Torts

By Hardy Gregory, Jr.*

I. Family-Purpose-Car Doctrine

The evolution of the Family-Purpose-Car Doctrine in Georgia over the years has been a most interesting subject to observe.[1] A new aspect was added this year by the Supreme Court of Georgia in *Phillips v. Dixon*.[2]

The doctrine provides that the head of a family who keeps and maintains an automobile for the use of the members of the family is responsible for injuries to third parties that result from the negligent use of the automobile by a member of the family if the automobile is being used in furtherance of a family purpose.[3] It has long been held that the doctrine applies when the family member permits others to drive the vehicle if the family member is present and in control of the vehicle and it is being used for a family purpose.[4] It is also established that the mere disobedience of a family member, who uses a vehicle on a particular occasion against the instructions of a parent, does not bar application of the doctrine.[5]

But what if a parent has given his child express instructions not to allow third parties to operate the vehicle? In precise language, *Phillips* held that disobedience of such instructions alone is no bar to application of the doctrine:

> [A] parent who keeps and maintains an automobile for the use, comfort, pleasure and convenience of the family, is responsible for injuries resulting from the negligence of a third person whom the family member permits to drive, where the family member remains in the automobile and retains control, authority and direction over it, and where the automobile is being used in furtherance of the purposes of a family car. We hold this liability created by the Family Car Doctrine to be applicable notwithstanding the fact that the parent has expressly instructed the family member not to permit third persons to drive the car.[6]

Down through the years, there has been a running controversy of a sort between those who say that the Family Car Doctrine is but an extension

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1. The process began with Griffin v. Russell, 144 Ga. 275, 87 S.E. 10 (1915).
2. 236 Ga. 271, 223 S.E.2d 678 (1976).
3. Cohen v. Whiteman, 75 Ga. App. 286, 43 S.E.2d 184 (1947).
4. *Id.*
5. Battle v. Kilcrease, 54 Ga. App. 808, 189 S.E. 573 (1936).
6. 236 Ga. at 277, 223 S.E.2d at 681-82.

of the law of principal-and-agent on the one hand and, on the other hand, those who say that the Family Car Doctrine has become a body of law unto itself. The passing of time seems to favor the latter as the better argument.

II. PRODUCTS LIABILITY

In 1968 the General Assembly enacted an amendment to Georgia Code § 105-106, which deals with the liability of manufacturers of personal property.[7] The act purported to do away with the requirement of privity in tort actions and to base liability upon a finding that the property, when sold, was not merchantable and not reasonably suited to the use intended. In 1975 the Georgia Supreme Court determined that the act created a measure of strict liability in this state.[8]

During this survey period, a case that resulted in three separate opinions in our appellate courts further defined strict liability as it now applies in Georgia.[9] All three opinions should be read together for a grasp of the facts and rules of law set down. Two employees of a restaurant were attempting to open a plastic bottle containing a substance for cleaning drains. One employee, Parzini, held the container while another undertook to remove the top with a pair of pliers. The substance in the bottle turned out to be almost pure sulfuric acid, and it squirted into the air, fell on plaintiff Parzini's head and severely burned him and blinded him. A jury returned a verdict for the defendant. The supreme court, in an opinion by Presiding Justice Undercofler, plainly held that a plaintiff is not required to prove negligence under § 105-106. But the manufacturer is not an insurer. The manufacturer is liable only if his product "was not merchantable and reasonably suited to the use intended and such condition is the proximate cause of the injury sustained."[10] The phrase "not merchantable and reasonably suited to the use intended" means that the plaintiff must show that the manufacturer's product was defective when it was sold. The court pointed out that there is a substantial body of law built up in this country around the word "defective." A product is not defective when it is safe for normal handling and consumption. If the injury is the result of abnormal handling, the seller is not liable. If the product is such that the seller has

7. Ga. Laws, 1968, p. 1166. Part of the amendment provides: "However, the manufacturer of any personal property sold as new property, either directly or through a dealer or any other person, shall be liable in tort, irrespective of privity, to any natural person who may use, consume or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended and its condition when sold is the proximate cause of the injury sustained; a manufacturer may not exclude or limit the operation hereof."

8. Ellis v. Rich's, Inc., 233 Ga. 573, 212 S.E. 2d 373 (1975).

9. Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975); Parzini v. Center Chem. Co., 136 Ga. App. 396, 221 S.E.2d 475 (1975); Parzini v. Center Chem. Co., 134 Ga. App. 414, 214 S.E.2d 700 (1975).

10. Center Chem. Co. v. Parzini, 234 Ga. 868, 869, 218 S.E.2d 580, 582 (1975).

reason to anticipate that danger may result from a particular use, it is required to give an adequate warning of that danger.[11] The supreme court held that some products, even though dangerous, can still be sold if adequate warnings are given. In this particular case, even though the contents of the bottle were sulfuric acid, if the warnings were adequate, the product is not rendered "defective." The court further held that if consumers discover defects and thus are aware of the danger but still proceed unreasonably to use the product, they are barred from recovery.

When the *Parzini* case returned to the court of appeals, these rules were applied. The trial court had erroneously charged that the jury must find the manufacturer negligent before the plaintiff could recover. The correct rule was stated by the court of appeals in the last of the three appellate opinions:

> The jury is first to determine whether the product was defective. In this it has for consideration the manufacture, the packaging, and the warnings connected with its use. If the jury finds the product defective, it next considers whether the user knew of the defect and danger, and whether his use of the product in view of this knowledge was unreasonable. If so, the plaintiff may not recover on this legal theory. Thus, contributory negligence applies to the negligence theory of action, whereas assumption of risk applies to the strict liability theory.[12]

III. Rear-End Collisions

There has been a tendency in a number of recent decisions arising from automobile collisions to remove a certain type negligence case from jury consideration. Where two vehicles are proceeding in the same direction in the same lane of traffic and the following vehicle collides with the rear-end of the leading vehicle, the courts have tended to direct verdicts or to grant motions for summary judgment in favor of the leading vehicle on the issue of negligence.[13] This trend has been brought to a stop in *Atlanta Coca-Cola Bottling Co. v. Jones*.[14] Of course, there may be circumstances in any general type negligence case where a certain verdict is demanded, but the court has now made it plain that the general principles on directed verdicts and summary judgments apply equally to all type cases. So the principle that issues of negligence and proximate cause are issues for a jury except

11. Restatement (Second) of Torts §402A, comment *h* (1966), *cited* at 234 Ga. at 870, 218 S.E.2d at 582.

12. Parzini v. Center Chem. Co., 136 Ga. App. 396, 399, 221 S.E. 2d 475, 478-79 (1975).

13. *See* Pike v. Stafford, 111 Ga. App. 349, 141 S.E. 2d 780 (1965); Sutherland's Eggs, Inc. v. Barber, 116 Ga. App. 393, 394, 157 S.E. 2d 491 (1967); Rosenfeld v. Young, 117 Ga. App. 35, 159 S.E. 2d 447 (1969); Malone v. Ottinger, 118 Ga. App. 778, 165 S.E. 2d 660 (1968); Johnson v. Curenton, 127 Ga. App. 687, 195 S.E. 2d 279 (1972); Glaze v. Bailey, 130 Ga. App. 189, 202 S.E. 2d 708 (1973).

14. 236 Ga. 448, 224 S.E. 2d 25 (1976), *rev'g* 135 Ga. App. 362, 218 S.E.2d 36 (1975).

in very rare cases applies in rear-end collision cases. The supreme court quoted approvingly from a decision written in 1935 by Judge Hutcheson of the federal judiciary:

> All drivers of vehicles using the highways are held to the exercise of due care. A leading vehicle has no absolute legal position superior to that of one following. Each driver must exercise ordinary care in the situation in which he finds himself. The driver of the leading vehicle must exercise ordinary care not to stop, slow up, nor swerve from his course without adequate warning to following vehicles of his intention so to do. The driver of the following vehicle, in his turn, must exercise ordinary care to avoid collision with vehicles, both those in front and those behind him. Just how close to a vehicle in the lead a following vehicle, ought, in the exercise or ordinary care, be driven, just what precautions a driver of such a vehicle must in the exercise of ordinary care take to avoid colliding with a leading vehicle which slows, stops, or swerves in front of him, just what signals or warnings the driver of a leading vehicle must, in the exercise of due care, give before stopping or slowing up of his intention to do so, may not be laid down in any hard and fast or general rule. In each case except when reasonable minds may not differ, what due care required, and whether it was exercised, is for the jury.[15]

IV. Age of Accountability

When considering the capacity of a child to exercise due care, should it matter whether the child happens to be a plaintiff or a defendant in the lawsuit? In the past, it has made all the difference in Georgia.[16] In fact, the entire area of the tort responsibility of minors has been an unsettled matter for a good many years in this state.[17] Some clarification is now under way in our appellate courts. During the survey period, *Ashbaugh & Trotter*[18] was decided by the supreme court. The plaintiff, six years and three months old, was riding a grass-mowing machine being operated by

15. Cardell v. Tennessee Electric Power Co., 79 F.2d 934 (1935), *cited* at 236 Ga. at 450, 224 S.E.2d at 27.

16. *Brady v. Lewless*, 124 Ga. App. 858, 186 S.E. 2d 310 (1971).

17. As an example see Faith v. Massengill, 104 Ga. App. 348, 121 S.E. 2d 657 (1961), which concluded that there was no distinction between minor defendants who commit actionable negligence and minor plaintiffs who commit acts of contributory negligence. But then compare Brady v. Lewless, 124 Ga. App. 858, 186 S.E.2d 310 (1971), which indicated precisely the opposite conclusion. With regard to the age limit for actionable negligence, see: Crawford v. Southern Railway Co., 106 Ga. 870, 33 S.E. 826 (1899) (4-½-year-old child); Riggs v. Watson, 77 Ga. App. 62, 47 S.E. 2d 900 (1948), and Christian v. Smith, 78 Ga. App. 603, 51 S.E. 2d 857 (1949) (both cases about five-year-old children). In Brewer v. Gittings, 102 Ga. App. 367, 116 S.E. 2d 500 (1960), the court held that a seven-year-old child presented a jury issue over whether he could be guilty of negligence or contributory negligence. To so hold, it was necessary for that court to disagree with what had been said in Harris v. Combs, 96 Ga. App. 638, 101 S.E. 2d 144 (1957).

18. 237 Ga. 46, 226 S.E. 2d 736 (1976), *rev'g* 137 Ga. App. 378, 224 S.E.2d 42 (1976).

his stepfather, the defendant. The defendant contended that the injury was due to the child's own acts. The trial court entered a pre-trial order stating that a child six years old can be guilty of contributory negligence and that a jury should resolve the issue. Judge Clark, writing for the court of appeals, disagreed in principle but felt that the court was bound by stare decisis to follow *Redtop Cab Co. v. Cochran,*[19] holding that a child six years old was too young to be capable of contributory negligence. Without the overriding principle of stare decisis, it is plain to see, the court of appeals would have been inclined toward the view taken in the Second Restatement of Torts, which disapproves of setting an arbitrary age at which a child can be guilty of negligence and leaves the issue to the jury to resolve.[20] When *Trotter* reached the supreme court, there was an obvious initial desire on the part of that court to lay down a definite rule for the entire problem. But the facts in the case allowed only part of the problem to be reached. At any rate, the court held that the question of the contributory negligence of a child was an issue for the jury to decide and thus rejected any arbitrary age below which a child cannot, as a matter of law, be guilty of contributory negligence. The issue whether a defendant below a given age can be guilty of negligence was not before the court and hence not decided. There is little doubt that if the question soon arises in the supreme court, the court will decide that no arbitrary age will be set, regardless of whether the child is a plaintiff or a defendant. In other words, the plain language of Georgia Code § 105-204 will be followed: "Due care in a child of tender years is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation under investigation."

V. Professional Negligence[21]

Does the informed-consent doctrine relating to medical malpractice exist in Georgia? A great deal of discussion has been had about the matter. The court of appeals has now said that the answer is in the negative.[22]

The informed-consent rule provides that consent given by a patient to a physician for treatment is void unless the physician first discloses to the

19. 100 Ga. App. 707, 112 S.E.2d 229 (1959).

20. Restatement (Second) of Torts §283A (1966). The Restatement does imply that there is a minimum age, "probably somewhere in the vicinity of four years," below which negligence can never be found. This comment is peculiar. The problem arose in the beginning because of a feeling that there must be some age below which children as a matter of law, are not accountable for what they do. Why undertake to set any age? If one can say four years is the age limit, surely another might just as well say six.

21. I adopt the term at the suggestion of Judge Clark, writing in Kenney v. Piedmont Hospital, 136 Ga. App. 660, 222 S.E.2d 162 (1975), because "malpractice" has a "sinster connotation" and because "professional negligence" is a more comprehensive title for a homogeneous area of the law.

22. Young v. Yarn, 136 Ga. App. 737, 222 S.E. 2d 113 (1975).

patient the risks involved in the treatment. In 1966 the court of appeals raised the question, without giving the answer, whether Georgia recognized this doctrine.[23] In 1971 the General Assembly passed a statute entitled "Georgia Medical Consent Law,"[24] which undertook, in part, to define and describe the disclosure necessary. This statute requires disclosure "in general terms [of] the treatment or course of treatment."[25] Then arose the question whether the disclosure of the treatment "in general terms" includes disclosure of the risks. In *Yarn*, Judge Pannell characterized "treatment" as "a broad term covering all steps taken to effect a cure of an injury or disease; the word including examination and diagnosis as well as application of remedies."[26] Judge Pannell found that the legislature has used language that does not require disclosure of risks. So the Doctrine of Informed Consent does not prevail in Georgia; a plaintiff cannot base his claim on allegations that the physician breached a duty owed to his patient in failing to warn of the risks of treatment. Whether the last word has been spoken on the subject remains to be seen.[27]

Ordinarily, the standards of a profession must be established by expert testimony of those who are qualified in the profession and know what those standards are.[28] It is not sufficient for the expert to merely give his own views; he must establish the standard practice in the profession.[29]

Ferrell v. Haas[30] dealt with a standard in the legal profession. A default judgment was entered against a defendant in DeKalb County. The defendant retained a law firm, which unsuccessfully sought to reopen the default judgment. A trial was set on the issue of damages only, however. The attorneys failed to appear for that trial, and a second default, this for damages in excess of $27,000, was entered. It was then discovered that someone in the Superior Court clerk's office had furnished the attorney the wrong date for the trial. A calendar that had been published showed the correct date but failed to list the attorney's name as counsel of record. There was a local rule of court that counsel and parties might rely upon the publishd calendar, and it also appeared that it was an accepted prac-

23. Mull v. Emory University, Inc., 114 Ga. App. 63, 150 S.E. 2d 276 (1966).

24. Ga. Laws, 1971, p. 438; GA. CODE ANN. ch. 88-29 (1971, Supp. 1976).

25. GA. CODE ANN. §88-2906 (1971) provides in part: "A consent to medical and surgical treatment which discloses in general terms the treatment or course of treatment in connection with which it is given, and which is duly evidenced in writing and signed by the patient or other person or persons authorized to consent pursuant to the terms hereof, shall be conclusively presumed to be a valid consent in the absence of fraudulent misrepresentations of material facts in obtaining the same."

26. BLACK'S LAW DICTIONARY 1673 (4th ed. 1951), *quoted* at 136 Ga. App. at 738, 222 S.E.2d at 114.

27. *Yarn* has been followed in Kenney v. Piedmont Hospital, 136 Ga. App. 660, 222 S.E.2d 162 (1975).

28. Shea v. Phillips, 213 Ga. 269, 98 S.E. 2d 552 (1957).

29. Kenney v. Piedmont Hospital, 136 Ga. App. 660, 664, 222 S.E. 2d 162, 167 (1975).

30. 136 Ga. App. 274, 220 S.E. 2d 771 (1975).

tice for attorneys to examine the calendar for names of their firms, since the list of cases was quite lengthy. The suit that had gone into default was eventually settled. The attorney then brought suit against the defendant in the default case to collect his fee. The defendant filed a counterclaim alleging that the attorney was negligent in failing to appear and defend the original action which went in default. The court of appeals upheld the grant of a motion for summary judgment on the ground that there was no jury issue on the negligence of the attorney. The court found that, as a matter of law, the attorney performed his services with the reasonable degree of care and skill ordinarily employed by members of his profession under similar circumstances.

VI. EMOTIONAL HARM

This section deals with an area of tort law not often litigated in Georgia: cases where a person is injured by the negligent acts of another, and a relative or other person closely connected to the injured party suffers shock and emotional distress upon learning of the injury.

The rules and an analysis of these rules have been very well put forth in *Strickland v. Hodges.*[31] The plaintiff's 11-year-old child had been seriously injured in a collision between an automobile in which she was riding and an automobile driven by the defendant, who admitted he was intoxicated. The plaintiff was not present but learned of the injuries later. The three theories recognized in the case as having been established in various jurisdictions for holding a defendant liable to bystanders are the "impact theory," the "zone of danger theory," and the "fear for another theory." The court recognized that Georgia has already adopted the impact rule,[32] which requires that the defendant's negligent conduct result in actual contact with the plaintiff before there can be recovery. The plaintiff in the lawsuit recognized this controlling authority, but he attempted to distinguish his situation; he said the negligence in this case amounted to wilful and wanton negligence, so the impact rule should not apply. The plaintiff's counsel relied on a number of cases arising in California and Hawaii.

The court of appeals acknowledged that Georgia decisions had allowed a recovery for emotional harm without impact if the act was wilful and was directed toward the plaintiff.[33] However, the court declined to extend those cases. It denied recovery for wilful and wanton negligence where there was no impact and the negligence was not directed toward the plaintiff. Following the reasoning of a New York decision,[34] the court said there must be a

31. 134 Ga. App. 909, 216 S.E. 2d 706 (1975).

32. Kuhr Bros., Inc. v. Spahos, 89 Ga. App. 885, 81 S.E. 2d 491 (1954); Blanchard v. Reliable Transfer Co., 71 Ga. App. 843, 32 S.E. 2d 420 (1944).

33. Digsby v. Carrol Baking Co., 76 Ga. App. 656, 47 S.E. 2d 203 (1948); Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 S.E. 189 (1907).

34. Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419 (1969).

reasonable and proper limit to the scope of the duty of care owed by defendants; otherwise, people—motorists in particular—would be confronted with totally unpredictable liability. Where would one draw the line for those who might recover? Who would be allowed to be plaintiffs in such lawsuits? Would all bystanders be brought in? All relatives? All persons connected in any way? The law, the court reasoned, must control the legal consequences of wrongs; it is enough that the law establish liability in favor of those directly or intentionally harmed. The court finally rested its decision upon the existing right of a father of an injured child to recover for expenses and loss of services.[35]

In *Howard v. Bloodworth,*[36] the Court of Appeals of Georgia approved the reasoning of *Strickland v. Hodges*. The plaintiff said that his body rejected a transplanted kidney when he learned of the death of his mother due to the wilful and wanton acts of another. Since there was no impact, there was no recovery.

VII. MISCELLANEOUS CASES

The remaining cases will be grouped together. They deal with a variety of topics.

For the first time in Georgia, it has been held that oral communication of a written defamation constitutes libel.[37] The plaintiff was an employee of the defendant and was discharged. She applied for a job with another employer. The second employer inquired of an agent of the first employer about the reason for the defendant's dismissal. Over the telephone, the agent read a statement from the personnel file of the plaintiff: "Christine was discharged for shortages." The question was whether there had been publication of a libel where the defamatory statement was reduced to writing and the only possible publication was the reading of that writing to another. The supreme court analyzed the relevant statutes. Georgia Code § 105-701 defines "libel" as a false defamation of another expressed in writing and published,[38] and § 105-705 defines "publication" as communication to another.[39] The court quoted some persuasive authority to demonstrate that the writing of a defamatory statement distinguishes libel from slander. It is the permanence of the writing that is significant. Therefore, it is not particularly significant whether the writing is communicated

35. The right is granted in GA. CODE ANN. §105-107 (1968).

36. 137 Ga. App. 478, 224 S.E. 2d 123 (1976).

37. Garren v. Southland Corp., 235 Ga. 784, 221 S.E. 2d 571 (1976).

38. The exact language of GA. CODE ANN. §105-701 (1968) is: "A libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule. The publication of the libelous matter is essential to recovery."

39. The exact language of GA. CODE ANN. § 105-705 (1968) is: "A libel is published as soon as it is communicated to another person other than the party libeled."

by reading it to another person or whether the other person learns of the written statement by reading it himself. Publication occurs in either event.

A question about the right of privacy divided the court of appeals in *Hines v. Columbus Bank and Trust Co.*[40] On behalf of one of its customers, the bank wrote a letter of inquiry to the U.S. ambassador at Costa Rica and sought information about the plaintiff's business relationships, income and ownership in certain corporations. After the plaintiff sued for invasion of privacy, the court of appeals upheld the granting of the defendant's motion to dismiss. In doing so, the court balanced the plaintiff's right to be left alone against the need in commerce for the business world to gather information. "Law, logic, and the practicalities of modern commerce" require that inquiries such as those made about the plaintiff be allowed, the court said. When the courts balance such interests, it is easy to see that different opinions exist. One's right to be let alone and the necessities of the commercial world are ideas that are not precisely delineated. It is likely that a great deal of litigation will be required to fully define these terms.

From time to time there arises the question whether intervening criminal act is sufficient to insulate the negligence of a defendant. During the survey period, such a case arose.[41] The defendant, Munford, Inc., operated a chain of convenience stores, which had suffered numerous armed robberies. Another defendant was hired to stake out some of the chain stores with guards. One of the stores was robbed; the guard fired a short at the robber but struck the plaintiff, who was about to enter the store. The court of appeals held that a summary judgment for the defendants was proper because the criminal act of the robber insulated any negligence of the defendant as a matter of law. The supreme court reversed. It reasoned that a jury must determine whether it was reasonably foreseeable that the events might occur just as they did and whether the defendant was negligent in failing to exercise ordinary care to protect the plaintiff under the circumstances.

It is a familiar principle that a malicious-prosecution case may not proceed unless it is shown that the prosecution terminated in favor of the plaintiff. In *Ayala v. Sherrer,*[42] the supreme court answered in the affirmative the certified question of the court of appeals: "Where on trial the only showing made is that a criminal arrest warrant against the plaintiff was dismissed by the Recorder's Court of DeKalb County is this alone sufficient to establish that the prosecution terminated favorably to the plaintiff so as to afford the basis for a malicious prosecution action?" The supreme court already had recognized that a prosecutor's request for dismissal of an arrest warrant was sufficient to show termination of the crimi-

40. 137 Ga. App. 268, 223 S.E. 2d 468 (1976).
41. Lay v. Munford, Inc., 235 Ga. 340, 219 S.E. 2d 416 (1975), *rev'g* 134 Ga. App. 642, 216 S.E.2d 123 (1975).
42. 234 Ga. 112, 214 S.E. 2d 548 (1975).

nal prosecution in favor of a plaintiff. *Ayala* held that the showing is still sufficient, even though the arrest warrant is dismissed over the objection of the prosecutor. The plaintiff should be allowed, however, to show that the prosecution has not terminated even though the warrant was dismissed.