TORTS

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INTRODUCTION

The logical place to begin in writing an article on torts is to determine whether a cause of action had by a plaintiff should sound in contract or tort, or to state the question another way—Does the factual situation presented give rise to an action *ex delicto* or one *ex contractu*? This was the point raised in *Mauldin v. Sheffer*.[1] In the *Mauldin* case, an architect had filed suit against an engineer seeking to recover damages for the negligent performance of an oral contract in regard to plans and specifications which were to be furnished by the engineer for a consideration of $200 per week. The defendant appealed from the overruling of its general demurrer and the Court of Appeals of Georgia held that an *ex delicto* action was properly stated.

There are few concrete rules in Georgia regarding a tort action arising from a contract and this was expressly recognized by the court in its opinion. The CODE sections[2] governing this type case are used by the court as a point of demarcation. The general rule, one which may be applied to all such cases, is that in order to maintain an action *ex delicto* because of a breach of duty growing out of a contracted relation, the breach must be shown to have been a breach of duty imposed by law and not merely the breach of a duty imposed by the contract itself.[3]

In addition to this general rule, the court was more specific in making a distinction in cases of this type, between nonfeasance and misfeasance, but they were not ready to establish the rule without question. The cases have fairly consistently held that mere nonfeasance affords no basis for an action *ex delicto* even though the failure to perform may be characterized as negligent,[4] but in the case of misfeasance an election might be afforded.[5]

Another general proposition can also be gleaned from the *Mauldin* case. Professional persons, architects, physicians, engineers and the like are under an obligation to perform their contracts with a degree of care and ability ordinarily exercised by persons employed in the same or similar

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1. 113 Ga. App. 874, 150 S.E.2d 150 (1966).
2. GA. CODE ANN. §§105-101 to -105 (Supp. 1967).
3. *See*, 1 C.J.S. *Actions* §49a.
4. *See*, L&N R.R. v. Spinks, 104 Ga. 692 (1), 30 S.E. 968 (1897); Atlanta Gas Light Co. v. Newman, 88 Ga. App. 252 (1), 76 S.E.2d 536 (1953).
5. Frank Graham Co. v. Graham, 90 Ga. App. 840 (2), 84 S.E.2d 579 (1954).

profession under like circumstances.[6] This is a duty imposed by law and it is one as old as the tort books. The synthesis of this important case would logically be that an action *ex delicto* will lie against a professional man guilty of misfeasance in the performance of his professional obligation.

There are some interesting cases which arose during this survey period, involving the doctrine of sovereign immunity. *Trice v. Wilson*[7] presented a novel question, one that prior to this case had not been considered by Georgia courts. Mrs. Wilson brought suit against Edward Trice, administrator of the estate of Jessie L. Long, to recover for the wrongful death of her husband. The defendant's intestate had allegedly driven a truck owned by the State Highway Department across the centerline of the highway causing a collision with the vehicle driven by plaintiff's husband and resulting in his death. At the time of the collision, the defendant's intestate was an employee of the State Highway Department. Subsequently, the General Assembly of Georgia adopted a Resolution on the advice of the Georgia Claims Advisory Board, awarding to Mrs. Wilson $14,956.50. As a result of this award, the defendant filed a plea in bar to the plaintiff's action, the substance of which was that the acceptance of the award by Mrs. Wilson extinguished any cause of action she might have against the defendant in this case. Did the acceptance of this money constitute a "release" of one joint tort feasor thereby releasing the other or was this award a mere gratuity which would not benefit the defendant?

In a Tennessee case[8] involving similar facts, the Tennessee court had held for the defendant. The Georgia court recognized that the State of Tennessee had not abandoned its sovereign immunity but the Board of Claims in Tennessee unlike the Claims Advisory Board in Georgia was authorized by statute to sit as a quasi-judicial body and make final awards of compensation whereas the Board in Georgia acts only in an advisory capacity.

Thus, the fact that there are no statutory guidelines in Georgia to insure fair and adequate compensation to persons injured by state agencies was the turning point in this case. Obviously, the State of Georgia was not jointly liable for any damage done the plaintiff.

The court circumvented the constitutional question raised by the contention of the plaintiff and based on the Massachusetts case of *Pinkwick v. McCauliff*[9] that the award made to her was a gratuity by saying, in effect, that the award was founded on a strong moral obligation of the state, thus the award was based on good consideration and *not* violative of the

6. Block v. Happ, 114 Ga. 145 (2), 86 S.E. 316 (1915); Porter v. Davey Tree Expert Co., 34 Ga. App. 355, 356 (2), 129 S.E. 557 (1925).
7. 113 Ga. App. 715, 149 S.E.2d 530 (1966).
8. Schoenly v. Nashville Speedways, Inc., 208 Tenn. 107, 344 S.W.2d 349 (1961).
9. 193 Mass. 70, 78 N.E. 730 (1906).

Constitution of Georgia.[10] The court suggested, toward the end of its opinion, that the defendant might file a plea in mitigation claiming that the money paid by the state should be credited toward whatever a jury might find for the plaintiff.

This opinion is also of interest because of the court's digression from the question presented in order to make a suggestion that legislation toward adopting a tort claims act should be undertaken, basing this suggestion on the impracticality of the doctrine of sovereign immunity in these times when government activities touch the lives and property of all citizens.

In another case[11] involving the sovereign immunity of a county, a plea of immunity and general demurrer were sustained to a petition which alleged *inter alia* that the plaintiff was injured in the operation and use of a motor vehicle owned by the county, and that the county had in force a policy of liability insurance covering its motor vehicles. In view of GA. CODE ANN., section 56-2437 (1960 Rev.)[12] this writer cannot imagine how this case ever reached the appellate court particularly in view of the fact that the opinion contains no indication of any constitutional question being raised. It must be assumed from this short opinion that the defendants contended that the negligent loading of a truck is not the negligent operation of a truck, but as pointed out in the opinion this is not the case as a matter of law.[13]

FAMILY PURPOSE DOCTRINE

"The head of a family who keeps and maintains an automobile for the use, comfort, pleasure and convenience of the family is liable for an injury resulting from the negligence of a minor son, a member of the family, while operating the automobile with the knowledge and consent of the owner for the comfort or pleasure of the family, and thus, in pursuance of the purpose for which it was kept and maintained by the parent."[14] Vicarious liability stemming from the family-purpose doctrine is grounded on an agency relationship and once the courts establish prima facie the relationship they will go a step further, in many cases, and investigate the expressed or implied authority of the so-called agent. In *Strickland v. Moore*,[15]

10. GA. CONST. art. VII, §1 para. 2 (1945); GA. CODE ANN. §2-5402 (1948 Rev.). "The General Assembly shall not by vote, resolution or order, grant any donation or gratuity in favor of any person, corporation or association."
11. Strickland v. Wayne County, 113 Ga. App. 499, 148 S.E.2d 467 (1966).
12. "Whenever a municipal corporation, a county, or any other political subdivision of this State shall purchase such insurance the negligence of any duly authorized officer, agent, servant, attorney or employee in the performance of his official duties, its governmental immunity shall be waived to the extent of the amount of insurance so purchased. Neither the municipal corporation, county or other political subdivision of this state, as the case may be, nor the insuring company shall plead such governmental immunity as a defense. . . ."
13. Allen v. Reed, 93 Ga. App. 215, 218, 91 S.E.2d 308 (1956).
14. Cohen v. Whiteman, 75 Ga. App. 286, 43 S.E.2d 184 (1947).
15. 113 Ga. App. 209, 147 S.E.2d 682 (1966).

the court affirmed a judgment for the defendant wherein the plaintiff had relied on this agency relationship. The court found uncontradicted evidence to show that the father had given instructions to the son not to allow anyone else to drive the automobile. The driver at the time of the collision had forcibly assumed control of the car and the son was in the automobile at the time of the accident. This set of facts demanded a finding that the car was not being used for a family purpose at the time of the accident.

In two cases decided during this period, one cited by the other, the court assessed facts involving ownership of the vehicle, ownership of the liability insurance, source of funds for upkeep of the vehicle, and payment of insurance premiums. In *Calhoun v. Eaves*,[16] the court of appeals affirmed a judgment for the father on the basis of facts showing that the vehicle in question was listed on the father's insurance policy, that the father claimed and received payment under the policy for burial expenses, that the father provided funds to the son for upkeep and funds for the initial purchase of the automobile. All these facts were explained away by the defendant by a showing that the son was an emancipated minor; that he purchased the vehicle in his own name and for his own use; that he repaid his father the money lent to him for the initial purchase, and that at all times he was in exclusive custody and control of the automobile.

This case was distinguished from the case of *Sledge v. Law*,[17] in that in the *Sledge* case the father paid the balance on the note incurred by the son as a gift to his son. The son lived in the household with his father, and the father supported him and gave him money for his personal expenses including gasoline for the upkeep of his automobile. The most striking distinction between the *Calhoun* case and the *Sledge* case, aside from the emancipation of the son in *Calhoun* and the fact that the son in *Sledge* lived at home involves the question of liability insurance on the respective automobiles. In both cases the liability policies were owned by the fathers, but in the *Calhoun* case, the father did not request the coverage and did not know who did. In the *Sledge* case, the father actually procured insurance in his own name. This fact standing alone would hardly seem to be sufficient information on which to ground a distinction, so it may be assumed that these cases turn on the weight of a combination of circumstances when the question is close as in the case where the car is actually registered in the name of the son.

Another case decided during this survey period which turned on the family purpose doctrine was *Stancell v. Fowler*.[18] In this case, the trial court without a jury held the automobile at the time of the accident to be a family-purpose car. In this case legal title was taken in the name of the

16. 114 Ga. App. 756, 152 S.E.2d 805 (1966).
17. 113 Ga. App. 746, 149 S.E.2d 758 (1966).
18. 113 Ga. App. 377, 147 S.E.2d 793 (1966).

defendant father for the purpose of financing the car, but all the money invested in the car was the separate property of the son. The father claimed no control over or right in the vehicle. On the other hand, the father negotiated for the purchase of the car, forwarded the payments, received the bill of sale and invoice made out to him alone, financed the purchase through a local bank, bought the license plates, and returned the vehicle for taxation in his own name. It was also established that the son used the car to drive a younger brother from school and the car had been used to make deliveries in the father's business. On the basis of the facts, the court of appeals affirmed the trial court and stated, "It cannot be said that the record is devoid of proof that the defendant was in fact the owner."

Closely related to the cases concerning the family purpose doctrine is the case of *Chester v. Evans*.[19] In this case, the plaintiff was injured while riding in an automobile driven by the defendant's 13-year-old son. The alleged liability of the defendant father was grounded on the actions of the father in teaching his son how to drive; in creating an intense desire in his son to drive his automobile; in leaving the keys to the vehicle in a place accessible to the son; and his knowledge of his son's desire to drive the car. An oral motion to dismiss was denied, and this was reversed by the court of appeals.

The true rule in this type of case is given by the court thusly: "A parent may be liable for an injury which is directly caused by the child, where the parent's negligence has made it possible for the child to cause the injury complained of and probably that the child would do so, as where the parent negligently permits a young child to use or have access to firearms or other dangerous weapons, but the liability is based upon the rules of negligence rather than the relation of parent and child; and, as in other negligence cases, the negligence of the parent must have been the proximate cause of the injury. In other words, the injury must have been the natural and probable consequence of the negligent act, that is, a consequence, which, under the surrounding circumstances, might and ought reasonably to have been foreseen as likely to flow from such act."[20] The court in applying this rule decided that a father should not, as a matter of law, be held reasonably to have been able to foresee the injury when his child had shown no predisposition for disobedience. The plaintiffs had failed to plead such a predisposition and as a result were out of court.

MANUFACTURER'S LIABILITY

There were three cases decided during this survey period which discussed the applicability of the MacPherson Rule in Georgia. In *General Motors*

19. 115 Ga. App. 46, 153 S.E.2d 583 (1967).
20. *Accord:* Gardiner v. Solomon, 200 Ala. 115, 75 So. 621 (1917); Walker v. Klopp, 99 Neb. 794, 157 N.W. 962 (1916); Neubrand v. Kraft, 169 Iowa 444, 151 N.W. 455 (1915); Whitesides v Wheeler, 158 Ky. 121, 164 S.W. 335 (1914); Meers v. McDowell, 110 Ky. 926, 62 S.W. 1013 (1901).

Corp. vs. Jenkins[21] the court of appeals held that the trial court erred in overruling the general demurrer of General Motors and stated the following rule, which brought about a vigorous dissent by Judge Deen regarding manufacturers liability in Georgia:

> Where a vehicle is brought to an automobile dealer by its owner for the purpose of having it repaired and the owner reveals to the dealer the fact that there is a dangerous defect in the vehicle, the failure of the dealer to discover and correct the defect when he could have done so by the exercise of ordinary care relieves the manufacturer of liability, unless the manufacturer should have foreseen that a dealer might fail to discover and remedy the defect by the exercise of ordinary care.

Judge Deen in his dissenting opinion sets out what this writer considers to be the true rule regarding independent intervening forces and their impact on the liability of the original negligent party. Judge Deen points out the distinction between an original act of negligence which is static or passive, and an original act of negligence which requires no activation by any other agency to cause the injury resulting. In other words, according to the dissent if the original act of negligence produces a dangerous condition which is not injurious in and of itself and this static condition is activated by the negligent act of another party thereby causing the injury, then the negligent act of the second party is an independent intervening force which will break the chain of causation and thereby relieve the original negligent party of any liability for the damage done. On the other hand, if the original act of negligence would, in and of itself, produce injury regardless of whether the second act of negligence occurred, then in Judge Deen's opinion, the original negligent party should be held at least partially liable for the injury resulting if the injury should have been reasonably foreseen or anticipated. An original negligent party whose negligence creates only a passive condition which is not injurious in itself must foresee only that another negligent party might set in motion a force which combined with the condition created by the original negligence would result in injury in order that the original negligent party be held liable.

Taking the majority rule in this case at its face value it would seem that in order for a manufacturer to be relieved of liability for negligently causing a dangerous defect in its product which results in injury, all that need be done is for the purchaser of the product to take the same to a repairman and complain of a dangerous defect therein. This would shift the burden of liability to the repairman should any injury result. In all fairness it must be said that this case does not state expressly whether the owner of the automobile or other product need point out the exact defect in the vehicle or other product in order to relieve the manufacturer of

21. 114 Ga. App. 873, 152 S.E.2d 796 (1966).

liability and place the burden on the repairman. It would seem that the fairest rule would be to hold that the owner of the vehicle must point out to the repairman the exact defect in order to break the chain of causation thereby relieving the manufacturer of liability.

In *Sodderhamn Mach. Mfg. Co. v. Wilson*[22] the plaintiff brought an action for the death of her husband allegedly resulting from the malfunction of a wood chipping machine manufactured by the defendant. In this case, the petition contained allegations of the defendant's negligence in the manufacture of the machine and of the defendant's negligence subsequent to the manufacture in that defendant inspected and tested the machine after a complaint by the plaintiff that the machine was making a "knocking sound." After such inspection the defendant's representative assured the plaintiff that the noises were caused by a harmless air pocket which they could disregard. The twist in this case stems from appellant's contention that the petition attempts to state a cause of action based on the breach of an implied warranty and that the plaintiff did not have the privity of contract requisite to the bringing of such an action. The court cited *MacPherson v. Buick Motor Co.*,[23] among many other cases, for authority to the effect that such negligence on the part of the manufacturer is actionable.

An interesting case decided by the court of appeals during this survey period involving the applicability of the MacPherson Rule to a sale of realty was the case of *Dooley v. Berkner*.[24] In this case, the court of appeals reaffirmed the proposition that the doctrine of *caveat emptor* applies to real estate sales in Georgia with the exception that the fraudulent concealment of known defects in the realty by the seller is actionable. In this case the plaintiff sought compensatory and punitive damages for the negligent construction of a house which plaintiff purchased from the defendant. The deed given was without warranties and the court held that in the absence of an allegation of fraud on the part of the defendant, the sustaining of a general demurrer to plaintiff's petition was correct.

Actions Against Land Owners and Occupants

The most interesting case during the survey period regarding tort actions against land owners and occupants was that of *Crosby v. Savannah Elec. & Power Co.*[25] This case dealt basically with the court's distinction between trespassers, licensees and invitees and the duty of care owed to each. The action was against the power company for injuries received by a 15-year-old boy, whose mind was that of a child eight or nine years old, who, with the alleged knowledge of the defendant, was playing in an area where the

22. 113 Ga. App. 308, 147 S.E.2d 817 (1966).
23. 217 N.Y. 382, 111 N.E. 1050 (1916).
24. 113 Ga. App. 162, 147 S.E.2d 685 (1966).
25. 114 Ga. App. 193, 150 S.E.2d 563 (1966).

defendant's power pole was located. While in the area, the plainttiff climbed a power pole and touched an uninsulated wire thereby receiving the injuries complained of. While affirming the lower court's decision that the petition failed to state a cause of action against the defendant power company, the court held that, "In determining the status of a person, that is to say, whether he was an invitee, a licensee or a trespasser, neither his age nor his capacity, mental or physical, is a factor for consideration." Since the petition did not allege that the defendant had extended an invitation to the plaintiff, or extended to him permission to climb its power pole, it was assumed that the plaintiff was a trespasser to whom no duty was owed save that of not luring him into a man-trap or doing him willful and wanton harm. The court went further and stated, "The doctrine of mantrap or pitfall is resting upon the theory that the owner is expecting a trespasser or a licensee and has prepared the premises to do him injury. . . . It may result from the knowledge on the part of the owner of the existence of a dangerous or hazardous condition coupled with a conscious indifference to the consequences, so that a deliberate intent to inflict injury is inferable. . . ." Since the court found that a man-trap situation did not exist, nor did the allegations of the petition show wilful and wanton negligence on the part of the defendant power company, the petition was defective.

The court of appeals held that general demurrers were properly sustained in the following cases: A 3-year-old girl by her next friend, filed an action against her landlord for injuries sustained when her clothing caught fire while she was standing next to an unprotected gas heater in a leased apartment. The petition basically alleged that the plaintiff had occupied the premises approximately 2 months prior to the injury and that the defendant's negligence consisted of allowing the heater to remain without any protective guard to prevent the flames from emitting therefrom, after having actual notice of the dangerous condition. Chief Judge Felton stated for the court:

> A landlord is not liable for injuries to his tenant or to members of the latter's family for injuries resulting from a patent defect existing at the time of the rental agreement as to which both the landlord and the tenant had equal knowledge. . . . While a child of three years of age is conclusively presumed to be incapable of contributory negligence and any negligence of his parent or parents would not be imputable to the child in an action in the child's behalf . . . this case does not turn upon contributory negligence on the part of the plaintiff, but rather on lack of negligence on that of the defendant.[26]

In the next case, among other things, a tenant alleged that the hot-water heater located under the rental house in a pit would not stay lighted due

26. Hyde v. Bryant, 114 Ga. App. 535, 151 S.E.2d 925 (1966).

to seepage of water which frequently extinguished the pilot light and that, although he took special care to note whether gas escaped into the pit, he never smelled any escaped gas or had reason to believe gas had escaped and had there been a leakage he would have noticed it since the gas was impregnated with a pungent smelling ingredient. The tenant had complained to the defendant-landlord of the rusted and dirty condition of the thermostat and safety pop-off valve on the hot-water heater as well as the fact that the hot-water heater would not stay lighted, but the landlord failed to make any repairs to the hotwater heater and when the tenant reached down into the pit to light the pilot light, the gas, which had accumulated in the pit exploded, causing injury to the tenant. In holding that the plaintiff's petition showed that he failed to exercise ordinary care and diligence for his own safety, the court stated:

> Although the landlord, after knowledge or notice that the premises were out of repair, might have been liable to the tenant for injuries sustained by the tenant as a result of his neglect to make repairs within a reasonable time, it was the tenant's duty to abstain from using that part of the rented premises, the use of which would be attended with danger, and, if it affirmatively appears from the petition that the tenant voluntarily used the portion of the premises which he knew to be dangerous under the alleged existing and apparent conditions, such conduct was a failure to use ordinary care for his own safety and will bar the tenant's recovery, even though the landlord was negligent in failing to make the necessary repairs.[27]

A child was injured while playing in the yard of the defendant's apartment house when accumulated gasoline vapors exploded, the gasoline vapors having eminated from the vent pipes of an underground storage tank located on the premises of an adjacent gasoline service station and having settled at ground level in the yard where the plaintiff was playing. The gas exploded when another child struck a match. Judge Jordan, speaking for the court of appeals, stated that the allegations in the petition showed that the status of the child was that of a mere licensee and failed to disclose that the injuries were proximately caused by the violation of any duty owed by the defendant landlord to the child since, "as to a licensee, the defendant owed no duty as to the condition of his premises save that he should not knowingly let him run upon a hidden peril or wilfully cause him harm."[28]

In a case involving the granting of a non-suit against a tenant, Chief Judge Felton stated for the court that "Although a tenant may have notice of defects in the premises, she may yet continue to use the premises, including the part of the premises which are defective if she does not

27. Mullinax v. Cook, 115 Ga. App. 201, 153 S.E.2d 924 (1967).
28. Young v. Fowler, 113 Ga. App. 471, 148 S.E.2d 455 (1966).

know they are dangerous or has no reasonable ground to suspect such to be the fact . . . . Knowledge of a defect does not in and of itself constitute knowledge of danger inherent in the defect." The jury question existed under evidence and the trial court erred in granting the non-suit.[29]

In an action for personal injuries by a rider against an operator of an amusement device for injuries sustained when the plaintiff was thrown about in a car on a roller-coaster-like device and in view of the plaintiff's testimony she was familiar with the operation of such a roller-coaster-like device, and that it operated in no manner different on the occasion of her ride and there were no unexpected dangers or unobservable defects in the car or operation thereof, the court of appeals stated " 'The basis of the proprietor's liability is his superior knowledge and if his invitee knows of the condition or hazard there is no duty on the part of the proprietor to warn him and there is no liability for resulting injury because the invitee has as much knowledge as the proprietor does and then by voluntarily acting, in view of his knowledge, assumes the risks and dangers incident to the known condition.' " The motion for summary judgment filed on behalf of the defendant should have been granted.[30]

In another case,[31] it was held it was not error to sustain a motion to dismiss the invitee's petition which alleged that he slipped on a substance placed on the restaurant floor by others, but failed to allege that the defendant had knowledge or that under the circumstances he was chargeable with constructive knowledge of its existence.

In a case[32] where the lower court sustained the store owner's summary judgment motion, the court of appeals reiterated that an invitee on the premises is not required in all circumstances continuously to look for defects in the floor, although an invitee could admittedly see the defect had he been looking down. Nevertheless, he was not barred from recovery as a matter of law.

In an action by an alleged invitee for injuries he sustained at the defendant's home as a result of a slip and fall on the concrete back steps upon which ice had formed, the court of appeals held it was not error to sustain a general demurrer to the petition where it alleges that the weather was "cold, rainy, freezing and ice forming on the grounds." Construing the petition most strongly against the plaintiff, the court held that it must assume that the plaintiff knew of the weather conditions and that the steps, being exposed, were covered with ice, and he "cannot undertake to do an obviously dangerous thing, even though directed by another without assuming a risk incident thereto and without himself being guilty of

29. Carmak v. Oglethorpe Co., 114 Ga. App. 512, 151 S.E.2d 799 (1966).
30. Atlanta Funtown, Inc. v. Crouch, 114 Ga. App. 702, 152 S.E.2d 583 (1966).
31. Angel v. The Varsity, Inc., 113 Ga. App. 507, 148 S.E.2d 451 (1966).
32. Chotas v. J. C. Penny Co., 113 Ga. App. 731, 149 S.E.2d 527 (1966).

such lack of due care for his own safety as to bar him from recovery if he is injured."[33]

Further expanding on the duty of care owed to a licensee and an invitee, the court of appeals, in *Handebo v. McCarthy*,[34] held that it was proper to sustain a general demurrer to the plaintiff's petition which alleged, in substance, that the plaintiff's 4-year-old deceased son was a "licensee" at the time he drowned in the defendant's swimming pool located at the latter's residence. The court distinguished between a licensee and an invitee stating that "[A] person is an invitee where, for purposes connected with the business conducted on the premises, he enters any place of business" while a "licensee is a person who is neither a customer nor a servant, nor a trespasser, and does not stand in any contractual relation with the owner of the premises, and who is permitted, expressly or impliedly, to go thereon merely for his own interest, convenience or gratification." As to licensees, no duty devolves upon the land owner or occupant to keep the premises up to any particular standard, and the owner generally is liable to such licensee only for willful and wanton injury to him. While it is true that the owner or occupant of property owes a duty to a licensee whose presence is known to him to exercise ordinary care to avoid injuring him, this duty does not arise with respect to a mere dangerous statical condition of the premises, and as to such, the owner or occupant owes no greater duty to the licensee whose presence is known than to any other licensee, and this is, as stated above, merely not to injure him willfully or wantonly. The mere fact that such a child is an infant of tender years and unable to appreciate the danger of a particular situation, as readily as would an adult, does not alter the relation of the parties nor render the owner or occupant liable to him where he otherwise would not be liable.

In another case,[35] the court of appeals held that, where a person goes upon the premises of a merchant at a time other than a time when such merchant might reasonably be expected to be open for business or goes to a place to which the invitation to visit does not extend, he is, at most, a mere licensee.

LIBEL AND SLANDER

In discussing the "tortious misconduct rule", which has been developed in Georgia, the court of appeals in *Jordan v. J. C. Penney Co.*[36] affirmed the lower court's decision sustaining the defendant's general demurrers to the plaintiff's petition which alleged in three counts (1) tortious misconduct, (2) slander and (3) invasion of privacy by the employees of defen-

33. Roberts v. Bradley, 114 Ga. App. 262, 150 S.E.2d 720 (1966).
34. 114 Ga. App. 541, 151 S.E.2d 905 (1966).
35. Clark v. Rich's, Inc., 114 Ga. App. 242, 150 S.E.2d 716 (1966).
36. 114 Ga. App. 822, 152 S.E.2d 786 (1966).

dant. The petition alleged that the defendant's employees had remarked to the plaintiff (invitee) in the presence of a large number of other customers directing the plaintiff to turn in her charge card for the stated reason that the plaintiff had gone bankrupt when, in fact, the plaintiff was not a bankrupt. The stated reason given by the employee was in response to the plaintiff's request as to why she was being requested to turn in her charge card. The court felt that "tortious misconduct" was not shown since the defendant could refuse to give credit to anyone at any time and without giving any reason therefor, and the remarks that were alleged made by the defendant's employee failed to come within the category of "approbrious, insulting or abusive language." Regarding slander (count 2), the court felt that the petition was defective since it did not allege that the corporate defendant expressly directed the agent to speak the identical words used by him. This rule may seem harsh but without it the corporate defendant would often have no defense to an action for an unauthorized, even unforeseen and rash act of the agent. If, in the light of present day concepts, it is too harsh, the amelioration of the rule lies only in the province of the supreme court, for as has been seen, it stems from *Behre v. National Cash Register Co.*,[37] by which we are bound. Regarding count 3, the court stated that no cause of action for the invasion of the right of privacy was set forth in the petition which alleged that subsequent to the incident in the store the plaintiff received a notice by mail from the defendant that she had failed to make previous payments which were past due and by reason of said action she received severe nervous shock and fright that should have been foreseen by the defendant and thus, such actions amounted to a willful disregard of the consequences and an invasion of the plaintiff's right of privacy and her personal security.

In another case[38] dealing with "tortious misconduct" the court of appeals held that an action for "tortious misconduct" is solely on the invitee relationship and in the absence of such a relationship, a corporation is not liable for damages resulting from speaking false, malicious, or defamatory words by one of its agents, even where, in uttering such words, the speaker was acting for the benefit of the corporation and within the scope of his agency, unless it affirmatively appears that the agent was directed or authorized by the corporation to speak the words in question.

In *Horton v. Tingle*[39] the action was based on the alleged slanderous remarks given in open court in a separate suit as evidenced by the defendant, whose duty it was to answer questions propounded to him. The court of appeals held that under the facts of that particular case, the defendant's statements were responsive to questions asked by counsel and not disal-

37. 100 Ga. 213, 27 S.E. 986 (1897).
38. Herring v. Pepsi Cola Bottling Co., 113 Ga. App. 680, 149 S.E.2d 370 (1966).
39. 113 Ga. App. 512, 149 S.E.2d 185 (1966).

lowed by the court, and, therefore, absolutely privileged and were not actionable.

In *Southern Fin. Co. v. Alexander*,[40] notwithstanding the absence of actual injury or damage to personal property of the plaintiff, he could recover damages for mental suffering and wounded feelings resulting from being subjected to an alleged assault and battery by the agent of the defendant finance company acting within the course of his employment. In a malicious prosecution case, the court held in *Barber v. Addis*[41] that the gravamen of the action is the want of probable cause on the part of the person instituting the prosecution and whether he was guilty or innocent of the charge for which he was prosecuted is not material.

Actions Against Hospitals and Doctors

In holding that it was error to sustain a general demurrer to the employee's petition against the hospital for negligence in failing to provide her with a safe place to work which failure led to the plaintiff's contracting a serious disease, the court stated, "[A]lthough the hospital was not an insurer of the safety of its employees, it had the duty to use reasonable care to protect them against danger of the employment which might reasonably be expected to produce disease and the hospital would be liable for disease contracted by a plaintiff where such disease was brought about by employer's negligence."[42]

Although the court recognized the rule that a servant assumes the ordinary risk of employment which are those incident to the business, nevertheless under the assumption-of-skill doctrine, where under the master's technical or scientific knowledge of his business makes the knowledge implied to him superior to that applied against the servant as to matters in conjunction with the business, the master is under a duty to warn his servant of the dangers involved.

In a suit based on *res ipsa loguitur* it was alleged that the plaintiff, who had a paralyzed condition and speech impediment, was burned in a hospital bed when his pipe allegedly fell from his mouth onto the bed causing a fire. The court held that the hospital is under a duty to a paying patient to exercise reasonable care by looking after and protecting the patient to the extent that his known condition requires. This duty extends to safeguarding and protecting the patient from any known or reasonably apprehended danger from himself which may be due to his mental or physical incapacity, and to use ordinary and reasonable care to prevent it.[43] The judgment in the lower court for the plaintiff was affirmed by the court

40. 113 Ga. App. 740, 149 S.E.2d 526 (1966).
41. 113 Ga. App. 806, 149 S.E.2d 833 (1966).
42. Thigpen v. Executive Comm. of the Baptist Convention, 114 Ga. App. 839, 152 S.E.2d 920 (1966).
43. Hospital Auth. v. Eason, 113 Ga. App. 401, 148 S.E.2d 499 (1966).

of appeals but was reversed by the Georgia Supreme Court on certiorari on the grounds that the evidence at the trial of the case was too uncertain and speculative to raise a presumption of negligence on the part of the hospital and did not invoke the *res ipsa loquitur* doctrine.

In a wife's action for loss of consortium allegedly resulting from the failure of the defendant doctor properly to diagnose her husband's diabetic condition and institute treatment therefor, the court of appeals held that a jury question was presented as to whether there was a causal connection between the damage suffered by the plaintiff and the alleged negligence of the defendant.[44]

CONSPIRACY

In a civil suit based on conspiracy, the court of appeals, in sustaining a general demurrer to the plaintiff's petition alleging a conspiracy to destroy the plaintiff's business and to acquire all of the corporation assets, held that, "A conspiracy . . . is a combination between two or more persons either to do some act which is a tort, or else to do some lawful acts by methods which constitute a tort." Where it is sought to impose civil liability for a conspiracy the conspiracy of itself furnishes no cause of action. The gist of the action, if a cause of action exists, is not the conspiracy alleged, but the tort committed against the plaintiff and the resulting damage.[45] In two other cases, *Woodall v. McEachern*[46] and *McCrary v. AA Music Serv., Inc.*,[47] the court of appeals affirmed the lower court's decision sustaining general demurrers to the plaintiff's petitions alleging conspiracy against defendants on the ground that the petitions failed to set forth all necessary elements of a distinct tort committed during the course of conduct resulting in damage.

MISCELLANEOUS

In a trover action,[48] the plaintiff's testimony as to the value of his goods is not sufficient without showing some basis or reason for the witnesses' testimony such as having some knowledge, experience or familiarity with the value of the goods or similar goods. The plaintiff's testimony as to the cost price of the goods standing alone was insufficient to support an opinion as to value.

In another trover action,[49] it was pointed out by the court of appeals

44. Albright v. Powell, 113 Ga. App. 363, 147 S.E.2d 848 (1966).
45. J & C Ornamental Iron Co. v. Watkins, 114 Ga. App. 688, 152 S.E.2d 613 (1966).
46. 113 Ga. App. 213, 147 S.E.2d 659 (1966).
47. 115 Ga. App. 65, 153 S.E.2d 643 (1967).
48. Hoard v. Wiley, 113 Ga. App. 328, 147 S.E.2d 782 (1966).
49 Forsyth v. Peoples, Inc., 114 Ga. App. 726, 152 S.E.2d 713 (1966).

that a plaintiff finance company could not recover more than the balance due on its retention of title contract or the value of the automobile, whichever was less.

In an action against a defendant operator of a service station for damage sustained when the temperature dropped to 17 degrees above zero and the engine block in the plaintiff's automobile burst after defendant's employees had told the plaintiff that the anti-freeze in the radiator would withstand a freeze of 10 degrees below zero, the court of appeals pointed out that in the absence of an allegation of fraud or that the employee knew that his opinion was erroneous at the time it was given, the plaintiff's petition failed to set forth a cause of action.[50]

In a tort suit[51] for fraud and deceit predicated upon false and fraudulent representations as to future acts and events, made by an authorized agent of the defendant life insurance company in the sale of a life insurance policy, the court of appeals held that the petition failed to set forth a cause of action since promises as to future acts and events cannot be the basis for an action in tort for fraud and deceit.

Brazelton Bros., Inc. v. Bettermade Dairy Prod.[52] was also a suit for fraud and deceit where the court of appeals pointed out that misrepresentations are not actionable unless the plaintiff was justified in relying upon them in the exercise of common prudence and diligence. In this particular case, the petition failed to set forth the causes of action against the principal since the facts as alleged affirmatively showed that the plaintiff was not entitled to rely upon the representations of the defendant's employee. *Holland v. City of Calhoun*[53] raised the question of whether or not the city could be equitably estopped from relying upon the 6-months notice statute. The facts of this case indicated that the plaintiff appeared twice before the city council within the statutory 6-month period to claim damages and was told that the city wished to settle the claim without litigation after medical information was furnished. The court of appeals held that it was error for the trial court to sustain the defendant's general demurrer as the allegations of the petition, if proved, were sufficient to create an equitable estoppel within the meaning of GA. CODE ANN. section 38-114 (1954 Rev.) "where it would be more unjust and productive of more evil to hear the truth than to forebear the investigation." However, the decision was reversed by the Supreme Court of Georgia,[54] thereby making it clear that the notice provisions of the 6-months statute are mandatory and cannot be waived by the city.

50. DeMoyo v. Walton, 114 Ga. App. 483, 151 S.E.2d 886 (1966).
51. Kennesaw Life & Acc. Ins. Co. v. Flannigan, 114 Ga. App. 510, 151 S.E.2d 881 (1966).
52. 113 Ga. App. 382, 148 S.E.2d 71 (1966).
53. 114 Ga. App. 51, 150 S.E.2d 155 (1966).
54. City of Calhoun v. Holland, 222 Ga. 817, 152 S.E.2d 752 (1966).