.[100] The court comments that allowing apportionment of fault to the criminal assailant does not nullify the property owner's duty because "[t]he duty remains even where damages are apportioned."[101] While it is true that the property owner's duty has not been "nullified," the court fails to acknowledge that it likely has been severely undermined.

The criticism here is more than one over word choices. The court's systematic discounting of the practical consequences of its ruling masks the deficiencies with its "ordinary language" statutory construction analysis. The relevant question on statutory construction is legislative intent. Thus, the relevant questions are whether by using the undefined term "fault" the legislature intended to overturn more than a hundred years of common law precedent and allow a de facto comparative fault defense to intentional torts and to diminish, probably significantly, the incentives for premises owners to meet their nondelegable duty to use reasonable care to protect invitees from the foreseeable risk of criminal assaults. Cast in this light, resorting to a dictionary seems an inadequate, or at least incomplete, guide to legislative intent.

A more intellectually honest response would be to acknowledge that the 2005 amendments to O.C.G.A. § 51-12-33 as construed in *McReynolds* and *Couch* are likely to dilute the financial incentives for premises owners to take reasonable precautions to protect invitees from the foreseeable risk of criminal assaults, but this result was a policy choice made by the legislature in enacting the legislation. Similarly, the legislature chose to shift the risk of the uncollectible share from tortfeasors to innocent plaintiffs. In other words, the legislature determined that a defendant's interest in limiting its liability to its percentage of fault should take precedence over the potential dilution of incentives or the innocent plaintiff's interest in securing full compensation. It is not appropriate for the court to substitute its judgment

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99. *Couch*, 291 Ga. at 366, 729 S.E.2d at 384.

100. This duty is imposed by statute, and has been characterized as "nondelegable." O.C.G.A. § 51-3-1 (2000); Mason v. Chateau Cmtys., Inc., 280 Ga. App. 106, 112, 633 S.E.2d 426, 431 (2006); Hickman v. Allen, 217 Ga. App. 701, 702, 458 S.E.2d 883, 884 (1995).

101. *Couch*, 291 Ga. at 366, 729 S.E.2d at 383.

regarding policy for that of the legislature so long as the statute is constitutional.

What can the plaintiff do in response to *McReynolds* and *Couch*? One point that has already been discussed is to challenge the defendant to prove that the other parties or non-parties to whom the defendant seeks to have fault apportioned are, in fact, at least partially liable to the plaintiff. This tactic places the plaintiff in the unaccustomed position of arguing that someone was not at fault, not a cause in fact, or not the proximate cause of the injuries for which she seeks compensation. This strategy, successfully employed in *McReynolds*[102] and *Fields*,[103] may prove to be problematic in the premises liability/negligent security context. In order to establish that the premises owner's negligence was the cause in fact and proximate cause of a criminal assault, the plaintiff must prove there was a criminal assault. Thus, the very evidence needed to establish the premise owner's liability will tend to provide the basis for apportioning fault to the criminal assailant.

A second and equally challenging strategy will be to find ways to convince the trier of fact to apportion more fault to the target defendants and less fault to those parties and non-parties from whom the plaintiff cannot realistically expect to recover. Thus, the plaintiff-passenger in *Barnett* would attempt to convince the jury that her husband-driver (who is protected by spousal immunity) was either not at fault or his fault was minor in comparison with that of the driver of the other vehicle.[104]

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102. In *McReynolds*, the defendant's failure to offer evidence that GM manufactured a defective automobile precluded set off and apportionment. *See* text accompanying *supra* note 92.

103. In *Fields*, the defendants' failure to offer evidence that the plaintiff was exposed to products containing asbestos manufactured by fifty-one non-parties precluded apportionment of fault to those non-parties. *See* text accompanying *supra* note 54.

104. Apportioning fault to parties with immunities will change the dynamics of other litigations. For example, employees who are injured on the job and bring tort actions against third parties will now have their recovery against third parties reduced by any percentage of fault assigned to the plaintiffs' employers. Employers will have little incentive to defend their conduct as their liability is limited by workers' compensation. Thus, it will now fall upon the employee to challenge the third party's assertion that the employer was negligent and that the employer's negligence was a cause in fact and proximate cause of the plaintiff's injuries. For a general discussion of the complexity of balancing the interests of employers, employees, and third parties when an injured worker has both a workers' compensation claim and a tort claim against a third party, see 7 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 121 (2012). My analysis appears in Thomas A. Eaton, *Revisiting the Intersection of Workers' Compensation and Product Liability: An Assessment of a Proposed Federal Solution to an Old Problem*, 64 TENN. L. REV. 881 (1997).

In the premises liability/negligent security context, the formidable challenge will be to convince a jury to apportion more fault to the premises owner and less to the criminal assailant. While this challenge is formidable, it is not always insurmountable. In *Hutcherson v. City of Phoenix,*[105] a jury apportioned seventy-five percent of fault to the city that negligently handled a 911 call and twenty-five percent of fault to the person who murdered the two plaintiffs.[106] In affirming the trial court's denial of the city's motion for a new trial, the Arizona Supreme Court emphasized three points: first, the city had a duty to use reasonable care to prevent the very type of harm that occurred; second, the city had actual knowledge of the danger and time within which to act; and third, the conduct of the 911 operator could be viewed as "shockingly inadequate, given the information [she] had obtained" regarding the threats.[107]

B. Unanswered Questions

Couch and several lower court opinions addressed who may and may not be apportioned fault. The court in *Couch* establishes that fault may be apportioned to unknown intentional (indeed criminal) tortfeasors.[108] Lower court opinions indicate that fault may be apportioned to those protected by immunity, but not to those who owe no duty to the plaintiff, and not to persons whose liability is derivative of the fault of others. Justice Benham's dissenting opinion in *Couch* raises several other interesting possibilities.[109] Can fault be apportioned to someone whose liability is predicated upon principles of "strict liability?" It is commonly understood that strict liability is liability without fault.[110] If this understanding were to prevail, it would seem that a trier of fact would not be authorized to apportion fault between a tortfeasor whose liability is based on negligence and another who is strictly liable. Georgia courts have often referred to products liability as a form of strict liability.[111]

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105. 961 P.2d 449 (Ariz. 1998).

106. *Id.* at 451.

107. *Id.* at 453-54.

108. *Couch*, 291 Ga. at 359, 729 S.E.2d at 379.

109. *Id.* at 371, 729 S.E.2d at 387 (Benham, J., dissenting) ("How far along the spectrum of culpability does 'fault' run? Did the General Assembly intend for it to cover strict liability? Breach of warranty? Product liability?").

110. One leading legal dictionary defines "strict liability" as "[l]iability that does not depend on actual negligence or intent to harm .... Also termed ... *liability without* fault." BLACK'S LAW DICTIONARY 998 (9th ed. 2009) (emphasis added).

111. *E.g.*, Jones v. Nordictrack, Inc., 274 Ga. 115, 118 n.5, 550 S.E.2d 101, 103 n.5 (2001) (indicating that a risk/utility test analysis applies under both negligence and strict liability theories); Banks v. ICI Americas, Inc., 264 Ga. 732, 735 n.3, 450 S.E.2d 671, 674

Does this mean that there can be no apportionment between a negligent retailer and the manufacturer of a defective product?[112] Georgia courts have also allowed personal injury recovery under the theory of breach of warranty.[113] Historically, actions for breach of warranty were grounded in principles of contract and conduct-based defenses, such as comparative fault, which traditionally have not applied to breaches of contract. In light of these principles, can fault be apportioned to the seller of a product when there is a breach of express or implied warranty?[114]

The absence of a statutory definition of fault renders these questions unnecessarily difficult. Courts will be called upon to answer them without any clear legislative guidance, and it is folly to believe they can be resolved by simply repeating the mantra of "ordinary language." *Webster's New Collegiate Dictionary* offers little insight into legislative intent when the underlying legal principles are so deeply entwined in a rich and complex history. There is no extrinsic evidence that the General Assembly that enacted the 2005 amendments to O.C.G.A. § 51-12-33 gave any consideration to the specific questions of interpretation that courts will be called upon to answer.

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n.3 (1994) (noting that the risk/utility test used to determine whether a product has a defective design may "overlap" with negligence, but insisting that a risk utility test does not obliterate the "long recognized [distinction] between negligence and strict liability"). The Georgia Court of Appeals recently held that a Georgia court should not apply Indiana products liability law because it does not allow a strict liability claim for defective design. Bailey v. Cottrell, Inc., 313 Ga. App. 371, 374-75, 721 S.E.2d 571, 574 (2011). Judge, now Justice, Blackwell concurred specially. He agreed that Georgia law should govern the case, but disagreed that there was any meaningful difference between Indiana's negligence and Georgia's risk/utility standards. *Id.* at 376, 721 S.E.2d at 575.

112. *Cf.* Deere & Co. v. Brooks, 250 Ga. 517, 299 S.E.2d 704 (1983) (implying that careless conduct of the plaintiff falling short of assumption of risk is not a defense to a products liability claim); Ray v. Ford Motor Co., 237 Ga. App. 316, 514 S.E.2d 227 (1999) (finding no error in charging a jury that contributory negligence is not a defense to a claim of strict liability, but that comparative negligence could apply to a claim for negligent design).

113. *E.g.*, Keaton v. A.B.C. Drug Co., 266 Ga. 385, 467 S.E.2d 558 (1996) (breach of implied warranty of merchantability); Moore v. Berry, 217 Ga. App. 697, 458 S.E.2d 879 (1995) (breach of express warranty); *see also* Caboni v. Gen. Motors Corp., 278 F.3d 448 (5th Cir. 2002) (breach of express warranty).

114. A leading treatise on Georgia products liability law states that the plaintiff's negligence is not a defense to warranty-based claims. NEAL, *supra* note 93, § 11:3, at 219 (citing Ford Motor Co. v. Lee, 137 Ga. App. 486, 487, 224 S.E.2d 168, 170 (1976) *judgment aff'd in part, rev'd in part on other grounds*, 237 Ga. 554, 229 S.E.2d 379 (1976)); *see also* Firestone Tire & Rubber Co. v. Jackson Transp. Co., 126 Ga. App. 471, 474, 191 S.E.2d 110, 112-13 (1972) (noting contributory negligence is not a per se defense to a claim based on breach of warranty).

Another set of unanswered questions concerns the reconciliation of O.C.G.A. § 51-12-33 with the two statutes that precede it. First, consider O.C.G.A. § 51-12-31.[115] This statute provides: "In its verdict, the jury *may* specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally."[116] The permissive "may" used in § 51-12-31 contrasts sharply with the mandatory "shall" that appears in § 51-12-33(b). When is a jury permitted to apportion fault (or not), and when is it required to do so? The court in *Couch* found no conflict between these two statutes because § 51-12-31 expressly provides that *"[e]xcept as provided in Code Section 51-12-33."*[117] But this begs the question: In what cases will § 51-12-31 have any application? By amending but not repealing § 51-12-31, the legislature must have envisioned there would be some circumstance in which that statute would apply. But precisely when remains a mystery.[118]

A similar issue arises regarding O.C.G.A. § 51-12-32, which authorizes contribution among joint tortfeasors.[119] Under § 51-12-33(b), however,

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115. O.C.G.A. § 15-12-31 (2000 & Supp. 2012).

116. *Id.* (emphasis added).

> Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.

Id.

117. *Couch*, 291 Ga. at 373 n.15, 729 S.E.2d at 389 n.15 (emphasis added); *see also* O.C.G.A. § 51-12-31.

118. This issue has been argued in a case pending before the Georgia Supreme Court. Appellee's First Supplemental Brief, GFI Mgmt. Servs., Inc. v. Medina, No. S12A1228, 2012 WL 3236340 (Ga. Apr. 6, 2012). At the time of the preparation of this Article the court had not issued an opinion in this case.

119. O.C.G.A. § 51-12-32 (2000).

> (a) Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.
>
> (b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.
>
> (c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

"liability of each person against whom [damages] are awarded [] shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution."[120] How does one harmonize a statute that authorizes contribution with one that eliminates joint liability? *McReynolds* does not address this apparent conflict other than to say § 51-12-32 "obviously cannot trump the rules set forth in [O.C.G.A.] § 51-12-33 because it begins with the phrase, '[e]xcept as provided in Code Section 51-12-33.'"[121] Again, this observation begs the question: In light of § 51-12-33, when, if ever, does a right of contribution exist under § 51-12-32?

Finally, can an innocent plaintiff avoid the apportionment problems discussed in the paper entirely by simply bringing suit against only one defendant? Apportionment under O.C.G.A. § 51-12-33(b) is required "[w]hen an action is brought against more than one person for injury to person or property . . . ."[122] If we take an "ordinary language" approach to statutory construction, this provision would appear to have no application to cases when the action is brought against only one person.

V. CONCLUSION

Without question, O.C.G.A. § 51-12-33 as construed in *McReynolds* and *Couch* ushers in a new era in Georgia tort law. It topples the old regime in which multiple tortfeasors were held jointly liable when their combined acts of negligence injured an innocent plaintiff. The new regime is one of apportionment and liability limited to one's personal share of fault. Fault may be apportioned when it previously could not. It may be apportioned to those who are immune, to those who are unknown, and even to those who intentionally injure an innocent plaintiff. The practical consequence of this regime change is to place the risk of the uncollectible share upon the innocent plaintiff. Fewer innocent plaintiffs will be fully compensated for their injuries, and liability incentives for defendants will be reduced. While important questions remain to be resolved, the big picture has emerged: apportionment, not joint liability, is the new norm.

Id.

120. O.C.G.A. § 51-12-33(b) (2000 & Supp. 2012).

121. *McReynolds I*, 290 Ga. at 852-53, 725 S.E.2d at 588; *see also* O.C.G.A. § 51-12-32(a).

122. O.C.G.A. § 51-12-33(b).

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