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Torts

Edwin Maner Jr.

TORTS

By EDWIN MANER, JR*

During the survey period, decisions were handed down by the Georgia appellate courts reaffirming well-established principles of law with regard to the duty of counties in the construction and maintenance of bridges,[1] duty to invitee on premises of defendant,[2] duty to invited guest in automobile,[3] duty of care between bailor and bailee,[4] duty of care between pedestrian and operator of automobile,[5] intervening negligence,[6] concur-

*Member Savannah Bar; A.B., 1941, LL.B., 1943, University of North Carolina; Member American and Georgia Bar Associations.

1. Grady County v. Banker, 81 Ga. App. 701, 59 S.E.2d 732 (1950) (Duty to construct and maintain bridges in workmanlike and proper manner so that any person may use them with safety is one of ordinary care; actual or constructive knowledge of defect is necessary to liability; no duty to post warning signs on approaches to bridge, but allegation of failure to post signs is proper to show lack of contributory negligence); Collier v. Cobb County, 81 Ga. App. 712, 59 S.E.2d 672 (1950) (Law of contributory and comparative negligence applied to above principles).
2. Atlantic Coast Line Railroad Co. v. Dupriest, 81 Ga. App. 733, 59 S.E.2d 767 (1950) (Employee of shipper present at loading of shipment on box car was invitee on railroad premises, though his duties were not to load box car, but he was being transported in the truck from which the shipment was being loaded from his home to another place at which his duties actually were to begin, and railroad owed him duty of ordinary care); (McCarthy v. Hiers, 81 Ga. App. 365, 59 S.E.2d 22 (1950) (No duty to inspect roof of premises for benefit of invitee unless there is actual knowledge of defect or unless there is indication of possible or probable defect); Lowe v. Atlanta Masonic Temple Co., Inc., 79 Ga. App. 575, 54 S.E.2d 677 (1949) (Duty of inspection); Davidson v. Harris, Inc., 79 Ga. App. 788, 54 S.E.2d 290 (1949) (Proprietor owes ordinary care to protect invitee from injury resulting from misconduct of employees or others on premises after danger of injury becomes apparent or circumstances become such as to cause reasonable apprehension of danger); Hill v. Davison-Paxon Co., 80 Ga. App. 840, 57 S.E.2d 680 (1950) (Ignorance of danger on part of invitee must be shown); Nash v. Reed, 81 Ga. App. 473, 59 S.E.2d 259 (1950) (Invited guest in automobile riding to confer some substantial benefit upon host, *i.e.*, some benefit more than merely affording the host the pleasure of the guest's company, becomes an invitee to whom is due the exercise of ordinary care); *cf.* Blaylock v. Ware, 81 Ga. App. 498, 59 S.E.2d, 274 (1950).
3. Nash v. Reed, note 2 *supra* (Only slight care is due to invited guest who is riding solely for the guest's own benefit and not for the purpose of conferring any benefit upon the host, *i.e.*, any benefit more than the pleasure of the guest's company); Georgia Power Co. v. Blum, 80 Ga. App. 618, 57 S.E.2d 18 (1949).
4. Nash v. Reed, note 2 *supra* (Bailor furnishing vehicle to bailee for mutual benefit owes duty of ordinary care to furnish vehicle suitable and safe for intended use); Gober v. Nolan, 81 Ga. App. 16, 57 S.E.2d 700 (1950).
5. Sapp. v. Shumate, 81 Ga. App. 432, 59 S.E.2d 8 (1950) (Operator of automobile is under duty to anticipate the presence of others upon the way who have a right to be there equal with his own, and he must exercise reasonable care to anticipate the presence of pedestrians and to avoid injuring them after he is aware or should be aware of their presence; pedestrians are " . . . required to anticipate the presence of persons and vehicles upon the highway. But it cannot be said that the duty which is upon the pedestrian is as urgent as that devolving upon the driver of an automobile; for the foot passenger's action or inaction in the premises is far less important to the other users of the highway. The impact of the body of a pedestrian, absorbed in his own meditation upon a passer-by, might be measurably uncomfortable; but it would seldom be hazardous to either life or limb, whereas the impact of an automobile in motion while the driver is asleep might cause as certain death as if the injured person had been willfully pursued and wantonly crushed." A pedestrian is not bound to be continually looking and listening to determine if automobiles are approaching under penalty that, if he fails to continually look and listen and is injured, it must be presumed that he was negligent. "The pedestrian and the automobile have equal rights upon the highway, but their capacity for inflicting injury is vastly disportionate."); Baggett v. Jackson, 79 Ga. App. 460, 54 S.E.2d 277 (1949); Watson v. Riggs, 79 Ga. App. 784, 54 S.E.2d 323 (1949)

ring negligence,[7] duty to licensee and to trespasser on premises of defendant,[8] duty to anticipate negligence or unlawful conduct of another,[9]

(Exceptions to charge not said to be meritorious when charge stated that a child running across the street may properly be considered a pedestrian, and " . . . there is no law so far as this case is concerned which prohibits a child . . . from playing in the street or from crossing the street at any point he might desire. Such a child has as much right upon the street and in the street as a truck . . . driven by the defendant. . . . A pedestrian and a person with an automobile have each the right to use the public highway, but the right of the operator of an automobile upon the highway is not superior to the right of the pedestrian, and it is generally the duty of each to exercise his right with due regard to the corresponding rights of the other . . . The pedestrian generally must use reasonable care only, and . . . the law places no duty upon the child . . . to exercise any degree of care for his own protection.")

6. Bowyer v. Cummins, 81 Ga. App. 118, 58 S.E.2d 224 (1950) (Original tort-feasor liable if his negligence combined with that of intervenor to constitute a contributing proximate cause and if the negligence of the intervenor was not such as to make his negligence the preponderating cause); Georgia Power Co. v. Blum, note 3 *supra;* Ethridge v. Nicholson, 80 Ga. App. 693, 57 S.E.2d 231 (1950) (It is not necessary that an original wrongdoer shall contemplate or foresee or even be able to anticipate the particular injury that may result from his negligence. It is sufficient if he should anticipate from the nature and character of the negligent act committed that some injury might result as a natural and reasonable consequence of his negligence. "However, if the two negligent acts are so related that the first would not probably have resulted in the injury if the other had not occurred, and the latter amounts to such a preponderating cause that it probably would have produced the injury even if the first negligence had not occurred, or if the author of the latter negligence with the immediate effects of the former negligence consciously before him, is guilty of a new negligent act which preponderates in producing the injurious effect, we say that the first negligent cause is not the proximate cause . . . . "); East Alabama Coast Lines, Inc. v. Boyd, 80 Ga. App. 93, 55 S.E.2d 634 (1949).
7. Thornton v. King, 81 Ga. App. 122, 58 S.E.2d 227 (1950) (Two concurring acts of negligence by persons acting independently may constitute the proximate cause of an event, and the liability arising therefrom is joint and several); Georgia Power Co. v. Blum, note 3 *supra;* Ethridge v. Nicholson, note 6 *supra* ("If two concurrent causes stand so related that neither would have produced a harmful result but for the other, and both of them consist of such acts as, according to the general course of human probabilities, produce some such injurious effect as that which did in fact ensue . . . we say the two negligent actors are guilty of concurring negligence." And "the mere fact that the plaintiff's injuries would not have been sustained had only one of the acts of negligence occurred will not of itself operate to limit the other act as constituting the proximate cause.") Kennedy v. Ham Chevrolet Co., 80 Ga. App. 720, 57 S.E.2d 236 (1950).
8. Brigman v. Brenner, 206 Ga. 222, 56 S.E.2d 471 (1949) (Liability to licensee for willful or wanton injury only; to trespasser for malicious injury only); Aller v. Atlanta & West Point Railroad Co., 80 Ga. App. 63, 55 S.E.2d 374 (1949) (Where injury was to a four-year-old child, court held child could not be guilty of intentional trespass, and it was a jury question whether defendant should have anticipated child's presence).
9. Southern Bell Telephone & Telegraph Co. v. Bailey, 81 Ga. App. 20, 57 S.E.2d 837 (1950) (A person cannot be charged with the duty of using any degree of care and diligence to avoid the negligence of a wrongdoer until he knows of it or has reason to apprehend its existence, and, "One not himself violating the law is not charged with the duty of anticipating that it will be violated by another."); Southern Railway Co. v. Florence, 81 Ga. App. 1, 57 S.E.2d 856 (1950) (The Code of Georgia places a duty on the operators of railroad trains running across public crossings to warn the public of the approach of the train, and "Generally a person has the right to enter upon such . . . crossing at any time if he is unaware of the actual approach of a train. A train standing, no matter how near the crossing, is not a train approaching the crossing . . . A party using a public crossing has a right to assume that the railroad's employees will obey the law and will use reasonable care in avoiding injuring him . . . . "); *cf.* Gay v. Sylvania Central Railway Co., 79 Ga. App. 362, 53 S.E.2d 713 (1949); McDowall Transport, Inc. v. Gault, 80 Ga. App. 445, 56 S.E.2d 161 (1949) (automobile driver has right to assume that other drivers will observe law respecting lights on rear of vehicles); Georgia Power Co.

comparative negligence,[10] proximate cause,[11] allegations essential to action in tort,[12] accident,[13] emergency,[14] scope of employment,[15] defense of alibi in a civil case,[16] allegations essential to case based on fright,[17] cow cases,[18] libel,[19] violation of right of privacy,[20] malpractice,[21] trover,[22] intervention of criminal act of third party between negligent act of defendant and injury to plaintiff,[23] negligence per se,[24] venue in actions against joint tort-feasors.[25]

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v. Blum, note 3 *supra* (One who himself is violating a law must anticipate that others, like himself, may violate the law.).

10. Gay v. Sylvania Central Railway Co., note 9 *supra;* Baggett v. Jackson, note 5 *supra;* McDowall Transport, Inc. v. Gault, note 9 *supra.*
11. Vinson v. Augusta Roofing & Metal Works, 79 Ga. App. 434, 54 S.E.2d 274 (1949) (If the injury complained of did not flow naturally and directly from the defendant's wrongful act, or could not reasonably have been expected to result therefrom, or would not have resulted therefrom but for the interposition of some independent unforeseen cause, the defendant's act would not be the proximate cause.).
12. Vickers v. Georgia Power Co., 79 Ga. App. 456, 54 S.E.2d 152 (1949).
13. Baggett v. Jackson, note 5 *supra* (Accident refers to event not proximately caused by negligence but arising from unforeseen or unexplained cause; also often used to designate event which, though not wholly free from negligence by some person, was not proximately caused by the failure of either of the parties litigant to exercise ordinary care.).
14. Baggett v. Jackson, note 5 *supra* (A person threatened with imminent danger is not held to the same course of conduct as if he were acting without the compulsion of danger, and "A person has a right to choose even a dangerous course, if that course seems the safest one under the circumstances.").
15. Davidson v. Harris, Inc., note 2 *supra.*
16. Roberts v. McCellan, 80 Ga. App. 199, 55 S.E.2d 736 (1949).
17. Hamby v. Edmunds Motor Co., 80 Ga. App. 209, 55 S.E.2d 743 (1949).
18. Atlantic Coast Line Railroad Co. v. Sears, 80 Ga. App. 338-339, 56 S.E.2d 130 (1939) (Railroad not required to slow up its trains when animal is seen near track in a place of safety unless animal is apparently approaching track or unless there is apparent danger that through fright or otherwise it will get on the track. Only when the engineer sees or in the exercise of ordinary care could see that an animal in proximity to the track is in danger of getting on it is he bound to exercise all reasonable diligence to check the train and avoid killing or injuring the animal.); Atlantic Coast Line Railroad Co. v. Sears, 80 Ga. App. 338, 56 S.E.2d 129 (1949) (The law expects railroads to run their passenger trains on schedule, and they are not ordinarily required in fog or rain to reduce speed to discover livestock on track; presumption of railroad's negligence arising from showing that cow was killed by running of train is overcome by uncontradicted evidence that fog was so thick that engineer could not see cow in time to stop.); Atlantic Coast Line Railroad Co. v. Hodges, 79 Ga. App. 563, 54 S.E.2d 500 (1949).
19. Walker v. Sheehan, 80 Ga. App. 606, 56 S.E.2d 628 (1949) (citing with apparent approval *Thompson v. Adelberg & Berman,* 181 Ky. 487, 205 S.W. 558, holding that placarding of a debtor constitutes libel per se); Davis Finance & Thrift Corp., 80 Ga. App. 708, 57 S.E.2d 22 (1950).
20. Davis v. General Finance & Thrift Corp., note 19 *supra.*
21. Andrews v. Lofton, 80 Ga. App. 723, 57 S.E.2d 338 (1950) (Reasonable degree of care and skill must be exercised which, in similar circumstances, is ordinarily employed by the profession generally, but the mere failure to have a license to practice does not, of itself, raise an inference of negligence.).
22. Scoggins v. General Finance & Thrift Corp., 80 Ga. App. 847, 57 S.E.2d 686 (1950) (Trover lies even though property is destroyed or disposed of prior to suit.)
23. Skelton v. Gambell, 80 Ga. App. 880, 57 S.E.2d 694 (1950).
24. Atlantic Coast Line Railroad v. Brand, 79 Ga. App. 552, 54 S.E.2d 312 (1949) (Pay particular attention to dissent by Judge McIntyre at page 556.).
25. Georgia Power Co. v. Blum, note 3 *supra* (The words "joint trespassers," in the constitutional provision that suits against joint trespassers residing in different counties may be tried in either county, has reference to all joint tort-feasors and is controlling even though one of the joint tort-feasors may be a railroad company or electric company protected by a statute stating that suits against them must be brought in the county where the injury occurred.).

In *Hotel Dempsey Co. v. Miller*[26] it was discovered by "the very astute and able counsel" for the plaintiff in error that an incorrect statement of the rule of res ipsa loquitur has frequently been given and approved by the appellate courts and quoted in many form books. A correct statement of the rule that the doctrine of res ipsa loquitor may be applied where, among other things, the most reasonable inference that can be drawn from the happening of the alleged tortious event is that it would not have happened had *not* the person charged with the operation of the instrumentality which caused the injury been guilty of the negligence alleged. The incorrect statement heretofore widely approved omitted the italicized "not." Such omission, of course, left the statement that the rule could be applied where the reasonable inference was that the injury would not have occurred had the defendant been negligent. The court suggested that the error originated, "either through the omission of the word, 'not,' by the trial judge, or its omission by the reporter or the printer, so that the bound volumes have since appeared with the word, 'not,' deleted."

An important addition to the automobile law of this state was made in *McDowall Transport, Inc. v. Gault,*[27] where the court ruled that it is not necessarily such a lack of ordinary care as will defeat a recovery for the operator of a properly equipped automobile to drive it at night at such a rate of speed that he cannot stop it within the range of his lights. Judge Felton, in his concurring opinion, said that all cases inconsistent with this decision should be overruled.

Another important addition to the automobile law is found in *Vinson v. Augusta Roofing & Metal Works,*[28] where it was held that it is the duty of the driver of one automobile following another to regulate his speed and the distance between his car and the car ahead so as not to collide with another vehicle parked on the street in front of him in case the car he is trailing turns sharply to avoid striking the parked vehicle.

First impression interpretations of traffic regulations were given in *State Farm Mutual Automobile Insurance Co. v. Henderson,*[29] where it was held that the provisions of the Code[30] referring to the mounting of lamps on vehicles and tractors apply whether the vehicle is standing still or moving forward or backward, and in *Mathis v. Nelson,*[31] where it was held that the same section also applies to road scraping equipment. *Mathis v. Nelson,* however, held that Sections 68-303 and 105-112, relating to motor vehicles passing on the right, do not apply to road equipment engaged in the maintenance of roads. The court reasoned, "While it might, as a necessary incident to working roads be necessary to proceed otherwise than in the ordinary direction of traffic, there would be no such excuse for failing to have the tractor properly lighted."

That case involved an attempt to hold a county warden liable for injuries resulting from the negligent night operation of a road machine without lights, under the defendant's direction and with his knowledge. The

26. 81 Ga. App. 223, 58 S.E.2d 475 (1950).
27. Note 9 *supra.*
28. Note 11 *supra.*
29. 81 Ga. App. 541, 59 S.E.2d 319 (1950).
30. GA. CODE ANN. § 68-302 (Supp. 1947).
31. 79 Ga. App. 639, 54 S.E.2d 710 (1949).

court distinguished the case from those cases involving injury resulting from the performance of a discretionary function for which an officer is not liable in the absence of wilfulness, fraud, malice or corruption and held that the actual process of road work and the duties of the supervisor in carrying out the work are ministerial in character and that a public officer so engaged is liable for an injury resulting from his negligence. He is not liable for the negligence of his subordinates, however, unless he has failed to exercise due care in their selection or unless he knows of their negligence.

In *McKay v. Atlanta*[32] the general rule was stated that municipal corporations are not liable for errors in exercising judicial powers but are liable for errors in performing ministerial duties, and one of those duties is to keep its streets and sidewalks in reasonably safe condition for ordinary travel, day and night. The city is liable for any injury resulting from its failure to do so, and this is true regardless of the cause of the defect so long as the city knew of the defect or should have known of it in time to repair it or to give warning of its existence. Such knowledge is presumed if the defect has existed for such length of time that, by reasonable diligence in the performance of their duties, the proper authorities could have discovered the defect. The particular defect in the street which caused the plaintiff's fall in this case was not more than one inch deep, two to three inches wide and fifteen inches long. The court said that if this were a question of first impression it would be inclined to hold that such a defect is too minor to give rise to a cause of action. In this state, however, cases based on even minor defects must be submitted to the jury unless the defect is so slight that the minds of reasonable men could not differ in the conclusion that it constitutes no danger.

In *Brinkley v. Dixie Construction Co.*[33] it was held that the provision of the Code,[34] "No court, commission, or quasi-judicial body shall discriminate against any person because of his illegitimate birth," does not by implication or otherwise amend the provisions of another section,[35] "A widow, or, if no widow, a child or children, minor or sui juris, may recover for the homicide of the husband or parent . . . ," so as to authorize such a suit by an illegitimate child. The Supreme Court stated that the section prohibiting discrimination does not purport to amend any existing law and amounts only to an effort on the part of the legislature to perform a judicial function, in violation of the Constitution of 1945,[36] by directing the judiciary in respect to the construction which it should place upon the law. The court further stated that if the law does discriminate against illegitimate children, it is the responsibility of the General Assembly to prevent it by appropriate legislation.

In *Edward v. Stiles*,[37] an action of fraud and deceit in connection with a sale of real estate, it was indicated that it is sufficient in such an action

32. 80 Ga. App. 797, 57 S.E.2d 510 (1950).
33. 79 Ga. App. 583, 54 S.E.2d 510 (1949), *certified question to Supreme Court*, 205 Ga. 415, 54 S.E.2d 267 (1949).
34. GA. CODE ANN. § 74-204 (Supp. 1947).
35. GA. CODE § 105-1302 (1933).
36. GA. CONST. Art I, § 1, ¶ 23, GA. CODE ANN. § 2-123 (1948 Rev.).
37. 81 Ga. App. 138, 58 S.E.2d 260 (1950).

to allege that the false representation complained of, though perhaps not known to be false, was recklessly made with the intent to deceive. This may, to some extent, relax the harsh rule previously stated[38] that actual, conscious, moral guilt and purposeful deception must be alleged. It appears to the writer that if the falsity of the representation is not known to the person making it, he could not possibly have the intention of being deceitful, and that the rule, therefore, should only require the intent, not to deceive, but to induce the sale or event complained of. There is some authority in this state[39] that legal fraud, *i.e.*, a misrepresentation made by mistake and innocently acted upon by the opposite party, gives rise to a cause of action. This authority has never been overruled, disapproved or distinguished, and it is suggested that some clarification and further relaxation of the requirements of this type of action is desirable.

In *Brigman v. Brenner*,[40] involving a claim against the defendant for injury inflicted by her husband upon a trespasser, it was held that the rule that the husband is head of the family and the wife subject to him, while merely a legal theory in most instances, does establish a presumption that the husband's conduct is not ruled by the wife's commands, and to hold the wife liable in such case it must be shown that she aided and abetted in the tort or that the injuries were maliciously inflicted at her command or counsel.

In *Ford v. S. A. Lynch Corp.*[41] the petition alleged that the plaintiff was injured when he slipped and fell on the smooth and highly polished marble floor of the defendant's hotel while the floor was covered with soapy water which was "translucent and transparent on said marble floor and not visible to the eye." The case was decided by the whole court. The majority opinion held that the petition showed on its face that the cause of the plaintiff's injury was his negligence and held that, as a matter of law, soapy water that is translucent is visible and could have been seen by the plaintiff notwithstanding his allegation that it was not visible. Yet, the plaintiff had qualified his allegation by saying it was not visible "on the highly polished marble floor." Furthermore, by reference to Webster's Collegiate Dictionary, we find that a rare meaning of transulent is transparent. That the plaintiff may have used the word in that sense is indicated by the fact that he alleged the water was both translucent and transparent. Judges Felton and Townsend dissented on the ground that the petition did not show on its face such negligence as would bar a recovery.

The liability of the proprietor of a premises for the safety of his invitee appears to have been enlarged to some extent by the decision in *Lowe v. Atlanta Masonic Temple Co., Inc.*[42] The writer's impression of the general rule is that there is no duty to inspect the premises to discover a defect unless there is reason to apprehend that such specific defect may exist. The principal case held that there is also a duty to protect the invitee from such defects as "a reasonable inspection would disclose," and

38. Dundee Land Co. v. Simmons, 204 Ga. 248, 49 S.E.2d 488 (1948); Camp Realty Co. v. Jennings, 77 Ga. App. 149, 47 S.E.2d 917 (1948).
39. Middleton v. Pruden, 57 Ga. App. 555, 196 S.E. 259 (1938).
40. 206 Ga. 222, 56 S.E.2d 471 (1949).
41. 79 Ga. App. 481, 54 S.E.2d 320 (1949).
42. Note 2 *supra*.

this is apparently true whether or not there was a reason to suspect that the particular defect existed. That duty may also have been increased by the case of *McCarthy v. Hiers,*[43] stating that there is a duty to inspect if there is any indication of a "possible or probable" defect. It might be said that the mere possibility of a defect is always present, that the sole fact that the premises exist would, a fortiori, indicate the possibility of a defect, and that, therefore, there is always the duty to inspect. The Code section[44] governing the proprietor's liability provides that he shall use ordinary care to keep the premises "safe." That responsibility has been changed judicially, however, to require him only to use ordinary care to keep the premises "reasonably safe."[45]

In *W & A. Railroad Co. v. Wright,*[46] an action against a railroad for the death of its employee where the Federal Employer's Liability Act was not involved, the court held, as a matter of law, that under sufficient evidence a jury would be authorized to find that the force of suction created by a fast moving train could pull a man into the train when he had been standing on an adjacent track, and it would be a jury question whether the railroad should have anticipated such danger to one who it should have anticipated might be so situated. It could not be said, as a matter of law, under such circumstances that no suction was possible or probable or that the deceased should have known as much about suction as those in charge of the train or that the deceased assumed the risk of such suction.

In *Rushton v. Howle*[47] the defendant's automobile had been parked on an incline by her agent who failed to securely apply the brakes. The car began to roll, and the defendant called on the plaintiff to stop it. The plaintiff was injured while attempting to help. On a question of first impression the court held that the doctrine of rescue applies in Georgia to the rescue of another's property just as it does to the rescue of one's own property or to the rescue of human life. The only issue is whether the defendant's negligence, in causing the need for the rescue, calls for the effort made as a normal reaction to the situation so that such effort could not be said to be reckless as a matter of law. If it was not reckless as a matter of law it is for the jury to determine whether reasonable and prudent men would have acted in the same way under similar circumstances.

Norris v. Pig'n Whistle Sandwich Shop, Inc.[48] involved the construction of Code Section 42-109(7), which states that an article of food shall be deemed adulterated "if it consists in whole or in part of . . . any portion of animal unfit for food." The court said that this language did not mean that an article of food containing meat should be deemed adulterated merely because it contained a piece of the animal bone or other portion of the animal which was inedible. Otherwise, it was pointed out, numerous articles of food which necessarily contain inedible portions of animal matter would be deemed adulterated. Numerous meats and fish are normally prepared containing bone or other matter indigenous to the animal from

43. Note 2 *supra.*
44. GA. CODE § 105-401 (1933).
45. Hill v. Davison-Paxon, note 2 *supra.*
46. 79 Ga. App. 733, 54 S.E.2d 655 (1949).
47. 79 Ga. App. 360, 53 S.E.2d 768 (1949).
48. 79 Ga. App. 369, 53 S.E.2d 718 (1949).

which the food is derived, yet these articles of food could not be deemed adulterated. Therefore, the mere fact that a piece of pig bone was found in a barbecue pork sandwich would not constitute negligence per se, and the defendant would only be liable for failure to use ordinary care to discover and remove the bone particle before offering the food for sale.

An interesting point with regard to the doctrine of last clear chance was made in *Georgia Power Co. v. Blum.*[49] The court said that Code Section 105-603, stating that a plaintiff is not entitled to recover when, by the exercise of ordinary care, he could have avoided the consequences of the defendant's negligence, is essentially the doctrine of last clear chance, and that that doctrine is not applicable unless the injured person himself is chargeable with such negligence as would, apart from the doctrine, preclude recovery. Therefore, in guest cases where the negligence of the host is not imputable to the guest and where the guest himself is not negligent, the mere fact that the host was grossly negligent cannot operate to invoke the doctrine of last clear chance against the guest.

The duty of care required of persons handling gas and explosives was laid down in *Atlantic Co. v. Taylor,*[50] where it was said that the duty is one of ordinary care, and that such duty runs to those whom the handler should anticipate might lawfully come within the orbit of the danger. In *Atlantic Gas Light Co. v. Davis*[51] it was said that the duty is to use such skill and diligence as is proportionate to the delicacy, difficulty and nature of the particular business.

In *Finch v. Evins Amusement Co.,*[52] a workman's compensation case, the important rule was laid down that for an injury to be compensable in a case where disease or physical disability exists, exertion on the part of the employee in the performance of his duties must combine with the disease and its effects contribute to the resulting condition of the employee.

In a question of first impression, in *Hunt v. Thomasville Baseball Co.,*[53] it was held that one who buys a ticket to a baseball game and accepts a seat in a section of the grandstand which his own observation will readily inform him is unprotected voluntarily assumes the risk of wild balls being thrown or hit into such unprotected areas.

The issue of whether a wife has a right to recover against a tort-feasor for injuries to her husband resulting in loss of consortium was discussed but not decided by an evenly divided court in *McDade v. West.*[54] Three of the judges felt that no action would lie because the authorities almost universally so hold, because no such remedy existed at common law and because the damage to the wife is too remote and indirect. The other half of the court argued that the action should lie because the common law gives a remedy wherever a right is violated, the legal status of the wife is now the same as that of her husband and if loss of consortium is not too remote and consequential an injury for the husband to recover for, neither is it too remote and consequential for the wife.

49. Note 3 *supra.*
50. 80 Ga. App. 25, 54 S.E.2d 910 (1949).
51. 80 Ga. App. 377, 56 S.E.2d 140 (1949).
52. 80 Ga. App. 457, 56 S.E.2d 489 (1949).
53. 80 Ga. App. 572, 56 S.E.2d 828 (1949).
54. 80 Ga. App. 481, 56 S.E.2d 299 (1949).