Torts

By Ralph F. Simpson*

From the almost two hundred tort or tort-related cases decided by the appellate courts of this state, the following decisions have been gleaned because of their significance and impact in this field of the law.

I. Family Purpose Doctrine

This doctrine, once thought by many to be an extension of the law of principal and agent has been the case law of Georgia since *Griffin v. Russell*[1] was decided in 1915. Since then the doctrine has been consistently applied, developed and expanded.[2] The most recent expansion of the doctrine occurred in 1969 with the case of *Stewart v. Stephens*,[3] in which the Georgia Supreme Court determined that "the family-purpose doctrine as applied . . . to automobiles is applicable as well to boats."[4] This lead has been followed by the court of appeals during the survey period in *Kimbell v. DuBose*.[5] The plaintiff sued the pilot-son and father-owner of an airplane. The evidence showed that the airplane was used for the entertainment and pleasure of both the father and the son, who was 21, unemployed, and lived in his parents' home. Upon review of the prior decisions in which the doctrine had been expanded and broadened, the court was compelled to conclude that the doctrine should have broad application. Accordingly, it held: "The family purpose doctrine is applicable to aircraft as well as automobiles and watercraft."[6]

Therefore, it seems that we have firmly established in Georgia a body of law unto itself dealing with the family purpose doctrine.

II. Slip and Fall

Two recently decided cases further define the nature and quantum of

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1. 144 Ga. 275, 87 S.E. 10 (1915).
2. *See, e.g.*, Hubert v. Harpe, 181 Ga. 168, 182 S.E. 167 (1935); Ferguson v. Gurley, 218 Ga. 276, 127 S.E.2d 462 (1962); Stewart v. Stephens, 225 Ga. 185, 166 S.E.2d 890 (1969); Phillips v. Dixon, 236 Ga. 271, 223 S.E.2d 678 (1976).
3. 225 Ga. 185, 166 S.E.2d 890 (1969).
4. *Id.*
5. 139 Ga. App. 224, 228 S.E.2d 204 (1976).
6. *Id.* at 228, 228 S.E.2d at 207.

proof necessary in slip and fall cases. The first of these is *Winn-Dixie Stores, Inc. v. Hardy.*[7] The plaintiff saw "a big . . . greasy looking, wet . . . sort of something" after she fell. The defendant denied knowledge of the presence of any foreign substance on the floor. The court determined that this case fell into the category of cases in which liability is predicated upon the duty of the defendant to exercise reasonable care in inspecting and keeping the premises in safe condition.[8] The court held that the plaintiff in this type case must prove "a period of time [during which] the dangerous condition has been allowed to exist. Without such [proof] it would not be possible to determine whether the defendant had been afforded a reasonable time within which to inspect and remove the hazard."[9] Because of plaintiff's failure to prove a specific length of time that the foreign substance was permitted to remain on the floor, the verdict and judgment for the plaintiff was reversed.

The second case, *Piggly-Wiggly Southern, Inc. v. Tucker*[10] dealt with the quantum of evidence necessary to get a slip and fall case to a jury. Twenty-two witnesses testified in the case. None of defendant's employees saw any foreign substance upon which plaintiff could have slipped. However, one of the witnesses saw a "slush" of transparent, oily substance on the floor about five minutes before plaintiff fell. This testimony presented a question for the jury which was resolved by it in favor of plaintiff. Judgment affirmed!

III. LIBEL

Two libel actions resulted in decisions of first impression by the Georgia courts. In one of the cases, *Garren v. Southland Corp.*,[11] the Georgia Supreme Court held for the first time that oral communication of a written defamation constitutes libel. This year, on its second appearance before the same court on certiorari, the court considered the question of the defendant corporation's authorization to publish slander.[12] The court held that the usual rules of respondeat superior apply in libel cases. This holding is a departure from the applicable rule in a slander case, viz; that the agent

7. 138 Ga. App. 342, 226 S.E.2d 142 (1976).

8. *See* Home Fed. Sav. & Loan Ass'n v. Hulsey, 104 Ga. App. 123, 121 S.E.2d 311 (1961); Boatright v. Rich's Inc., 121 Ga. App. 121, 173 S.E.2d 232 (1970). *Compare,* S. H. Kress & Company v. Flanigan, 103 Ga. App. 301, 119 S.E.2d 32 (1961); Sharpton v. Great A.&P. Tea Co., 112 Ga. App. 283, 145 S.E.2d 101 (1965). The latter cases are the type in which the liability of the defendant is based upon the fact that an employee of the defendant was in the immediate area of the dangerous condition and could have easily seen the substance and removed the hazard.

9. 138 Ga. App. at 345, 226 S.E.2d at 145.

10. 139 Ga. App. 873, 229 S.E.2d 804 (1976).

11. 235 Ga. 784, 221 S.E.2d 571 (1976).

12. Garren v. Southland Corp., 237 Ga. 484, 228 S.E.2d 870 (1977).

must be expressly authorized or directed to publish the libel.[13] Accordingly, the question in a libel case against a corporate defendant has become whether the publication is made by an employee while acting within the scope of his employment.[14]

The other case also involved a corporate party, but this time the corporation was the plaintiff, not the defendant. In *Eason Publications, Inc. v. Atlanta Gazette, Inc.*,[15] the plaintiff brought a libel action alleging malicious publication of false information to advertisers which would injure the plaintiff's standing and business reputation and expose it to ridicule, resulting in losses of advertising revenue. An interlocutory appeal to the court of appeals was granted to determine "the sole question of whether a corporation may be libeled, a question of first impression in this state."[16]

The defendant contended that the language of the Georgia statute did not include corporations because the statute refers to an "individual."[17] The court rejected this argument, relying instead on the common-law rule which generally recognized a cause of action by corporations for libel when the publication adversly affected its business, property or credit. The test in such cases was stated as follows: "In determining whether the business reputation of a corporation has been injured, the test is not different from that which would be applied in determining whether an individual's business reputation has been defamed."[18]

IV. Malicious use of Process

In *Johnson v. Monumental Properties*,[19] the court restated the rule that there are three essential elements in an action for malicious use of process, i. e., (1) malice, (2) want of probable cause, and (3) termination of the prior proceedings in favor of the defendant.

In a case involving interesting facts, the court dealt with the first of these essential elements. The action for malicious use of process in *Balasco v. County of San Diego*[20] arose out of a prior action by the county under the Uniform Reciprocal Enforcement of Support Act. Following the Georgia law, since the wrong (filing the action) occurred in Georgia, the court reasoned that a state cannot be charged with malice, and therefore, neither

13. Home Machine Co. v. Souder, 58 Ga. 64 (1877).

14. *See* Behre v. National Cash Register Co., 100 Ga. 213, 27 S.E. 986 (1897).

15. 141 Ga. App. 321, 233 S.E.2d 232 (1977).

16. *Id.*

17. Ga. Code Ann. §105-701 (1968) provides: "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." (Emphasis added.)

18. 141 Ga. App. at 321, 233 S.E.2d at 233.

19. 141 Ga. App. 151, 232 S.E.2d 644 (1977).

20. 140 Ga. App. 482, 231 S.E.2d 485 (1977).

can a county. Since the defendant could not be charged with malice, the grant of summary judgment in its favor was affirmed.

V. STATUTES OF LIMITATIONS

Several cases were decided concerning the effect of the applicable statute of limitation.

The first, *Bailey v. General Apartment Co.*,[21] involved the two-year statute on an action for malicious prosecution.[22] The plaintiff had been previously indicted for the burglary of one of the apartments managed by the defendant. The case was terminated by nolle prosequi. More than two years elapsed from the date of the nolle prosequi before the plaintiff's suit was filed. However, the plaintiff contended that the suit was brought within the statutory period because Code §27-601[23] allows reindictment within six months of a nolle prosequi and thus the two-year statute did not begin to run until the end of that time. The court held that the action was barred. The statute began running on the date the "nol-pros" was entered rather than at the end of the six-month period.

The plaintiff in *Mattair v. St. Joseph's Hospital, Inc.*[24] was injured when her hospital bed jackknifed and collapsed. More than three years later she brought suit for her injuries. The defendant answered and pleaded the statute of limitations. The plaintiff then amended her complaint, setting up a claim for breach of contract by the hospital. The question according to the Court of appeals was as follows: "[W]hether the complaint as amended [was] barred by the two-year statute of limitation for personal injuries or the four or six-year statute involving contract actions."[25]

Because this question had not arisen in Georgia before, the court relied on analagous decisions in medical negligence cases to reason its way to decision. The election to sue either in tort or contract in such actions was recognized. The plaintiff was allowed the same election, the court observing: "Plaintiff should be allowed to control the theory of her case as long as no legal principles are circumvented. We see none here, and hold that the trial court erred in sustaining defendant's motion to dismiss based on the statute of limitation."[26] Accordingly, it was held that the four-year statute on contract actions applied and that plaintiff's suit was timely filed.

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21. 139 Ga. App. 713, 229 S.E.2d 493 (1976).

22. GA. CODE ANN. §3-1004 (1975).

23. GA. CODE ANN. §27-601 (1972) provides: "If the indictment is found within the time limited, and for any informality shall be quashed or a nolle prosequi entered, a new indictment may be found and prosecuted within six months from time the first is quashed or the nolle prosequi entered."

24. 141 Ga. App. 597, 234 S.E.2d 537 (1977).

25. *Id.*

26. *Id.* at 599, 234 S.E.2d at 538-39.

In *Liggett v. Benton Brothers Drayage & Storage Co.*,[27] the issue "simply stated, is whether a claim for lost wages and for lost earning capacity must be brought within two years or within four years after the right of action accrues."[28] As the court predicted, resolution of the question is considerably more difficult. Although there are conflicting decisions on point, the court accepted *Frazier v. Georgia Railroad & Banking Co.*[29] as controlling authority, in which the supreme court held: "Where an injury is done to the person of the plaintiff, the pecuniary damage sustained thereby cannot be so separated as to constitute an independent cause of action, for the cause of action is single and consists of injury to the person, and the damages are the consequence merely of that injury."[30] Using this line of reasoning the court held in *Leggett* that the statute of limitation for recovery of lost earning capacity is two years. Going further, the court said: "[W]e . . . reiterate that monetary loss or damage resulting from an injury to the person must be recovered within two and not four years."[31]

Following this lead, the court stated that the claim in *Stoddard v. Woods*,[32] seeking recovery for medical, surgical, dental, hospital, and drug expenses incurred as an result of an automobile collision, was controlled by *Leggett*.

These decisions abrogate the prior distinction in personal injury cases between "injuries to personalty and injuries to person."[33] Claims for all damages in personal injury cases must now be brought within two years.

VI. AGE OF ACCOUNTABILITY

The anomoly which has existed in our law on this point for so long still continues.[34] Last year the supreme court decided *Ashbaugh v. Trotter*[35] and rejected any specific age of accountability for the contributory negligence of an infant plaintiff. Resolving this question, the court held that the plain meaning of Code §105-204[36] must be applied by the jury in determining whether an infant plaintiff should be found contributorily negligent.

However, controversy still surrounds the question of an infant defen-

27. 138 Ga. App. 761, 227 S.E.2d 397 (1976).
28. *Id.* at 762, 227 S.E.2d at 399.
29. 101 Ga. 70, 28 S.E. 684 (1897).
30. *Id.* at 76, 28 S.E. at 686.
31. 138 Ga. App. at 766, 227 S.E.2d at 401.
32. 138 Ga. App. 770, 227 S.E.2d 403 (1976).
33. *See* Hutcherson v. Durden, 113 Ga. 987, 39 S.E. 495 (1901); Dalrymple v. Brunswick Coca-Cola Bottling Co., 51 Ga. App. 754, 181 S.E. 597 (1935); Robinson v. Bomar, 122 Ga. App. 564, 177 S.E.2d 815 (1970); Davis v. Patrick, 128 Ga. App. 677, 197 S.E.2d 743 (1973).
34. *See* Gregory, *Annual Survey of Georgia Law; Torts*, 28 MERCER L. REV. 247, 250 (1976).
35. 237 Ga. 46, 226 S.E.2d 736 (1976).
36. GA. CODE ANN. §105-204 (1968) provides: "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 occassion and situation under investigation."

dant's responsibility for negligence. In *Ashbaugh,* the supreme court declined to review the decision of *Hatch v. O'Neill*[37] which held that "an infant under the age of criminal responsibility is immune from suit for tort."[38] During the survey period this rule was applied in *Baroletti v. Kushnee.*[39] Baroletti was one month short of 12 years of age at the time he allegedly vandalized the plaintiff's home. The trial court denied the defendant's motion for summary judgment based upon his defense of immunity under Ga. Code Ann. §105-1806 (1968) which states:

> Infancy is no defense to an action in tort, provided the defendant has arrived at those years of discretion and accountability prescribed by this Code for criminal offenses.

When the case reached the court of appeals, the majority reversed, finding error in the trial judge's ruling.

Presiding Judge Deen entered a well-reasoned, convincing, dissenting opinion with the concurrence of Judges Stoltz, McMurray, and Smith, based upon the language of the statute. His precise point was that the words "*this Code*" incorporated by reference the specific provisions of the Code of 1863, which continued unchanged in the Code of 1933. These statutes set the age of criminal responsibility at 10 years. The present statute, Ga. Code Ann. §27-701, (1972) sets the age at 13 years. The dissent, therefore, contended that civil liability is tied to the ten-year age of accountability by the direct reference to the earlier codes by the words "*this Code.*" At the very least, this interpretation provides the required degree of predictability needed by the bench and bar of the state. Otherwise the age of accountability of defendants will have to weather the seas of possible future legislative changes in the age of criminal responsibility.

VII. PROFESSIONAL NEGLIGENCE[40]

The first two cases in this section should be "required reading" for every practitioner in this state. They both deal with the question of professional negligence of attorneys. In *McDow v. Dixon,*[41] the court applied the generally recognized doctrine that a party claiming damages must prove not only the wrong but the amount of his damage as well. The result is the following rule which is peculiarly necessary in "legal malpractice" cases:

> An action for the negligence of the attorney in the unskillful conduct and management of litigation is for the value of the claim lost through such negligence. The claim must be valid, and every fact essential to its

37. 231 Ga. 446, 202 S.E.2d 44 (1973).
38. *Id.* at 447, 202 S.E.2d at 44.
39. 140 Ga. App. 468, 231 S.E.2d 358 (1976).
40. Gregory, *supra* note 34, at 251 n.21.
41. 138 Ga. App. 338, 226 S.E.2d 145 (1976).

> validity . . . must appear, and it must further appear that the party against whom the claim was asserted was solvent.[42]

Solvency, as was later explained by the court, does not imply a bankruptcy-type standard, but rather is intended to "illustrate the original defendant's ability to pay a judgment, had one been rendered against him."[43]

Necessarily, this adds a new dimension, and results in a departure from the general rule that wealth has no relevance in a civil suit for damages. The court has provided the following rule for admissibility of such evidence:

> Generally, evidence of the parties' worldly circumstances would be inadmissible, because of prejudice and lack of relevancy, in determining the issue of liability, i. e., whether or not the plaintiff had a valid claim for damages against the original alleged tortfeasor, and, if so, its value in money. *Once these two questions have been decided favorably to the plaintiff, it is then proper to allow the introduction of evidence of the original alleged tortfeasor's worldly circumstances, financial status, assets, insurance coverage, ownership or other interest in real or personal property, etc., to determine the ability of the original tortfeasor to satisfy, in whole or in part, what has been determined to be the plaintiff's damages.*[44]

It is this latter amount of money that determines the financial liability and responsibility of the legal malpractice defendant, assuming professional negligence has been determined.

This rule requires a bifurcated trial. More importantly, the implication is that damages can be allowed only to the extent of the original defendant's financial ability to satisfy the judgment as proved in the damage portion of the trial.

The other legal negligence case decided during the survey period was *Berman v. Rubin*.[45] The defendant's attorney negotiated a property settlement relating to the plaintiff's divorce. The action arose because of the construction of the following provisions of the settlement agreement drafted by the attorney.

> (a) At the present time, the husband earns approximately [a stipulated amount]. To the extent that in any one year, the husband shall earn in excess of this said sum the amount of child support *per child* for that year *and* alimony for the wife for that year shall be increased by 15% of such increase . . . (b) Nothing herein contained shall permit the amount

42. *Id.*, 226 S.E.2d at 146-47 (citation omitted).
43. *Id.* at 339, 226 S.E.2d at 147.
44. *Id.* at 341, 226 S.E.2d at 148 (emphasis supplied).
45. 138 Ga. App. 849, 227 S.E.2d 802 (1976).

> of child support per child to exceed $8,000.00 for any one (1) year, nor shall any amount of alimony to the wife exceed $16,000.00 . . . .[46]

In a contempt action, the trial court later construed this provision to require payment of fifteen percent of the plaintiff's increased earnings for *each* child and fifteen percent for the wife. (A total of sixty percent of the doctor's increased earnings.) This construction was approved by the Georgia Supreme Court.[47]

The alleged "malpractice" was the defendant's negligence in representing the contents of the agreement to the plaintiff. The court found that the defendant owed the plaintiff the following duty which arose out of their prior attorney-client relationship: "[T]o use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."[48]

In considering this case the court expressed and adopted several principles which all attorneys should know. First is that an attorney is not an insurer of the documents he drafts. However, he may breach the duty owed his client when "after undertaking to accomplish a specific result he fails to comply with prescribed statutory formalities or to effectuate the intent of the parties." An attorney may also breach his duty because of "ignorance of basic, well established and unambigious principles of law." These principles are countered somewhat by the general rule that "an attorney acting in good faith and to the best of his knowledge will be insulated from liability from adverse results."[49] As in medical malpractice cases, competent professional evidence must be presented to show that the attorney-defendant has deviated from the parameters of acceptable professional conduct before he can be found negligent.

However, after thorough discussion of the above principles, the court concluded that the record showed affirmatively that the attorney's actions in the case *sub judice* were not the "cause of the alleged injury"[50] to the plaintiff. The court held simply that "when the document's meaning is plain, obvious, and requires no legal explanation, and the client is well educated, laboring under no disability, and has had the opportunity to read what he signed, no action for professional malpractice based on counsel's alleged misrepresentation of the document will lie."[51]

Dickerson v. Halsey[52] is a medical negligence case. It is significant because the ruling of the trial court granting summary judgment in favor of the defendant was affirmed. This is unusual because the summary judg-

46. *Id.* at 850, 227 S.E.2d at 804 (emphasis by the court).
47. Berman v. Berman, 231 Ga. 723, 204 S.E.2d 124 (1974).
48. 138 Ga. App. at 850, 227 S.E.2d at 804.
49. *Id.* at 852, 227 S.E.2d at 805.
50. *Id.* at 854, 227 S.E.2d at 806.
51. *Id.* at 855, 227 S.E.2d at 806.
52. 138 Ga. App. 108, 225 S.E.2d at 464 (1976).

ment was granted upon affidavits by the physician-defendant and another doctor, expressing opinions that the defendant used a proper degree of skill and care in his treatment of the plaintiff. As the dissenting opinion by Judge Evans aptly points out, "*opinion evidence* . . . can never 'pierce the pleading'—and can never be sufficient evidence upon which to base a summary judgment."[53]

In *Parr v. Palmyra Park Hospital, Inc.*,[54] the plaintiff based his claim upon the hospital's alleged duty to inform him of the risks of contracting hepatitis in connection with blood transfusions needed for his surgery which was performed in the hospital. After a review of the recent decisions of the Georgia courts rejecting the informed consent doctrine,[55] the court inspected the provisions of the Georgia Medical Consent Law[56] to determine what disclosures were required of the hospital. The adoption of this statute has been accepted as an expression of the legislature rejecting the informed consent doctrine in this state, and supporting the rule that risks of treatment do not have to be pointed out to the patient to obtain a valid consent. It is sufficient if the "general course" of treatment is disclosed.

Going further, the court concluded that no written consent is required. Summary judgment in favor of the defendant is authorized when it is established that the "plaintiff-patient knew, *from any source,* the general course of treatment to be undertaken."[57] Therefore, it seems that the court of appeals will continue to rely on the Georgia statute and to ascribe to the position that the doctrine of informed consent does not prevail in Georgia.

VIII. PRODUCTS LIABILITY

This area seems to be one of the fastest developing areas of tort law. Expansion of the responsibility of manufacturers has brought both criticism and support for the basic concepts applicable in this field of the law. However, the concepts of products liability law are just beginning to emerge in our case law.

Decisions which have been long awaited have finally made their way through the system and reached the forefront during the survey period.

53. *Id.* at 111, 225 S.E.2d at 466 (emphasis by the court).

54. 139 Ga. App. 457, 228 S.E.2d 596 (1976).

55. Young v. Yarn, 136 Ga. App. 737, 222 S.E.2d 113 (1975). Kennedy v. Piedmont Hosp., 136 Ga. App. 660, 222 S.E.2d 162 (1975).

56. 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."

57. 139 Ga. App. at 460, 228 S.E.2d at 598 (emphasis supplied).

The most important of these is probably *Ford Motor Company v. Carter.*[58] This was a wrongful death action brought by a widow to recover damages for the death of her husband "by reason of strict liability against the manufacturer"[59] of the automobile in which he was riding. The suit was brought under the provisions of Ga. Code Ann. §105-106 (1968) (strict liability) and §§105-1301 and -1302 (1968 and Supp. 1977) (wrongful death). These statutory provisions were discussed by the court of appeals which held that a wrongful death action could be maintained under the strict liability statute. However, the supreme court disagreed.

According to the supreme court, the wrongful death statutes were enacted in derogation of the common law and thus must be strictly construed. Under §105-1301, a wrongful death recovery can be had only when the death results from a "crime, or from criminal or other negligence." The court of appeals had found liability by construing §105-106 as a negligence per se statute. The supreme court, however, analyzed §105-106 and found that it was a strict liability statute and did not rest on negligence. Since the action under §105-106 did not contain any element of negligence, the supreme court held that the wrongful death statute could not support recovery. The best guess of the Fifth Circuit Court of Appeals about the Georgia Supreme Court's interpretation of these statutes was thus proven correct.[59.1]

Pierce v. Liberty Furniture Co.[60] was a suit brought by the purchaser of a porch swing set which collapsed after assembly because of a defect in hardware included in the swing "kit" in a sealed package. The plaintiff sued the retailer. The court held that Liberty would not be liable under the provisions of §105-106 because there was no evidence indicating that it manufactured the swing. However, the court recognized a theory of liability for breach of warranty against the seller, arising from Code §109A 2-314.[61] The court stated: "The provision, in fact, establishes a concept for retailers similar to that employed in Code Ann. §105-106, supra, by which manufacturers may be held strictly liable for defective products."[62] In other language, the court approved a "strict liability" approach to hold retailers liable for damages suffered because of breach of the implied warranty of merchantibility, pointing out that the retailer's remedy is an action over against his seller upon the same grounds. The opinion in this case seems to sound the death knell for the pre-U.C.C. "sealed container

58. No. 32291 (Ga. Sept. 7, 1977), *rev'g* 141 Ga. App. 371, 233 S.E.2d 444 (1977). *See also,* Patent Scaffolding Co. v. Etheridge, 141 Ga. App. 376, 233 S.E.2d 448 (1977) for a similar holding by the court of appeals.

59. 141 Ga. App. at 371, 233 S.E.2d at 446.

59.1. Higginbotham v. Ford Motor Co., 540 F.2d 762 (5th Cir. 1976).

60. 141 Ga. App. 175, 233 S.E.2d 33 (1977).

61. GA. CODE ANN. §109A-2-314 (1973) provides: "Goods to be merchantable must be at least such as . . . are fit for the ordinary purposes for which such goods are used."

62. 141 Ga. App. at 176, 233 S.E.2d at 35.

doctrine" formerly adhered to by our courts.[63]

A similar view was taken in *Chrysler Corporation v. Taylor*.[64] Taylor brought suit alleging numerous defects in his vehicle and seeking damages primarily for his loss of bargain. The court opined that if a customer seeks this type of recovery he should pursue it under warranty laws and not in negligence or strict liability. Accordingly, denial of the defendant's motion for directed verdict was error by the trial judge.

IX. MISCELLANEOUS

Two cases were decided which are interesting because of the court's application of general rules to the factual situation in each case. Both deal with proximate cause. *Stern v. Wyatt*[65] was a wrongful death action. The plaintiff's deceased husband's vehicle was traveling along the freeway in Atlanta when his vehicle was struck by the defendant's car which broke through a chain link fence when she lost control of it. After the collision, the decedent, suffering only from a cut lip, got out of his car and reached a position of safety on the side of the highway to wait for the police. He was upset and excited. Ten to twenty minutes later he attempted to return to his car and was struck and killed by a passing motorist. The court held that "there exists a genuine issue of material fact as to proximate cause."[66] The summary judgment granted in favor of the defendant was reversed.

General Motors Corporation v. Davis[67] was also a wrongful death action. A truck owned by Brown broke down during rush hour traffic on I-75 in Atlanta because of a defective alternator. The truck was manufactured by General Motors. After traffic returned to normal, the truck remained on the freeway, but because of the electrical failure no warning lights were working. The plaintiff's deceased husband drove his Volkswagen fastback into the parked truck, and was killed. The court remarked:

> We find first that there was causation in fact linking General Motors' alleged negligence to the freeway death . . . .
>
> . . . In the instant case, if General Motors had not negligently manufactured the alternator, the truck would not have stalled, and there would not have been a stationary vehicle on the freeway for the decedent to hit. Therefore, causation in fact does exist.[68]

These cases demonstrate the tendency of the court of appeals to make the jury the final arbiter of questions such as these.

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63. *See* Woods v. Hub Motor Co., 110 Ga. App. 101, 137 S.E.2d 674 (1964); Maroney v. Montgomery Ward & Co., 72 Ga. App. 485, 34 S.E.2d 302 (1945); Bel v. Adler, 63 Ga. App. 473, 11 S.E.2d 495 (1940).

64. 141 Ga. App. 671, 234 S.E.2d 123 (1977).

65. 140 Ga. App. 704, 231 S.E.2d 519 (1976).

66. *Id.* at 704, 231 S.E.2d at 520.

67. 141 Ga. App. 495, 233 S.E.2d 825 (1977).

68. *Id.* at 496, 497, 233 S.E.2d at 827.