TORTS

By EDWARD E. DORSEY*

Development in the law of torts during the period in question was by a process of accretion, rather than creation or discovery. Many well established rules were reaffirmed, and an occasional landmark decision was distinguished or criticized, but in the main the appellate courts did not markedly divert the flow of tort decisions from well established channels.

As Judge Townsend said in *Moore v. Kroger Company*,[1] "It has been said times without number that questions of negligence are ordinarily for the jury;" during the past year it *was* said times without number that questions of negligence, comparative negligence, gross negligence, proximate cause, and virtually all other questions which could conceivably be cast into the hands of the talesman were matters, not for the courts, but for the juries. Although it is no part of this summary to comment on the ultimate result of this trend, it should be noted that even the most casual comparison of the decisions during the past year with those of a decade ago reveals a tremendous enlargement in the judicial concept of the function of the jury.

Further, in the rare cases where the appellate courts decided that plaintiffs in tort cases had failed to state a cause of action there was no discernable pattern to be found upon which the practitioner could base a studied prediction.

In one of the rare cases where the appellate courts held that the plaintiff had failed to state a cause of action, *Hubert v. Know Corporation*,[2] the court held that a female plaintiff had failed to exercise ordinary care in discovering a nail in her tire, and thereby avoiding a puncture, the nails having been scattered on the highway by defendant's truck. The Court of Appeals seems to have decided this case upon its interpretation of "the truths of human experience," apparently having reference to a sort of judicial super-notice or omniscience. This doctrine appeared again in a decision on Workmen's Compensation Law, where it was extended to include medical knowledge as well.[3]

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1. 87 Ga. App. 581, 74 S.E.2d 481 (1953).
2. 86 Ga. App. 449, 71 S.E.2d 770 (1952).
3. "We think that knowledge from human experience, including medical caution against exertion in such cases in the admitted opinion of experts that exertion might contribute to such attacks authorized the findings. . . . (that a man who had fainted on the job had suffered a cerebral hemorrhage)." Hartford Accident & Indemnity Co. v. Waters, 87 Ga. App. 117, 73 S.E.2d 70 (1952).

On questions involving the elusive doctrine of comparative negligence, it was held that a charge which authorized the jury to compare the negligence of a host driver, not a defendant, with the negligence of the sole defendant was error, the rule that negligence of a host is imputable to his guest only when there is such a relation or privity to the negligent person as to create relation of principal and agent, being reaffirmed; the Court of Appeals reaffirmed the rule that the negligence of a plaintiff suing two joint tort-feasors is to be separately compared with the negligence of each of them separately, rather than with the aggregate of both defendants' negligence, so as to continue the rule that a plaintiff may not recover from any defendant less negligent than himself.[4] In *Craven v. Brighton Mills, Inc.*,[5] the Court of Appeals fully recognized the doctrine that the comparative negligence rule in Georgia is entirely statutory, and in derogation of the common law. The subject of that case was a collision which took place in South Carolina, and the law of South Carolina was neither specially plead nor proved. The Court of Appeals, applying the well known presumption that the law of a foreign state is presumed to be that of Georgia, in the absence of special proof, applied the common law doctrine of contributory negligence as it existed in Georgia prior to the evolution of the comparative negligence doctrine, and held that a plaintiff guilty of any contributory negligence at all was barred from recovery.

An important deviation from the rule that a momentary lapse of care does not constitute gross negligence sufficient to make a host driver liable to a guest is to be found in the case of *McGowan v. Camp*,[6] wherein the court held that an intentional and deliberate act on the part of the driver, as distinguished from a sudden or involuntary act, may constitute gross negligence. The cases of *Harris v. Reid*,[7] wherein the defendant host scraped another car in passing and turned back to see what damage had been done, and *Tucker v. Andrews*,[8] where a child turned a milk bottle over on the back seat and exclaimed, and the driver turned back to see what had occurred, in both of which cases the Court of Appeals had failed to find gross negligence but instead had found only a momentary lapse of care, were distinguished upon the ground that in each of those cases the momentary lapse was neither intentional nor deliberate. In the *McGowan* case, the court made no mention of the case of *Edwards v. Ford*,[9] in which the defendant host was alleged to have taken her eyes from the road for the purpose of leaning over and picking up a puppy from the floor of the car. It would seem that such an act was certainly "intentional and deliberate," and thus not within the purview of the momentary lapse exception

4. Wilson v. Harrell, 87 Ga. App. 745, 75 S.E.2d 436 (1953).
5. 87 Ga. App. 126, 73 S.E.2d 248 (1952).
6. 87 Ga. App. 671, 75 S.E.2d 350 (1953).
7. 30 Ga. App. 187, 117 S.E. 256 (1923).
8. 51 Ga. App. 841, 181 S.E. 673 (1935).
9. 69 Ga. App. 578, 26 S.E.2d 306 (1943).

to the comparative negligence rule laid down in the *Harris* and *Tucker* cases; however, the Court of Appeals specifically designated the *Edwards* case as within the momentary lapse exception at the time of its decision and therefore the recent *McGowan* case would seem to be in direct conflict with the *Edwards* case.

The decision in the *McGowan* case is perhaps in harmony with the earlier decision in *McCord v. Benford,*[10] in which it was held that "the momentary lapse must have taken place as a result of some *sudden impulse or emergency.*" Whatever the true rule may be, there is no doubt as to the existence of a sharp conflict among the decisions on the momentary lapse doctrine now extant.

In *Sammons v. Webb,*[11] the Court of Appeals implemented Code section 11-107 by holding that rules of contributory and comparative negligence are applicable to cases between host and pilots and passengers in airplanes, exactly as in automobile cases.

There were several cases during the period involving injuries to school children alighting from various means of transportation. In the case of *Hanks v. Georgia Power Co.,*[12] the Court of Appeals held that an ordinary transit bus being specially used to transport children between home and school did not fall within the requirements of Code section 68-311 requiring distinctive markings, etc., and that the driver of such a bus cannot be held to have sufficient knowledge of the location of the homes of his passengers to require him to deposit them in a safe place, nor be required to warn them of approaching traffic from the opposite direction. In the case of *Doss v. Miller,*[13] wherein children were transported to school by the defendant for a consideration of ten cents per day, and a child was injured in crossing the street to the school, the Court of Appeals in effect refused to decide whether the driver of such a vehicle owed a duty of exercising extraordinary care as the operator of a public conveyance, or not, holding simply that the driver did owe the child a duty not to negligently permit her to alight from an automobile and cross the street under the dangerous circumstances alleged in the plaintiff's petition.

There were several decisions involving municipalities. In the case of *Welch v. City of Camilla,*[14] the court reaffirmed the rule that a municipality operating an electric light plant furnishing electricity for profit is engaged in a private, nongovernmental business, and is not immune from suit for damages to others occasioned by negligence of the city employees. In *Mayor and Aldermen of the City of Savannah v. Johns,*[15] it was held that

10. 48 Ga. App. 738, 173 S.E. 208 (1934).
11. 86 Ga. App. 382, 71 S.E.2d 32 (1952).
12. 86 Ga. App. 654, 72 S.E.2d 198 (1952).
13. 87 Ga. App. 230, 73 S.E.2d 349 (1952).
14. 86 Ga. App. 609, 72 S.E.2d 83 (1952).
15. 87 Ga. App. 719, 75 S.E.2d 342 (1953).

a city truck traveling on a mission to dump sand into a hole in the city street was engaged in ministerial duty for the city, apparently on the basis that street maintenance is a city function. In *Siano Construction Company, Inc. v. City of Atlanta,*[16] it was held that a municipality was under no duty to know of a latent defect in a sleeve casting used in a water main.

There were two libel and slander cases, *Shealey v. Southeastern Newspapers, Inc.*[17] which reaffirmed the doctrine that a newspaper article which may be understood in a double sense may be libelous, and *Veazy v. Blair,*[18] which narrowed somewhat the defense of complete privilege protecting testimony given in judicial proceedings.

In *Pfeifer v. Yellow Cab Company of Atlanta,*[19] the court reaffirmed the doctrine that "one who himself violates a statute cannot rely upon the presumption that others in like position will not disobey the law" and that defendants who themselves violate a municipal law or ordinance must anticipate that others may likewise disobey traffic laws and regulations.

In a case of first impression in Georgia, the Court of Appeals held that the ultimate and delivering carrier of a railway car may not be held liable for injuries resulting from negligent loading of the interior of the car, unless the fact of dangerous loading can be ascertained from an external inspection.[20]

The General Assembly enacted no statute touching directly upon the field of tort law.

16. 86 Ga. App. 828, 72 S.E.2d 795 (1952).
17. 87 Ga. App. 167, 73 S.E.2d 211 (1952).
18. 86 Ga. App. 721, 72 S.E.2d 481 (1952).
19. 88 Ga. App. 221, 76 S.E.2d 225 (1953).
20. Butler v. Central of Georgia Railway Company, 87 Ga. App. 492, 74 S.E.2d 395 (1953).