TORTS

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This survey of torts is organized in terms of the basic theories of negligence, causation in fact, and proximate cause. The duty of owners and occupiers of land is followed by products liability and then mental distress. Attention is finally directed to defenses, releases, and damages.

CAUSATION

The two most confusing and least understood concepts in tort law are "causation in fact" and "proximate cause" or "duty." It is appropriate therefore to begin the survey by examining how recent cases have handled these concepts.

Causation in Fact

In order for a defendant to be liable for a tort, his conduct must be the cause in fact of the plaintiff's injury.[1] The older restrictive "but for" test[2] for causation in fact has largely been replaced by the more inclusive "substantial factor" test.[3] The cause in fact question is reduced to asking whether the defendant's conduct was a substantial factor in producing the alleged injury.[4] The superiority of the substantial factor test may be illustrated by means of an example. If *A* and *B* fired their shotguns at a bird at the same time and *C* was hit by one shot, the "but for" test would release *A* and *B* without liability. Under the "substantial factor" test, however, *A* and *B* are both liable.[5]— Georgia tort law is in a state of confusion because the courts combine the concepts of cause in fact and proximate cause.[6] The Georgia test for cause in fact is "sole proximate cause."[7] The metaphysical term "sole proximate cause," like Caesar's wife, is all things to all men. It creates unnecessary ambiguity and has even been used in Georgia to erase a statutory mandate.

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1. 2 F. HARPER AND F. JAMES, THE LAW OF TORTS §20.2, at 1110 (1956) [hereinafter cited as HARPER & JAMES]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS §41, at 237 (4th ed. 1971) [hereinafter cited as PROSSER].

2. PROSSER §41, at 238.

3. Anderson v. Minneapolis, ST. P. & S.S.M. Ry. Co., 146 Minn. 430, 179 N.W. 45 (1920).

4. HARPER AND JAMES §20.2, at 1110.

5. Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948).

6. *See* Carter v. Madray, 128 Ga. App. 40, 195 S.E.2d 685 (1973); Stroud v. Willingham, 126 Ga. App. 156, 190 S.E.2d 143 (1972); Teppenpaw v. Blaylock, 126 Ga. App. 576, 191 S.E.2d 466 (1972).

7. Cases cited in note 6 *supra*.

In *Teppenpaw v. Blaylock*,[8] the plaintiff, a four-year-old child, walked from between a row of parked cars into the side of the defendant's car. From the facts, it appears that the baby-sitter was not watching the plaintiff and that the plaintiff was careless.[9] The court states that the defendant could win if "the actions of [the baby-sitter] were the *sole proximate cause* of the injuries" or "the acts of the plaintiff . . . were the *sole proximate cause* of the collision."[10] The court adds that "even though the plaintiff could not by law be guilty of contributory negligence, nevertheless her actions could have been the sole proximate cause of her injuries, which would necessarily exclude the negligence . . . of the defendant as a proximate cause."[11]

The court seems to be using "sole proximate cause" in place of "causation in fact." Under the "substantial factor" test, however, the cause in fact of the injury was the conduct of all three parties, plaintiff, baby-sitter and defendant.

The plaintiff should have won the case easily, except for one point. There was no evidence of the defendant's negligence.[12] The four-year-old plaintiff walked out of a row of parked cars and into the side of the defendant's car.[13] The court should have stressed this element of the case, rather than creating confusion by seeking a sole proximate cause.

There was, finally, no question of proximate cause in *Teppenpaw*.[14] It was a basic question of whether there was any evidence of defendant's negligence.

Sole proximate cause is an all-purpose doctrine that is strong enough to remove the language of an express statute from the books. Ga. Code Ann. §105-205 (Rev. 1968) provides: "In a suit by an infant the fault of the parent, or of the custodians selected by the parents, is not imputable to the child."[15]

Stroud v. Willingham[16] involved a child plaintiff being run over by the defendant's car. The defendant used the all-purpose tool as a defense and argued: "The sole proximate cause of the alleged injuries to the plaintiff was the negligence of plaintiff's father . . . *in failing to exercise ordinary care to prevent the injuries to the plaintiff in this case*."[17] In answer to the plaintiff's statutory argument that "the negligence of the parent, not imputable to the child, cannot be used as a bar or defense,"[18] the court

8. 126 Ga. App. 576, 191 S.E.2d 466 (1972).
9. *Id.* at 577, 191 S.E.2d at 468.
10. *Id.*
11. *Id.* at 578, 191 S.E.2d at 469.
12. *Id.* at 579, 191 S.E.2d at 469.
13. *Id.* at 577, 191 S.E.2d at 468.
14. *Id.* at 579, 191 S.E.2d at 469.
15. GA. CODE ANN. §105-205 (Rev. 1968).
16. 126 Ga. App. 156, 190 S.E.2d 143 (1972).
17. *Id.* at 157, 190 S.E.2d at 144 (emphasis in text).
18. *Id.* at 158, 190 S.E.2d at 144.

replied: "[W]here the negligence of the parent is the sole proximate cause of the injury to the child, the child cannot recover from the defendant."[19]

The court then states that the rule of sole proximate cause presupposes no causative negligence on the part of the defendant.[20] This manifests that the root meaning of sole proximate cause in Georgia is causation in fact. The court, in *Stroud*, used the colorful "sole proximate" test in place of the "but for" test for causation in fact. A casualty of this semantic battle was Ga. Code Ann. §105-205 (Rev. 1968).[21] The "substantial factor" test, on the other hand, is more inclusive and would perhaps have given the injured plaintiff a chance with the jury.[22]

The doctrine of sole proximate cause may also be used to defeat the modern comparative negligence concept. In *Carter v. Madray*,[23] the plaintiff, age 20, was drowned while swimming in a lake owned by the defendant. The plaintiff was an epileptic and was likely negligent in swimming without a lifeguard. The defendant was also likely negligent in not providing a lifeguard. The issues were negligence, contributory negligence and comparative negligence. Nevertheless, the court permitted the defendant to overthrow the comparative negligence doctrine by arguing that "the sole and proximate cause of death was [plaintiff's] failure to exercise ordinary care for his own safety, due to his physical condition, fitness and swimming ability."[24] One can only speculate as to whether the jury was confused by the sole proximate cause language.[25]

In *Martin v. Southern Bell Telphone & Telegraph Co.*,[26] the plaintiff's car went off the road and hit the defendant's telephone pole. The court of appeals permitted the plaintiff to go to the jury in his action against Southern Bell for negligent placement of the telephone pole.[27] The majority opinion criticized the search for the "sole proximate cause" by saying: "The proximate cause of an injury may be two separate and distinct acts of negligence acting concurrently in causing the injury."[28]

The dissent used "sole proximate cause" in place of the "but for" test and said: "It is plain . . . that the sole proximate cause of injuries resulting from this collision was the action of the driver."[29] Under the better "sub-

19. *Id.*

20. *Id.* at 158-59, 190 S.E.2d at 144-45.

21. Teppenpaw v. Blaylock also used the term "sole proximate cause" to erase section 105-205.

22. It is not clear from the facts whether the defendant's conduct was a substantial factor in causing the plaintiff's injury.

23. 128 Ga. App. 40, 195 S.E.2d 685 (1973).

24. *Id.*

25. The charge to the jury on the question of causation was not discussed by the appellate court.

26. 126 Ga. App. 809, 192 S.E.2d 176 (1972).

27. *Id.* at 819, 192 S.E.2d at 182.

28. *Id.* at 817-18, 192 S.E.2d at 182.

29. *Id.* at 821, 192 S.E.2d at 184.

stantial factor" test, however, the conduct of Southern Bell in placing the pole too close to the road was a cause in fact of the damage. The majority correctly analyzed the problem as one of scope of liability (proximate cause) rather than causation in fact.[30]

Proximate Cause

The most difficult concept for tort students to grasp is proximate cause. One reason for the difficulty is the term itself. Proximate cause has nothing to do with nearness in time or space[31] and nothing to do with causation in fact.[32] The problem in all proximate cause cases is the scope of liability: should this defendant be held liable for this particular injury?[33] Duty is a better term and it will help to clarify analysis.[34]

The most important point concerning proximate cause or duty is that there are no formulas or rules. Duty is purely a question of policy[35] and is always a question for the judge and not the jury.[36] Indeed, the judge decides the scope of liability even when he indicates that he has given the question to the jury.[37] One way to assist a judge in deciding the question of duty is to indicate the important factors to be considered. He should weigh the following aspects of each case in deciding whether there is liability: loss shifting, insurance, precedents, administration of the law, possible preventive methods, and the economic impact of the decision.[38]

Georgia relies on the term "proximate cause"[39] to denote scope of liability. Three tests are popular: the foreseeability test,[40] the natural and direct test,[41] and the sole proximate cause test.[42]

The purpose of the proximate cause concept is to give the judges a tool for controlling the jury.[43] It is clear, therefore, that *Martin v. Southern Bell Telphone & Telegraph Co.*[44] is incorrect in stating that generally proximate

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30. *Id.* at 185-19, 192 S.E.2d at 180-83. *See* Gibson v. Garcia, 96 Cal. App.2d 681, 216 P.2d 119 (1950).

31. PROSSER §42, at 244.

32. Green, *Duties, Risks, Causation Doctrines*, 41 TEXAS L. REV. 42, 46 (1962).

33. *Id.* at 45-46.

34. *Id.* at 43.

35. *Id.* at 45.

36. *Id.* at 59.

37. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1025-26 (1928).

38. *See Id.* at 1014-45; Green, *The Duty Problem in Negligence Cases*: II, 29 COLUM. L. REV. 255 (1929); HARPER & JAMES §20.4, at 1132-33.

39. Martin v. Southern Bell Tel. & Tel. Co., 126 Ga. App. 809, 817, 192 S.E.2d 176, 181 (1972), *rev'd on other grounds*, 229 Ga. 881, 194 S.E.2d 910 (1972).

40. *Id.* at 818, 192 S.E.2d at 182.

41. *Id.*

42. Carter v. Madray, 128 Ga. App. 40, 195 S.E.2d 685 (1973).

43. *See* Green, *Duties, Risks, Causation Doctrines*, 41 TEXAS L. REV. 42, 43, 55, 59, 61 (1962).

44. 126 Ga. App. 809, 192 S.E.2d 176 (1972).

cause is a question for the jury to decide. In saying this, the court has already decided the critical point of proximate cause. The court has decided, in favor of the plaintiff, that it is permissible to hold the defendant liable.

Martin rejects the foreseeability test for proximate cause and embraces the equally illusive natural and direct test.[45] Both tests boil down to a jury asking, to decide the question of negligence, what a reasonable person could anticipate and then the reviewing court also asking, for proximate cause purposes, what a reasonable person could anticipate. This is needlessly repetitious.

The jury determines the question of negligence and, therefore, what a reasonable person could foresee.[46] The court, on the other hand, determines the scope of liability, not what a reasonable man could anticipate.[47]

In *Martin*, the plaintiff ran off the road and into Southern Bell's telephone pole. The pole was located at the apex of the turn and only four inches from the road.[48] The court correctly refused to accept Southern Bell's argument that the placement of the pole was not a proximate cause of the injury. The court's opinion would have been clearer, however, if it had stressed the ease of preventing the injury and the opportunity for loss shifting rather than the vague directness of the injury test.[49]

Additional confusion is created when the court in *Teppenpaw* states that the test for proximate cause is the same as the test for negligence: "[N]egligence which is the proximate cause of an injury is such an act that a person of ordinary caution and prudence would have foreseen that some injury might likely result therefrom."[50]

In *Seaboard Coast Line R.R. v. Sheffield*,[51] the court indicates that proximate cause is the critical issue. The plaintiff drove his automobile into the side of Seaboard's freight train as the train was moving through a grade crossing at midnight.[52] The evening was cloudy and dark, it was lightly raining. The plaintiff was traveling at about 20-25 miles per hour when suddenly he saw a big, black object in the middle of the road.[53] The plaintiff alleged that the railroad was negligent in not warning that the crossing was blocked.[54] Georgia law provides, however, that there is no duty to warn when the obstruction is obvious.[55] The issue in *Seaboard*, then, was

45. *Id.* at 818, 192 S.E.2d at 182.
46. *See* Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961); Green, *supra* note 43, at 58.
47. Green, *supra* note 43, at 45-47.
48. 126 Ga. App. 809, 811, 192 S.E.2d 176, 178 (1972).
49. *Id.* at 818-19, 192 S.E.2d at 182.
50. 126 Ga. App. 576, 578, 191 S.E.2d 466, 469 (1972).
51. 127 Ga. App. 580, 194 S.E.2d 484 (1972).
52. *Id.*
53. *Id.*
54. *Id.* at 581, 194 S.E.2d at 485.
55. *Id.*

whether there was any evidence of negligence not whether the injury was within the scope of the railroad's liability.

An extreme set of facts occurred in *Eckerd-Walton, Inc. v. Adams*.[56] An automobile, driven through the plate glass window of the defendant's drug store, pinned the plaintiff, a customer, against the counter.[57] The facts indicate that to hit the plaintiff the driver "had to turn right from the street into the entrance area, turn left parallelling the row of buildings, turn right in front of Eckerd's, cross over the approximately 5-inch curb, over six feet of sidewalk, over the almost 8-inch brick wall and through the plate glass window."[58] The court dismissed the defendant drug store on the proximate cause rationale that the injury was not foreseeable.[59] It would have been clearer to have said that there was no reasonable means for the defendant to have prevented the damage to the plaintiff. The court could also have said that there was no evidence of the defendant's negligence.

The phrases "sole proximate cause" and "proximate cause" are well entrenched in the law of Georgia. It is perhaps asking too much to change the terminology at this point. It would be helpful, however, to think of proximate cause as a policy decision for the judge and not a rule to be applied sometimes by the jury and sometimes by the court.

Owners and Occupiers of Land

The general method for determining the duty to persons injured on the land of another is to classify the plaintiff as a trespasser, licensee, or invitee.[60] The function of the classification system is to provide a means for protecting the landowner from the jury.[61] Just results are often reached by squeezing persons into the most favored invitee class, however.[62] Two remarkable developments foreshadow a revolution in the classification system. The first development is a recent California decision[63] and the second development is the Restatement of Torts treatment of trespassing children.[64]

The far-reaching rule in the California case of *Rowland v. Christian*[65] is that the landowner owes a duty of reasonable care to all persons entering his land. The reasons presented for overthrowing the caste system are logical and clear:

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56. 126 Ga. App. 210, 190 S.E.2d 490 (1972).
57. *Id.* at 211, 190 S.E.2d at 491.
58. *Id.* at 212, 190 S.E.2d at 491-92.
59. *Id.* at 213, 190 S.E.2d at 492.
60. Harper & James §§27.1 to 27.14, at 1430-1505; Prosser §§57-61, at 351-98.
61. Green, *supra* note 43, at 59; Green, *supra* note 38, at 272. *See* Harper & James §27.4 at 1432.
62. Harper & James §27.7, at 1467-70; Prosser §60, at 378.
63. Rowland v. Christian, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).
64. Restatement of Torts (Second) §339 (1965).
65. 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

> The cases dealing with the active negligence and the trap exceptions are indicative of the subtleties and confusion which have resulted from application of the common law principles governing the liability of the possessor of land. Similar confusion and complexity exists as to the definitions of trespasser, licensee, and invitee. . . .[66]
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> [E]ven within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved . . . towards imposing on owners and occupiers a single duty of reasonable care in all circumstances.[67]
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> . . . .
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> [I]t is apparent that the classifications of trespasser, licensee, and invitee . . . often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land. Some of these factors, including the closeness of the connection between the injury and the defendant's conduct, . . . the policy of preventing future harm, and the prevalence and availability of insurance, bear little . . . relationship to the classifications.[68]
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> . . . .
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> A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or . . . without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters. . . . The common law rules obscure rather than illuminate the proper considerations which should govern determinations of the question of duty.[69]

The flexibility necessary to reach just and fair results is provided in *Rowland* by the terms "reasonable" and "circumstances."[70] The landowner does not become an insurer, instead his liability will vary with what is appropriate under the various conditions.[71]

The court, in *Haag v. Stone*,[72] classified a social guest as a licensee. The plaintiff, a 9-year-old girl, was injured when thrown from the defendant's horse. In denying the defendant's motion for a summary judgment, the court reasoned that the possessor of land is subject to liability for physical harm caused to licensees by a condition on the land.[73] Surely a horse is an activity rather than a condition.[74] A better approach would be to jettison the unwieldy classes and merely ask, as in *Rowland*, whether there was

66. *Id.* at 102, 443 P.2d at 566.
67. *Id.*
68. *Id.* at 103, 443 P.2d at 567.
69. *Id.* at 104, 443 P.2d at 568.
70. *Id.*
71. *Id.*
72. 127 Ga. App. 235, 193 S.E.2d 62 (1972).
73. *Id.* at 236, 193 S.E.2d at 63.
74. HARPER & JAMES §27.6, at 1461-67.

evidence that the owner failed to exercise reasonable care under the circumstances. In *Haag*, the defendant father was not at home and the defendant mother was in the house at the time the plaintiff was thrown. The defendant could perhaps have prevented this injury by staying with the children while they rode the horse.[75]

It might well be argued that Georgia has quietly adopted the *Rowland* rule. In *Moody v. Southland Investment Corp.*,[76] for example, the plaintiff sustained lacerations when she walked through a sheet glass sliding door while a guest in an apartment owned by the defendant landlord. Without mentioning whether the plaintiff was a licensee or an invitee, the court permitted the case to go to the jury on the basis that "what ought to be done is fixed according to the standard of the ordinarily prudent man . . . ."[77] This is the same approach that was used in *Rowland*. *Moody* is worth reading just to see Judge Eberhardt's fine discussion of secondary sources.

A more traditional approach to the landowner's duty is taken in *La Branche v. Johnson*.[78] The court reaches a fair result by stretching the invitee class to include the plaintiff. Generally, a social guest, like the plaintiff, is classified as a licensee.[79] In *La Branche* the plaintiff was invited to defendant's home to assist her in making a quilt. The defendant offered to pay the expense of the plaintiff's trip.[80] The court concludes that these facts make the plaintiff an invitee.[81] The result is just and the strained logic is quite common in landowner cases.[82]

It is apparent that Georgia law follows the older theory of protecting the landowner rather than human life. In *McGruder v. Georgia Power Co.*,[83] a ten-year-old boy was swimming in a pool of water below defendant's dam and power plant on Lake Jackson. He was trapped and drowned inside a drainage pipe which runs from this pool to a lower-lying pool about 20 feet away. Ga. Code Ann. §105-408, provides that an owner of land owes no

75. Haag v. Stone, 127 Ga. App. 235, 236, 193 S.E.2d 62, 63. At the time of the fall, the defendant's wife was in the house. The defendant was not at home.

76. 126 Ga. App. 225, 190 S.E.2d 578 (1972).

77. *Id.* at 233, 190 S.E.2d at 583.

78. 127 Ga. App. 244, 193 S.E.2d 228 (1972).

79. *See* Blair v. Manderson, 126 Ga. App. 235, 190 S.E.2d 584 (1972); Laube v. Stevenson, 137 Conn. 469, 78 A.2d 693 (1951).

80. La Branche v. Johnson, 127 Ga. App. 244, 245, 193 S.E.2d 228, 230 (1972).

81. *Id.*

82. *See* PROSSER §§58-62, at 357-99; *see also* Blair v. Manderson, 126 Ga. App. 235, 190 S.E.2d 584 (1972), where the plaintiff, a three-year-old neighbor child, was classified as a licensee. The defendant property owner backed his car over the plaintiff who had been playing in the defendant's yard. The court reached a just result by saying that there is a duty of reasonable care where the plaintiff's presence "reasonably should be anticipated." *Rowland v. Christian*, 70 Cal. Rptr. 97, 443 P.2d 561 (1968), is more to the point, although the result is the same.

83. 126 Ga. App. 562, 191 S.E.2d 305 (1972). PROSSER §58, at 360.

duty of care to keep the premises safe for use by others for recreational purposes.[84] There is a statutory exception for wilful failure to warn against a dangerous condition, or activity, however.[85] The court of appeals correctly construed wilful to include an intentional failure.[86] The court then held in favor of the plaintiff father on the grounds that the defendant knew that children swam in the pool and that there was no sign by the opening of the pipe specifically warning of this danger.[87]

The Supreme Court of Georgia reversed in *Georgia Power Co. v. McGruder*,[88] reasoning that "the statute is not applicable where, as here, the use of the land was expressly denied to the deceased boy by the posting of 'keep out' signs in the area."[89] The supreme court did not address the appellate court's point concerning the statutory exception for a wilful failure to warn of a dangerous condition.[90] The appellate decision should have been adopted on the grounds that an adequate warning of the specific danger would have been inexpensive and the Georgia Power Company is an appropriate party to spread the loss.[91]

The second most important development in the law of owners and occupiers of land is Restatement of Torts (Second) §339 (1965) (Artificial Conditions Highly Dangerous to Trespassing Children), which provides:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
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> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
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> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
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> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.[92]

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84. GA. CODE ANN. §105-405 (Rev. 1968).
85. GA. CODE ANN. §105-408(a) (Rev. 1968).
86. McGruder v. Georgia Power Co., 126 Ga. App. 562, 563-64, 191 S.E.2d 305, 307 (1972).
87. *Id.* at 564, 191 S.E.2d at 307.
88. 229 Ga. 811, 194 S.E.2d 440 (1972).
89. *Id.* at 812, 194 S.E.2d at 440.
90. GA. CODE ANN. §105-408(a) (Rev. 1968).
91. *See generally* RESTATEMENT OF TORTS (SECOND) §334 (1965). Comment (e) at 187 is particularly appropriate to this discussion.
92. RESTATEMENT OF TORTS (SECOND) §339 (1965).

Professor Prosser believed that "[t]he Section has been cited so frequently, and has received such general acceptance on the part of the great majority of the courts, as the best available statement of the law, that it must be taken as a new point of departure."[93]

In light of the Restatement and the place of children in society, *Montega Corp. v. Grooms*[94] is an unwarranted decision. The defendant, Montega, was engaged in construction of an apartment complex and had bulldozed an excavation on the site. Surface waters from a heavy rain accumulated in this pit, creating a pond which was about nine feet deep. The plaintiff's son, age 12, drowned in the pond when he jumped into it for the purpose of rescuing his four-year-old sister. She had either fallen or jumped into the water and was in distress. There was no fence between the plaintiff's front yard and the excavation only 45 feet away. There was a fence at other points, however.[95]

With four judges dissenting, the majority found for the defendant because "there was simply no negligence on the part of Montega, and no breach of duty owed by it either to the deceased or to his sister."[96]

In view of the value of children to the community, the court should have found for the plaintiff by applying section 339 as follows:

A. The corporation was expressly told that children played near the excavation.[97]

B. The serious danger of deep water to children is obvious to adults, but defendant was also warned of this.[98]

C. It is equally obvious that a four-year-old child would not realize the dangers inherent in a rain-filled excavation.[99]

D. The defendant had several cheap options at hand for avoiding the danger: fully fence the area, drain the excavation, fill the excavation or provide a guard.

E. Here the defendant took no steps to eliminate the danger or to protect the children.

Under the Restatement test, Montega was negligent towards the four-year-old girl. The rescue doctrine would therefore permit recovery by the decedent 12-year-old boy.[100] When the court adopts such a severe rule as *Montega*, it certainly should explain in detail why Georgia law prefers apartment developers to young children, especially when the better reasoned and widely followed Restatement goes the other way.

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93. PROSSER §59, at 366. Professor Prosser was talking about the original section 339, but the second Restatement provision is little changed from the first Restatement.

94. 128 Ga. App. 333, 196 S.E.2d 459 (1973).

95. *Id.* at 334, 196 S.E.2d at 460-61.

96. *Id.* at 340, 196 S.E.2d at 464.

97. *Id.* at 342, 196 S.E.2d at 465.

98. *Id.*

99. PROSSER §32, at 154-57.

100. Wagner v. International Ry. Co., 232 N.Y. 176, 133 N.E. 437 (1921).

PRODUCTS LIABILITY

One of the most difficult problems for a plaintiff in a products liability case is selecting a viable cause of action.[101] The critical issue of whether the action is in contract or tort is often confronted in deciding if the statute of limitations has run.[102] *Everhart v. Rich's, Inc.*[103] involved precisely that question. The plaintiffs purchased fiberglass draperies from the defendant, Rich's. Extreme personal discomfort was alleged to have been caused by billions of fiberglass particles breaking loose from the draperies and floating throughout the house.[104] The defendant argued that the statute of limitations contained in the Uniform Commercial Code had run.[105] The court of appeals agreed, reasoning that since a breach of warranty is a contract action, the breach occurred when delivery was made.[106]

The Supreme Court of Georgia reversed and found for the plaintiff.[107] It decided that since the action was a claim for personal injury, section 3-1004 controlled rather than the U.C.C. provision, Ga. Code Ann. §109 A-2-725 (1962).[108] The court characterized the case as a continuing tort which "tolls the statute of limitations so long as the continued exposure to the hazard is occasioned by the continued failure of the tortfeasor to warn the victim. . . ."[109]

The Supreme Court of Georgia did not clearly indicate whether it was dealing with the negligence or warranty cause of action. The court of appeals was inaccurate, however, in stating that a breach of warranty is a contract action.[110] Historical studies have shown that warranty was originally a tort action, although it was later absorbed into contracts.[111] Today, it is recognized that a breach of implied warranty for personal injuries is a tort action.[112]

Chaffin v. Atlanta Coca Cola Bottling Co.[113] also rejects the argument that the breach of an implied warranty for personal injuries is a tort action. The plaintiff, a third party, was injured when she drank a Coke purchased at a Big Apple store. The court found against the plaintiff in her implied warranty action because she was not in privity with Coca-Cola and privity

101. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
102. *See* Doughty v. Maine Cent. Transp. Co., 141 Me. 124, 39 A.2d 758 (1944); Webber v. Herkimer & M. St. R. R. Co., 109 N.Y. 311, 16 N.E. 358 (1888).
103. 128 Ga. App. 319, 196 S.E.2d 475 (1973).
104. Everhart v. Rich's Inc., 229 Ga. 798, 799, 194 S.E.2d 425, 427 (1972).
105. Everhart v. Rich's Inc., 128 Ga. App. 319, 320, 196 S.E.2d 475, 476 (1973).
106. *Id.*
107. 229 Ga. 798, 194 S.E.2d 425 (1972).
108. *Id.* at 802, 194 S.E.2d at 428-29.
109. *Id.*
110. 128 Ga. App. 319, 321, 196 S.E.2d 475, 476 (1973).
111. PROSSER §§54, 97, at 334, 335, 654.
112. Greenman v. YUMA Power Prods. Inc., 27 Cal. Rptr. 697, 377 P.2d 897 (1962).
113. 127 Ga. App. 619, 194 S.E.2d 513 (1972).

is required for an action in implied warranty under the Uniform Commercial Code.[114] *Henningsen v. Bloomfield Motors, Inc.*[115] is the leading case on privity and implied warranties and takes the opposite view. The court's reasoning in *Henningsen* is persuasive:

> Warranties developed in the law in the interest of and to protect the ordinary consumer. . . .[116]
>
> . . . .
>
> [S]ociety's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur. . . . The interest in consumer protection calls for warranties by the maker that *do* run with the goods, to reach all who are likely to be hurt by the use of the unfit commodity for a purpose ordinarily to be expected.[117]
>
> . . . .
>
> Most of the cases where lack of privity has not been permitted to interfere with recovery have involved food and drugs.[118]
>
> . . . .
>
> The obligation of the manufacturer should not be based alone on privity of contract. It should rest . . . upon "the demands of social justice."[119]

The court in *Chaffin*, however, made no attempt to indicate why it favored the manufacturer over the consumer. It did not explain why large corporations that spend millions of dollars to convince consumers that their products are of high quality should be shielded from tort suits in Georgia.

In order to recover in negligence, a defect in the product must be shown.[120] Defect is defined in several ways:

> Chief Justice Traynor has suggested that a product is defective if it fails to match the average quality of like products. . . . The Restatement emphasizes the viewpoint of the consumer and concludes that a defect is a condition not contemplated by the ultimate consumer which would be unreasonably dnagerous to him. . . . Dean Prosser has said that "the product is to be regarded as defective if it is not safe for such a use that can be expected to be made of it, and no warning is given."[121]

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114. *Id.* at 620, 194 S.E.2d at 515.
115. 32 N.J. 358, 161 A.2d 69 (1960).
116. *Id.* at 78.
117. *Id.* at 81.
118. *Id.* at 83.
119. *Id.*
120. PROSSER §99, at 658-59.
121. Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill.2d 339, 340, 247 N.E.2d 401, 403 (1969).

Poppell v. Waters[122] takes a hard line on the issue of defects. The plaintiff, a 12-year-old boy, was given a bicycle by his parents. He was killed at dusk when a car ran into him because his bicycle lacked both a headlight and a front reflector. The plaintiff sued the manufacturer and seller of the product.[123] The court held for the defendants on the grounds that the bicycle was not defective. It said "We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof. . . ."[124]

It is common knowledge, however, that children will ride bicycles on roads after dark even when the bicycles lack suitable lighting equipment. It is also clear that Schwinn could easily have prevented this child's death by installing a reflector for less than 50 cents.[125] Under the Restatement test, the bicycle was a death trap and not as the decedent expected. Obviously it was unreasonably dangerous to the boy. Under Prosser's test, the bike was defective because it was not safe for children. The only warning that should protect a manufacturer of bicycles is a front and rear reflector. This was a toy for children after all. One apparently forgotten role of the law is prevention.

Mental Distress

Courts often work to prevent recovery for mental distres because it is easy to feign, and hard to measure.[126] Georgia is a refreshing exception. In *Montega Corp. v. Hazelrigs*,[127] the plaintiff alleged that Montega was causing "unnatural flooding and the deposit of soil and rocks on [plaintiff's] property."[128] The Supreme Court of Georgia rejected the defendant's argument that mental distress was not recoverable and held that "an intentional trespass to property will support a claim for mental illness, unaccompanied by actual physical injury."[129]

Defenses

This section will examine the impact of recent cases on the defenses of contributory negligence, the guest passenger doctrine and various immunities.

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122. 126 Ga. App. 385, 190 S.E.2d 815 (1972).
123. *Id.* at 385-86, 190 S.E.2d at 816.
124. *Id.* at 387, 190 S.E.2d at 817.
125. *See* Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969).
126. Prosser §12, at 50.
127. 229 Ga. 126, 189 S.E.2d 421 (1972).
128. *Id.*, 129 S.E.2d at 422.
129. *Id.*

Contributory Negligence

In *Petroleum Carrier Corp. of Florida v. Jones*,[130] a guest passenger, the plaintiff, was injured when the defendant ran into the O'Neal car in which the plaintiff was riding. There was evidence that O'Neal, the driver, was intoxicated.[131] The defendant, therefore, alleged that the negligence of the guest passenger in riding with an intoxicated driver should be compared with the negligence of the defendant.[132] The court agreed, reasoning that: " 'Mere knowledge on the part of a passenger that the driver is under the influence of intoxicating beverages is not, as a matter of law, knowledge that such person is so much under the influence of intoxicants as not be able to drive safely. . . .' In such cases the negligence of the driver and that of his guest may be compared."[133]

The holding is that the negligence of the guest passenger can be compared with that of the other driver only where the guest's negligence was a proximate cause of the injuries suffered.[134] It is submitted, however, that the court meant cause in fact rather than proximate cause. If the guest's conduct was not a substantial factor in causing the injury, there is no reason to face the more troublesome issue of proximate cause.[135]

Mitchell v. Cox[136] states that "a minor child of tender years is incapable of contributory negligence."[137] This is an overstatement because even very young children are aware of common dangers such as height and fire.[138] The Restatement of Torts presents the better rule: "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances."[139]

Georgia is one of the few states that follows the equitable and progressive doctrine of comparative negligence.[140] The function of the doctrine is to prevent contributory negligence from being a complete bar to the plaintiff's recovery. It also provides a means of apportioning the damages based on the negligence of each party.[141] The function of the last clear chance doctrine on the other hand is to permit the court to compare the negligence of each party to decide who takes it all.[142] In Georgia comparative negli-

130. 127 Ga. App. 676, 194 S.E.2d 670 (1972).
131. *Id.* at 677, 194 S.E.2d at 671.
132. *Id.* at 679, 194 S.E.2d at 673.
133. *Id.* at 681, 194 S.E.2d at 674.
134. *Id.*
135. See text accompanying note 1 *supra*.
136. 126 Ga. App. 151, 190 S.E.2d 154 (1972).
137. *Id.* at 152, 190 S.E.2d at 155.
138. PROSSER §32, at 155.
139. RESTATEMENT OF TORTS (SECOND) §283A (1965).
140. Petroleum Carrier Corp. of Florida v. Jones, 127 Ga. App. 676, 194 S.E.2d 670 (1972).
141. PROSSER §67, at 435.
142. PROSSER §66, at 428.

gence means that damages are apportioned and the negligence of one party is not a bar.

It was, therefore, inappropriate for the court in *Central of Georgia Ry. v. Little*[143] to consider whether the defendant had the last clear chance. Dean Prosser states:

> In all probability [last clear chance] defeats the purpose of the [comparative negligence] legislation, since the system of apportionment breaks down in one important group of cases, where a loss from the fault of two parties is still visited on one. . . . The tendency in the latest decisions has been to hold that the apportionment statute takes effect, notwithstanding the fact that the defendant has the last clear chance.[144]

Guest Passenger

Numerous recent Georgia cases dealt with the application of the guest passenger rule.[145] The point of the rule is that, in order to recover from the driver, the guest must show gross negligence.[146] It may shortly be of only historical significance if the California Supreme Court does indeed predict future developments in tort law. In *Brown v. Merlo*,[147] the court held that the state's guest passenger statute to be unconstitutional. Judge Tobriner wrote:

> [W]e have concluded that the classifications which the guest statute creates between those denied and those permitted recovery for negligently inflicted injuries do not bear a substantial and rational relation to the statute's purpose of protecting the hospitality of the host-driver and of preventing collusive lawsuits. We therefore hold that, as applied to a negligently injured guest, the guest statute violates the equal protection guarantees of the California and United States Constitutions.[148]

Immunities

This section will consider the defenses of governmental, parental and charitable immunity.

It would no doubt be possible to fill the remainder of this article with citations to articles and cases that call for the abandonment of the governmental immunity concept.[149] The courts usually reply to these attacks by saying that if the immunity is to be changed it is a task for the legisla-

143. 126 Ga. App. 502, 191 S.E.2d 105 (1972).

144. PROSSER §67, at 428.

145. Averette v. Deen, 128 Ga. App. 52, 195 S.E.2d 924 (1973); Davis v. Calhoun, 128 Ga. App. 104, 195 S.E.2d 759 (1973); Waggoner v. Bevich, 127 Ga. App. 877, 195 S.E.2d 246 (1973).

146. 127 Ga. App. 877, 878-79, 195 S.E.2d 246, 247-48 (1973).

147. 106 Cal. Rptr. 388, 506 P.2d 212 (1973).

148. *Id.* at 407, 506 P.2d at 231.

149. PROSSER §131, at 984.

ture.[150] This is unresponsive because the doctrine is historically court-made and not legislative.[151]

Rather than limit or restrict governmental immunity, two recent Georgia cases have expanded it. *Southern Bell Telphone & Telegraph Co. v. Martin*[152] through implication extends governmental protection to telephone poles. The Supreme Court of Georgia held that: "The owner of a telephone pole is not liable for its alleged negligent placement in a public road right of way where such is located with the approval of the county or municipal authorities. . . ."[153]

Tory v. City of Atlanta[154] goes even further and extends the sovereign protection to garbage collection. In *Tory* a garbage truck ran into the rear end of the plaintiff's car. The plaintiff lost simply because the trash was governmental rather than industrial.

In *Perry v. Regents of the University System*,[155] the plaintiff sued the Regents for slander, libel, and failure to provide a safe place to work. The court applied sovereign immunity in a blanket fashion to all of the alleged torts. Although it might be desirable to protect the Regents from libel and slander actions because administrators should discharge their duties in a fearless fashion,[156] the same is not true for all other torts. If the plaintiff was injured because her work area was unsafe, there is no policy reason for protecting the Regents from such a personal injury action.

The fear of fraud and the preservation of domestic tranquility are the two main reasons for keeping the parental immunity doctrine.[157] In automobile accident cases, however, the fraud argument should be tempered with the reality that the minor plaintiff has been injured and suffered damages. Professor Prosser concludes that the doctrine protects insurers more than domestic tranquility:

> Since the defendant will not have to pay out of his own pocket, it is obvious that the family exchequer will not be diminished, and that domestic harmony will not be disrupted so much by allowing the action as by denying it; and since the party really interested in the defense is the liability insurer, any conception of family unity and sanctity can scarcely extend to or protect him.[158]

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150. K. DAVIS, ADMINISTRATIVE LAW TEXT §25.02 (3d ed. 1972).

151. *See* Eschen v. Roney, 127 Ga. App. 719, 733, 194 S.E.2d 589, 597 (1972); PROSSER §131, at 970.

152. 229 Ga. 881, 194 S.E.2d 910 (1972).

153. *Id.*, 194 S.E.2d at 912.

154. 128 Ga. App. 155, 195 S.E.2d 923 (1973).

155. 127 Ga. App. 42, 192 S.E.2d 518 (1972).

156. See Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (absolute privilege); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) (sovereign immunity).

157. Eschen v. Roney, 127 Ga. App. 719, 194 S.E.2d 589 (1972).

158. PROSSER §122, at 868.

Eschen v. Roney,[159] an automobile collision case, should never have reached these troublesome policy questions, however. The court held that because of the parental immunity doctrine a third party action could not be maintained against the mother of the plaintiff child. The doctrine was inapplicable, however, because this was an action by a third party, the driver of the other car, not the child. Judge Stolz reasoned:

> From the facts . . . it is readily perceived that there is no effort by the unemanipated child (plaintiff) to sue his mother. The suit was brought only against the defendant, Mrs. Eschen, who in turn brought a third-party action against plaintiff's mother for contribution.[160]

The next best thing to dropping the charitable immunity doctrine[161] is to find a smooth path around it. The plaintiff found such a path in *Mack v. Big Bethel A.M.E. Church, Inc.*[162] Mrs. Mack brought a suit for personal injuries sustained in a fall on rotten steps at residential premises which she rented from the defendant church corporation. The plaintiff alleged that she could recover from the income provided by the church's rental duplex and other commercial property. The court agreed and held that the church was liable to the extent of the noncharitable assets.[163]

Settlement and Release

A new provision of Ga. Code Ann. §109-1303A clarifies an ambiguous area of the law. It provides:

> The settlement of a claim or cause of action arising from a motor vehicle collision for property damage shall not bar . . . the claim . . . for physical injury to the person. The settlement of a claim or cause of action arising from a motor vehicle collision for physical injury to the person shall not bar the . . . claim . . . for property damage.[164]

The new section is supported by the holding in *Glover v. Southern Bell Telphone & Telegraph Co.*[165] *Glover*, in turn, reverses *Gregory v. Schnurstein*.[166] It should be noted, to be sure, that general language in a settlement may still function to release both the property and the personal injury actions.[167]

A release was not given effect in *Heard v. Johnson*[168] because of apparent

159. 127 Ga. App. 719, 194 S.E.2d 589 (1972).
160. *Id.* at 734, 194 S.E.2d at 597 (concurring specially in dissent).
161. President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).
162. 125 Ga. App. 713, 188 S.E.2d 915 (1972).
163. *Id.* at 714, 188 S.E.2d at 916.
164. Ga. Laws, 1973, p. 297.
165. 229 Ga. 874, 195 S.E.2d 11 (1972).
166. 212 Ga. 497, 93 S.E.2d 680 (1956).
167. Glover v. Southern Bell Tel. & Tel. Co., 229 Ga. 874, 195 S.E.2d 11 (1972).
168. 126 Ga. App. 222, 190 S.E.2d 455 (1972).

overreaching by the insurance company. The plaintiff was an ungrammatical person with a sixth grade education. She was pestered by the defendant to go with him to the adjuster's office. The plaintiff was under medical treatment, and was dizzy and weak. Because of these circumstances and the fact that "nothing was said about payment to her," the question of the validity of the release was for the jury.[169]

Damages

Smith v. Tri-State Culvert Manufacturing Co.[170] held that a wife may recover for loss of consortium. The court defined consortium as "companionship, love, affection, aid, services, cooperation, sexual relation, and comfort, such being special rights and duties growing out of the marriage covenants."[171] It then rightfully concluded that "we cannot regard an interference with these stated elements as being damnum absque injuria."[172]

Statutes

It is fitting to end the survey of torts by noting that the legislature has not yet passed a no-fault act. Perhaps next year's survey will begin with the statutory section rather than end with it.

169. *Id.* at 224, 190 S.E.2d at 456.
170. Smith v. Tri-State Culvert Mfg. Co., 126 Ga. App. 508, 191 S.E.2d 92 (1972).
171. *Id.* at 510, 191 S.E.2d at 94.
172. *Id.*