Tort and Contract in Georgia

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In deciding a number of different legal questions the courts have asked whether the cases with which they were confronted were "tort" or "contract," as if the difference were like that between fish and fowl or animal and vegetable. In fact, the distinction is not as clear as has been supposed. The blending of tort and contract in the products liability context was discussed in an earlier article.[1] This article will broaden the discussion into non-products cases. The article will begin with a general description and critique of the tort-contract distinction, and then will discuss how the distinction has operated in the decision of certain legal questions, noting that the tort-contract distinction has been neither useful, nor relevant, nor as significant as would appear from the language of the opinions. The focus will be on cases from a single jurisdiction, Georgia, and only a sampling of those cases will be discussed. The intent is to highlight the nature of the distinction without attempting to explore all of its ramifications.

I. The Tort-Contract Distinction In General

In determing whether a case is "tort" or "contract," the Georgia courts have looked to one of two factors. First, they have attempted to determine whether there has been a breach of an independent tort duty—that is, whether there was some tort beyond the mere breach of contract. Second, the courts have looked to the nature of the relief sought—whether it is the kind normally involved in contract cases, or whether it is "tort-like" relief. The first factor has generally been involved in cases arising out of the rendition of services, while the second has normally been involved in product cases.

With respect to the "tort duty" factor, it has been said that the earliest cases in which the courts found an independent tort duty were those involving common carriers and others engaged in common callings, in which the tort duty to the public arising out of the defendant's undertaking had historically preceded liability in contract for breach of a specific promise.[2]

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1. Ribstein, *Guidelines for Deciding Product Economic Loss Cases*, 29 Mercer L. Rev. 493 (1978).

2. *See* W. Prosser, *The Borderland of Tort and Contract*, in Selected Topics on the Law

This limited view of the independent tort duty appears to continue to some extent in the British and Commonwealth jurisdictions.[3] The American courts have expanded the independent tort duty category to include any case of misfeasance, or misperformance of a contract, as distinguished from nonfeasance, or mere nonperformance of a promise.[4] There is some vestige of the old limited view in Georgia.[5] However, many cases have held that misfeasance is an independent basis of the tort duty,[6] so that it appears that the Georgia courts have joined the national trend.

In the product area, the courts have sought to preserve an exclusive area for the operation of the statutory law of sales by distinguishing cases involving economic loss or "loss on the bargain" from those involving personal injury or property damage.[7] This tendency to deny tort liability for economic loss has been particularly strong in Georgia.[8]

Neither of these bases for distinguishing between tort and contract has substance. The "independent tort duty" cases mistakenly assume that there is a fundamental distinction between nonperformance of a promise and tort misfeasance. The lack of such a distinction can be demonstrated by comparing "misfeasance" and "nonfeasance" cases. Georgia courts have, for example, recognized tort liability on the part of workmen's compensation insurers for negligent safety inspections.[9] In such cases, the plaintiff is viewed as having been injured by the defendant's misperformed inspection—that is, as having been left in a worse position, rather than as

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OF TORTS (1953); Poulton, *Tort or Contract*, 82 L.Q. REV. 346 (1966) (hereinafter cited as Poulton).

3. *See* Poulton, *supra* note 2, at 346.

4. *See* 2 F. HARPER and F. JAMES, LAW OF TORTS §18.6 (1956). W. PROSSER, HANDBOOK OF THE LAW OF TORTS 617 (4th ed. 1971) (hereinafter cited as PROSSER); W. PROSSER, *The Borderland of Tort and Contract*, in SELECTED TOPICS ON THE LAW OF TORTS (1953).

5. *See* Orkin Exterminating Co. v. Stevens, 130 Ga. App. 363, 203 S.E.2d 587 (1973); Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966).

6. Synthetic Indus., Inc. v. Whitlock, Inc., 439 F. Supp. 1297 (N.D. Ga. 1977); Allred v. Dobbs, 137 Ga. App. 227, 223 S.E.2d 265 (1976); E. & M. Constr. Co. v. Bob, 115 Ga. App. 127, 153 S.E.2d 641 (1967); Orkin Termite Co. v. Duffell, 97 Ga. App. 215, 102 S.E.2d 629 (1958).

7. *See generally*, Ribstein, *supra* note 1, at 496-501.

8. *See* Mike Bajalia, Inc. v. Amos Constr. Co., 142 Ga. App. 225, 235 S.E.2d 664 (1977); Chrysler Corp. v. Taylor, 141 Ga. App. 671, 234 S.E.2d 123 (1977); Long Mfg. N.C., Inc. v. Grady Tractor Co., 140 Ga. App. 320, 231 S.E.2d 105 (1976); Long v. Jim Letts Oldsmobile, Inc., 135 Ga. App. 293, 217 S.E.2d 602 (1975). In some non-products cases the courts have considered whether the harm was tort-like, *i.e.*, whether the harm involved personal injury or property damage. However, in these cases the nature of the harm did not appear to be the decisive factor. *See* Sims v. American Cas. Co., 131 Ga. App. 461, 206 S.E.2d 121 (1974), *aff'd sub nom.* Providence Washington Ins. Co. v. Sims, 232 Ga. 787, 209 S.E.2d 61 (1974) (per curiam); Orkin Exterminating Co. v. Stevens, 130 Ga. App. 363, 203 S.E.2d 587 (1973).

9. *See* Sims v. American Cas. Co., 131 Ga. App. 461, 206 S.E.2d 121 (1974), *aff'd sub nom.* Providence Washington Ins. Co. v. Sims, 232 Ga. 787, 209 S.E.2d 61 (1974) (per curiam); Winslett v. Twin City Fire Ins. Co., 141 Ga. App. 143, 232 S.E.2d 638 (1977); Pennsylvania Millers Mut. Ins. Co. v. Thomas Milling Co., 137 Ga. App. 430, 224 S.E.2d 55 (1976); Aetna Cas. and Sur. Co. v. C.P. Co., 134 Ga. App. 552, 215 S.E.2d 314 (1975).

merely not having been benefited.[10] Although the point has not been explicitly settled in the Georgia cases,[11] it is clear that the undertaking has injured the plaintiff only if the plaintiff or his employer detrimentally relied on a promise of adequacy implied from the defendant's beginning of performance.[12]

Tort liability for reliance on an implied promise arising out of an undertaking is not far removed from tort liability for reliance on an actual promise unaccompanied by other conduct. In fact, it has been suggested that there should be tort liability for mere nonperformance of a promise,[13] and some non-Georgia cases have come very close to so holding.[14] In Georgia, cases involving injury caused by failure to send a railway ticket as promised,[15] failure to reserve a hotel room as promised,[16] and failure to pay insurance benefits as promised[17] have been characterized as involving breach of contract only. They could just as easily have been characterized as involving tort liability for injury resulting from the negligent nonperformance of a promise.

The similarity of tort misfeasance and nonperformance of a promise has led to a confusing profusion of results in several Georgia cases involving essentially the same situation—the negligent misperformance of a contract. Where it was claimed that construction plans[18] and a repair job[19] were done badly, the courts held that there was tort misfeasance. Where an exterminator failed to find the presence of termites during the course of an inspection,[20] and where the defendant contractor botched a re-siding job by failing to protect the exposed house after removing the old siding[21] the courts held that tort claims could be maintained. However, in two other exterminator cases[22] in which the defendant had failed to completely

10. *See* RESTATEMENT OF TORTS (SECOND) §323, comment "c" at 135 and §324A, comment "a" at 142 (1965). *But see* PROSSER, *supra* note 4 at 347.

11. *Compare* Sims v. American Cas. Co., 131 Ga. App. 461, 473, 206 S.E.2d 121, 130 (1974), *aff'd sub nom.* Providence Washington Ins. Co. v. Sims, 232 Ga. 787, 209 S.E.2d 61 (1974) (per curiam) (distinguishing a case denying liability because no reliance) *with* Winslett v. Twin City Fire Ins. Co., 141 Ga. App. 143, 232 S.E.2d 638 (1977) (expressly refusing to decide the point).

12. *See* RESTATEMENT OF TORTS (SECOND) §324A, comment "e" at 144 (1965).

13. *See* RESTATEMENT OF TORTS (SECOND) §323, comment "d" at 138 and §324A, comment "f" at 145 (1965); Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DE PAUL L. REV. 30 (1951).

14. *See* PROSSER, *supra* note 4 at 345-346.

15. Howard v. Central of Ga. Ry., 9 Ga. App. 617, 71 S.E. 1017 (1911).

16. Brown v. Hilton Hotels Corp., 133 Ga. App. 286, 211 S.E.2d 125 (1974).

17. Leonard v. Firemen's Ins. Co. of Newark, N.J., 100 Ga. App. 434, 111 S.E.2d 773 (1959).

18. Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966).

19. Frank Graham Co. v. Graham, 90 Ga. App. 840, 84 S.E.2d 579 (1954).

20. Allred v. Dobbs, 137 Ga. App. 227, 223 S.E.2d 265 (1976).

21. E. & M. Constr. Co. v. Bob, 115 Ga. App. 127, 153 S.E.2d 641 (1967).

22. Orkin Exterminating Co. v. Stevens, 130 Ga. App. 363, 203 S.E.2d 587 (1973); Orkin Termite Co. v. Duffell, 97 Ga. App. 215, 102 S.E.2d 629 (1958).

eradicate all of the termites so that new swarms and damage resulted, the courts refused to hold in favor of tort liability. In one of the cases,[23] the court reasoned that the plaintiff had alleged mere failure to control the termites rather than defective treatment.[24] Each of these cases could be characterized as involving *either* a failure to do something which should have been done *or* defective performance. The same could also be said, for example, of the failure of a termite inspector to appear as promised, if any damage resulted from reliance by the homeowner on the exterminator's promise to appear. Regardless of how it is phrased by the court, the liability essentially results from the defendant's failure to live up to his promise.

The distinction in product cases between contract-like damage, or economic loss, and tort-like damage is no more substantial than the misfeasance-nonfeasance distinction. The separate treatment of economic loss has been discussed and criticized extensively[25] and will only be treated briefly here in its principal Georgia manifestations. The Georgia cases have followed Justice Traynor's dictum in *Seely v. White Motor Co.*,[26] that repair loss to the product itself is loss on the bargain, or contract-like, and therefore not recoverable in tort, as opposed to "tort-like" personal injury or physical harm to other property. It is not possible, however, to ascribe these different types of injury to different types of duty, since each may result from the same breach of duty. Moreover, there is no distinction between the two types of duty. All product cases involve, to some extent, failure of the product to conform to expectations engendered by the defendant's representations.

The impossibility of dividing product cases into contract and tort may be demonstrated by comparing cases in the two categories. Tort liability has been denied in cases involving automobiles which were so defective that they failed to operate.[27] Yet is is difficult to understand why such cases are any more "loss on the bargain" than those in which the defect happens to cause personal injury or harm to other property.[28] In *Eades v. Spencer-Adams Paint Co.*,[29] the court allowed tort recovery for the removal of paint which failed to meet specifications, a clear case of a product not up to contract standards, deemed to be in the tort category and yet a suit for property damage. In *Mike Bajalia, Inc. v. Amos Construction Co.*,[30] the court allowed tort recovery for damage by defendant's components to the

23. Orkin Exterminating Co. v. Stevens, 130 Ga. App. 363, 203 S.E.2d 587 (1973).

24. *See* the discussion accompanying notes 71-80, *infra*, for a possible explanation of the *Stevens* holding.

25. *See* Ribstein, *supra* note 1, and authorities cited in notes 13, 23, 26, and 117.

26. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

27. Chrysler Corp. v. Taylor, 141 Ga. App. 671, 234 S.E.2d 123 (1977); Long v. Jim Letts Oldsmobile, Inc., 135 Ga. App. 293, 217 S.E.2d 602 (1975).

28. *See, e.g.*, Ford Motor Co. v. Lee, 137 Ga. App. 486, 224 S.E.2d 168, *aff'd and rev'd in part*, 237 Ga. 554, 229 S.E.2d 379 (1976).

29. 82 Ga. App. 123, 60 S.E.2d 543 (1950).

30. 142 Ga. App. 225, 235 S.E.2d 664 (1977).

roof they supported, but would not allow recovery for the defective components themselves, although both items of damage resulted from precisely the same breach of duty. Finally, it is not surprising that one court was of two minds about whether it had a tort or a breach of contract on its hands. In *Long Manufacturing, N.C. Inc. v. Grady Tractor Co.*,[31] the court recognized negligence liability for the collapse of the very product, a tobacco barn, sold by defendant. At the same time, the court denied strict liability on the ground that the suit was for "economic loss."[32]

Thus, the courts have been unsuccessful in drawing a line between contract and tort. This lack of success is because both the misfeasance-nonfeasance distinction in the service cases, and the economic loss-physical harm dichotomy in the product cases are based on the mistaken idea that tort and contract divide along the lines of promissory and non-promissory liability. While it is true that there is a difference between liability based on an exchange of promises and noncontractual liability, a significant element of both contract and tort liability is detrimental reliance on a defendant's representations,[33] which may take the form of the use of the defendant's product or reliance on the defendant's service. There is, therefore, a considerable overlap between contract and tort—a fact which is of some significance to the discussion in the next section.

II. A Critique Of The Contract-Tort Distinction Applied To Specific Legal Questions

A court will ask whether a case is contact or tort in order to answer a certain legal question presented by the case. It has been observed that the courts are often influenced by the specific question they are deciding, and do not make the contract-tort categorization in a vacuum.[34] In fact, it may logically be assumed that, in view of the insubstantial nature of the contract-tort distinction, whether a case is contract or tort *should* not make much difference in deciding the case. An examination of the cases in which the contract-tort categorization has been made from the point of view of the specific questions being decided reveals that there are policies at work to which the contract-tort distinction is irrelevant, and that, with

31. 140 Ga. App. 320, 231 S.E.2d 105 (1976).

32. *Id.* at 322, 323, 231 S.E.2d at 107, 108. The denial of strict liability in *Long* was explained by the court in *Bajalia* to be due to the fact that the plaintiff was a corporation and therefore not protected by Ga. Code Ann. §105-106 (1968). *See* 142 Ga. App. at 227, 235 S.E.2d at 666. That was not, however, the explanation given by the *Long* court in the passage cited at the beginning of this note.

33. *See generally,* Fuller and Perdue, *The Reliance Interest in Contract Damages: 1,* 46 Yale L.J. 52 (1936); Fuller and Perdue, *The Reliance Interest in Contract Damages: 2,* 46 Yale L.J. 373 (1937).

34. *See* Prosser, *supra* note 4 at 621-22; Fridman, *The Interaction of Tort and Contract,* 93 L.Q. Rev. 422, 447 (1977); W. Prosser, *The Borderland of Tort and Contract,* in Selected Topics on the Law of Torts (1953) at 451, 452; Thornton, *The Elastic Concept of Tort and Contract as Applied by the Courts of New York,* 14 Brooklyn L. Rev. 196 (1948).

respect to at least some of these questions, the distinction has made less difference to the results of the cases than would appear from the language of the opinions.

A. Damages

In several cases, the courts have first attempted to determine whether there has been a breach of an independent tort duty in deciding whether a relatively broad tort standard of damages should be applied, or whether the plaintiff should be limited to those damages recoverable in contract. The plaintiff in *Brown v. Hilton Hotels Corp.*,[35] was held not entitled to medical expenses, lost time from work, pain and suffering, loss of consortium, and punitive damages for mere breach of a promise to reserve a hotel room. Nor was the plaintiff in *Howard v. Central of Georgia Railway*[36] entitled to mental suffering damages for mere breach of a promise to send a train ticket to the plaintiff's son. In *Leonard v. Firemen's Insurance Co. of Newark, N.J.*,[37] the plaintiff was denied recovery for loss of the use of an automobile resulting from the defendant's failure to pay insurance benefits, on the ground that such damages were not sufficiently within the contemplation of the parties to be recoverable in contract, and the plaintiff had no remedy in tort. Finally, in *Mauldin v. Sheffer*,[38] the court held in favor of tort liability in a case involving negligence on the part of a consulting engineer, in which the plaintiff sought to recover punitive damages.[39]

The tort-contract distinction should not, however, matter with respect to the types of damage questions involved in the above cases. Perhaps it should make a difference whether the liability is based on the enforcement of a promise or on the injury caused by reliance on a promise if the question is whether the plaintiff should recover out-of-pocket loss or expectation damages, although such a position is debatable in view of the substantial interrelationship between reliance and expectation damages.[40] But there is nothing in the tort-contract distinction which is relevant to a determination of the applicable scope of damages or of whether mental suffering or punitive damages are recoverable. The determining factors with respect to such questions should be the degree of proof of damage, the specific type of conduct engaged in by the defendant and the relationship between the conduct and the injury.

The contract-tort distinction has not, in fact, been as significant as would first appear in deciding damage questions in Georgia. First, with

35. 133 Ga. App. 286, 211 S.E.2d 125 (1974).

36. 9 Ga. App. 617, 71 S.E. 1017 (1911).

37. 100 Ga. App. 434, 111 S.E.2d 773 (1959).

38. 113 Ga. App. 874, 150 S.E.2d 150 (1966).

39. It is not clear that the damage issue was the occasion for the contract-tort discussion, but no other occasion appears from the opinion.

40. *See* Fuller and Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936); Fuller and Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937).

respect to mental suffering and punitive damages, it is true that there is much language to the effect that such damages are not recoverable in *contract.*[41] However, in nonaccident cases (the only cases in which the tort-contract question arises) wilful, wanton, or reckless conduct is required for *tort* recovery of punitive damages or mental suffering.[42] Moreover, recovery of mental suffering damages has been recognized in certain types of *contract* cases,[43] and punitive damages have been held recoverable in cases arising out of contract.[44] The real reason why mental suffering and punitive damages were held not recoverable in the contract cases cited above[45] is not simply that the cases were in "contract," but that they did not involve sufficiently aggravated conduct. Mere failure to pay a balance due on a labor and materials contract,[46] or failure to pay an insurance claim,[47] or termination of a lease,[48] or negligent failure to deliver a message on time,[49] is an insufficient predicate for the recovery of mental suffering or punitive damages regardless of whether the case is called tort or contract or something else. Thus, whether there was a breach of an independent tort duty in *Brown, Howard,* and *Mauldin* was inconsequential upon the issue of whether mental suffering or punitive damages were recoverable in those cases. The only factor of consequence is the type of conduct engaged in by the defendant. Where the conduct justifies mental suffering or punitive damages, the court will be able to find a "tort," and where it does not, it does not matter whether there has been a "tort" or not.

Second, with respect to the general scope of damages, Georgia has

41. *See,* with respect to punitive damages, GA. CODE ANN. §20-1405 (1977); Hadden v. Southern Messenger Serv., 135 Ga. 372, 69 S.E. 480 (1910); Eskew v. Camp, 130 Ga. App. 779, 204 S.E.2d 465 (1974); Bennett v. Associated Food Stores, Inc., 118 Ga. App. 711, 165 S.E.2d 581 (1968); Kilgore v. National Life & Accident Ins. Co., 110 Ga. App. 280, 138 S.E.2d 397 (1964); Pure Oil Co. v. Dukes, 101 Ga. App. 786, 115 S.E.2d 449 (1960). *See,* with respect to mental suffering, Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S.E. 901 (1892).

42. *See* GA. CODE ANN. §§105-2002 to -2003 (1968); Westview Cemetary, Inc. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975); Hale v. Hale, 199 Ga. 150, 33 S.E.2d 441 (1945); Floyd v. Stevens-Davenport Funeral Home, 110 Ga. App. 271, 138 S.E.2d 333 (1964); Digsby v. Carroll Baking Co., 76 Ga. App. 656, 47 S.E.2d 203 (1948).

43. *See* Anderson v. Kirby, 125 Ga. 62, 54 S.E. 197 (1906) (breach of promise to marry); Parker v. Forehand, 99 Ga. 743, 28 S.E. 400 (1896) (breach of promise to marry); 5 A. CORBIN, CORBIN ON CONTRACTS §1076, (1964) (hereinafter cited as CORBIN); RESTATEMENT OF CONTRACTS §341, (1932).

44. *See* Clark v. Aenchbacher, 143 Ga. App. 282, 238 S.E.2d 442 (1977) (breach of building contract with allegations of fraudulent concealment of defects); 5 CORBIN *supra* note 43, at §1077.

45. *See* cases cited at note 41, *supra.*

46. Eskew v. Camp, 130 Ga. App. 779, 204 S.E.2d 465 (1974).

47. Kilgore v. National Life & Accident Ins. Co., 110 Ga. App. 280, 138 S.E.2d 397 (1964).

48. Bennett v. Associated Food Stores, Inc., 118 Ga. App. 711, 165 S.E.2d 581 (1968); Pure Oil Co. v. Dukes, 101 Ga. App. 786, 115 S.E.2d 449 (1960).

49. Hadden v. Southern Messenger Serv., 135 Ga. 372, 69 S.E. 480 (1910); Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S.E. 901 (1892). Note that the discussion in *Chapman* centers on the lack of wilfulness, rather than the contract-tort point.

adopted the rule of *Hadley v. Baxendale*[50] in contract actions,[51] a rule that is believed to impose tighter foreseeability restrictions on contract recovery than are imposed by tort proximate cause rules.[52] However, the difference between the tort and contract standards is, at most, a subtle one.[53] In *Leonard*, it is true that damages for loss of use of the automobile may have been too remote to be recoverable under the *Hadley* rule because they were not within the contemplation of the defendant at the time of the contract. It is also true that these damages were probably not sufficiently foreseeable to be recoverable in tort, particularly in light of the strict proximate cause rules governing economic loss occurring without physical harm.[54] Moreover, in tort as well as in contract, damages of the type sought in *Leonard* would be considered too speculative.[55] Thus, the results as to the scope of damages, as with respect to mental suffering and punitive damages, rest on factors other than whether the action is contract or tort.

B. Privity

Georgia law appears to make a black and white distinction on the privity issue between contract (complete privity) and tort (no privity).[56] To a certain extent, the question of who may sue does depend on whether the action is one for breach of contract or for the breach of a tort duty. Only those who are the subjects of promises,[57] or who are the intended beneficiaries of promises,[58] may sue on a contract, while broader rules determine the appropriate plaintiffs in a tort action.

To the extent, however, that the tort action is based on the defendant's misrepresentation (and, as discussed above,[59] many tort actions share with contract actions a representational base) the potential plaintiffs will not

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50. 156 Eng. Rep. 145 (1854).

51. *See* GA. CODE ANN. §20-1407 (1977).

52. *See* 5 CORBIN, *supra* note 43, §1008 at 75; PROSSER, *supra* note 4, at 618-619; Thornton, *The Elastic Concept of Tort and Contract as Applied by the Courts of New York*, 14 BROOKLYN L. REV. 196 (1948); Poulton, *supra* note 2, at 347.

53. *See* Considine, *Some Implications from Recent Cases on the Differences Between Contract and Tort*, 12 U. BRIT. COLUM. L. REV. 85, 97, 98 (1978); Poulton, *supra* note 2, at 347.

54. *See* Byrd v. English, 117 Ga. 191, 43 S.E. 419 (1903); Morse v. Piedmont Hotel Co., 110 Ga. App. 509, 139 S.E.2d 133 (1964); J. FLEMING, LAW OF TORTS, 169-175 (5th ed. 1977); PROSSER, *supra* note 4, at 938-942; James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43 (1972); Comment, *Foreseeability of Third-Party Economic Injuries—A Problem in Analysis*, 20 U. CHI. L. REV. 283 (1953); Note, *Negligent Interference with Economic Expectancy: The Case for Recovery*, 16 STAN. L. REV. 664 (1964).

55. *See* Carr v. Jacuzzi Bros., 133 Ga. App. 70, 210 S.E.2d 16 (1974); Georgia Grain Growers Ass'n v. Craven, 95 Ga. App. 741, 98 S.E.2d 633 (1957); Norris v. Pig'n Whistle Sandwich Shop Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949).

56. *See* GA. CODE ANN. §105-106 (1968).

57. *See* 4 CORBIN, *supra* note 43, at §778.

58. *See* RESTATEMENT OF CONTRACTS §133 (1932).

59. *See* note 25, *supra*, and accompanying text.

be markedly different from those who could sue if the representation were promissory in form. Tort misrepresentation rules require degrees of intent to affect plaintiff or foreseeability which vary subtly with the type of harm and scienter.[60] These requirements are sufficiently similar to the requirement in contract cases that the plaintiff be the subject of, or included within the promise, so that the result on the privity issue will often be the same regardless of whether tort or contract rules are applied. It is true that tort rules involve a reliance requirement[61] which is not required in contract cases, although it is also true that reliance will be present in most contract cases.[62]

The important distinction with respect to the privity question is not that between tort and contract, but between law-imposed and representational liability—that is, between liability to those who have been injured by defendant's representations, and liability to those unconnected with any representations by defendant, which must be based on public policy.[63]

The difference between the supposed and actual relevance of the tort-contract distinction to the privity question is illustrated by three Georgia cases—*Hayes v. Hallmark Apartments, Inc.*,[64] *Allred v. Dobbs*,[65] and *Stewart v. Gainesville Glass Co.*[66] In *Hayes* and *Allred*, the courts reasoned that there would be liability only in tort, whereas, in fact, the arguments for liability under a representational theory in the two cases would be equally strong whether phrased in terms of tort or contract. In *Hayes*, the defendant had allegedly used architectural plans in violation of an agreement with architect *A*, from whom the defendant had obtained the plans, who in turn had obtained the plans from architect *B*. *B* was denied a contractual cause of action on the ground that there was no intent to benefit *B* in the agreement between the defendant and *A*. The court did, however, recognize a fraud action arising out of the originating architect's reliance on the agreement. The court's ruling is questionable. If, in fact, there was sufficient intent to influence the acts of the architect, or foreseeability that the architect would act, to justify tort liability for intentional or negligent misrepresentation, it is probably also true that protection of the author of the plans was sufficently within the intention of the agreement to justify contract liability. On the other hand, the mere fact that the architect relied on the agreement without sufficient intention or fore-

60. *See* RESTATEMENT OF TORTS (SECOND) §402B (1965); RESTATEMENT OF TORTS (SECOND) §§531, 552, 551C (1977).

61. *See* RESTATEMENT OF TORTS (SECOND) § 402B (1965); RESTATEMENT OF TORTS (SECOND) §§531, 537, 552, 552C (1977).

62. *See* Fuller and Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936); Fuller and Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937).

63. For a discussion of this distinction *see* Ribstein, *supra* note 1, at 516-521.

64. 232 Ga. 307, 207 S.E.2d 197 (1974).

65. 137 Ga. App. 227, 223 S.E.2d 265 (1976).

66. 233 Ga. 578, 212 S.E.2d 377 (1975).

seeability on the part of defendant would not be sufficient for tort liability.

In *Allred,* the purchaser of a house was held to be entitled to the protection of a termite clearance letter given by the inspector to the seller. The court characterized the case as a tort action, and then went on to hold that the plaintiff could sue because his protection was within the overall intention of the letter, thus applying a standard that bears the earmarks of contract. In fact, the plaintiff would have a cause of action under both tort and contract rules because his protection was intended by the parties and because the letter was plainly intended to be relied upon by him. The fact that it did not matter whether a tort or contract standard was applied probably explains the court's willingness to find a tort under circumstances which are virtually indistinguishable from other exterminator cases which were determined to present contract-only situations.[67]

By contrast to *Allred* and *Hayes, Stewart* presents a situation which was inappropriate for representational liability whether phrased in terms of tort or contract. The court denied recovery under an express warranty theory to a homeowner who had purchased a house which had been furnished with window glass purchased by a former owner through a general contractor and a retailer. The glass had developed vision obstructions in breach of the manufacturer's express warranty. The court seemed to view the chain of title to have necessarily precluded privity. This was criticized by the dissenters in the supreme court (Justices Ingram and Jordan) on the grounds that § 2-318 of the UCC did not require vertical privity in express warranty cases, and that in all events the *consumer* must be viewed as an intended beneficiary of the warranty.[68] The dissenters were arguably correct insofar as the ultimate consumer is concerned. In fact, the consumer could more properly be characterized as the *promissee.*[69] By the same token, the consumer would be an intended target of the representation, and thus entitled to recover under a misrepresentation theory. But there should be no liability to the *plaintiff* under either theory because, as a subsequent purchaser of the house, he was not a beneficiary or intended target of the warranty or representation. If liability were to be imposed in a case like this, it could only be under the theory that public policy requires that the defendant's enterprise pay for the plaintiff's injuries. It is questionable whether the nature of the loss justifies liability under such a theory.[70]

C. *Exclusion and Limitation Clauses*

Where there is a contract between the parties but no liability under the contract, it should not be determinative as to the effect of the contract

67. *See* notes 22-24, *supra* and accompanying text.

68. 233 Ga. 579, 580, 212 S.E.2d 377, 378 (1975) (Ingram, J. dissenting).

69. *See* 4 CORBIN, *supra* note 43, §778 at 30; Hill, *Damages for Innocent Misrepresentation,* 73 COLUM. L. REV. 679, 743-745 (1973).

70. *See* Ribstein, *supra* note 1 at 509-511.

whether there is independent tort liability. Although, in situations where there is no liability under the contract, the court must consider whether some nonpromissory duty has been breached, that is only the beginning of the inquiry. Assuming that the defendant has breached a duty other than that which is the subject of the contract, the next question is whether the parties have agreed not only to limit any liability which may arise under the contract, but to exclude noncontractual liability. This is a matter of contract *interpretation.* Contractual limitation of tort liability is well recognized.[71] If the contract does limit noncontractual liability, the next question will be one of *public policy*—should the parties be able to contract away a duty imposed by law?

Two Georgia cases illustrate the confusion which may result when the court attempts to deal with the problem of contractual limitations and exclusions in terms of the distinction between tort and contract. In *Orkin Exterminating Co. v. Stevens*[72] and *Orkin Termite Co. v. Duffell*,[73] the plaintiffs sought recovery for damage caused by termites after the defendants' unsuccessful exterminating efforts. In both cases, the courts made a highly artificial distinction between failure to perform the contract and misperformance of the contract, which was criticized above.[74] It may be that the decisions can be explained by the terms of the contract between the parties.

The contract in *Stevens* provided for retreatment of the premises by the defendant if the extermination proved to be incomplete, and stated: " 'This Guarantee is limited to retreatment only and in no way, implied or otherwise, covers damages and repairs to the structure or contents.' "[75] Termite *damage* could have been covered for additional consideration.[76] Although the contract in *Duffell* was not discussed in detail, it was also stated to be a contract for retreatment,[77] was entered into by the same company as was involved in *Stevens,* and may well have involved a similar limitation and option to cover termite damage.

There are indications that the court in *Stevens* viewed the contract as attempting to limit Orkin's total liability, and not merely its exposure under the "guarantee."[78] There are also indications that the court believed

71. *See* Golden v. National Life & Accident Ins. Co., 189 Ga. 79, 5 S.E.2d 198 (1939) (dictum); Brown v. Five Points Parking Center, 121 Ga. App. 819, 175 S.E.2d 901 (1970); Hawes v. Central of Ga. Ry., 117 Ga. App. 771, 162 S.E.2d 14 (1968); 5 CORBIN, *supra* note 43, §1068; RESTATEMENT OF CONTRACTS §574 (1932); 15 S. WILLISTON, WILLISTON ON CONTRACTS §1750A (1972).

72. 130 Ga. App. 363, 203 S.E.2d 587 (1973).

73. 97 Ga. App. 215, 102 S.E.2d 629 (1958).

74. *See* the discussion accompanying notes 22-24, *supra.*

75. 130 Ga. App. at 364, 203 S.E.2d at 590.

76. *Id.* at 368, 203 S.E.2d at 592.

77. 97 Ga. App. at 215, 102 S.E.2d at 630 (syllabus).

78. *See* 130 Ga. App. at 368-369, 203 S.E.2d at 592-93. Note that the citations of Brown v. Five Points Parking Center, 121 Ga. App. 819, 175 S.E.2d 901 (1970), CORBIN, *supra* note

that this contractual provision could be scuttled by the mere expedient of finding tort liability and was unwilling to permit this to happen. The court said: "[W]here the breach of contract is not also a tort, limitations of liability for breach will usually be given effect"[79] and "[a] contrary decision—that is, one finding misfeasance, negligence and a valid tort action—would . . . make Orkin an insurer of its success . . . ."[80] It seems likely that the court strained to find nonfeasance only in order to give to Orkin what the court believed it was entitled to under the agreement. Although it is mere speculation, it is possible that the court in *Duffell* was similarly motivated.

The court in *Stevens* should have recognized that if the contract limited all liability, it is irrelevant whether Orkin's conduct could be characterized as tortious or as mere breach of contract. The real question was not the tort-contract characterization, but whether the contract did preclude noncontractual liability. Arguably it did not. In the first place, the most reasonable *interpretation* of the agreement is that it limited liability under the *guarantee,* and not for negligence. Secondly, there is a question whether Orkin should be permitted as a matter of public policy to avoid liability for negligence, since this was not a contract between bargaining equals.[81]

D. Jurisdiction

The Georgia Long-Arm statute[82] provides for the exercise of personal jurisdiction by Georgia courts over nonresidents with respect to causes of action arising from, insofar as is relevant here, transaction of business within the state (Ga. Code Ann. §24-113.1(a)(1971)), the commission of a tortious act within the state (§24-113.1(b)), or the commission of a tortious

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43, and 17 AM. JUR. 2D 556, *Contracts,* are all to discussions of contractual limitation of tort liability.

79. *Id.* at 365, 203 S.E.2d at 591.

80. *Id.* at 370, 203 S.E.2d at 593. It is also possible that the court was motivated by the absence of negligence. *See* 130 Ga. App. at 367-368, 203 S.E.2d at 591-92; Gregory, *Annual Survey of Georgia Law: Torts,* 26 MERCER L. REV. 221, 226, 227 (1974). However, the language of the opinion indicates the court's belief that the agreement could not even limit negligence liability, despite its intent.

81. It could, however, be argued that the plaintiff is in a relatively good bargaining position in the exterminator market as compared, for instance, with an automobile purchaser, and that plaintiff did have the option to purchase additional protection. *See* Delta Air Lines, Inc. v. McDonnell Douglas Corp., 503 F.2d 239 (5th Cir. 1974); Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146 (3rd Cir. 1974); K-Lines, Inc. v. Roberts Motor Co., 273 Or. 242, 541 P.2d 1378 (1975); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases,* 18 STAN. L. REV. 974, 1005-1009 (1966).

82. GA. CODE ANN. §24-113.1 (1971).

83. After the expansive interpretation of §24-113.1(b) in Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58, 195 S.E.2d 399 (1973), it is unlikely that §24-113.1(c) will have much independent effect. *See* Beaird and Ellington, *Annual Survey of Georgia Law: Trial Practice and Procedure,* 25 MERCER L. REV. 265, 269 (1974).

injury in the state if the tortfeasor has other contacts with Georgia (§24-113.1(c)). It has been held that jurisdiction under §24-113.1(a) is available only for contract actions, while §24-113.1(b) and, by inference, §24-113.1(c), are limited to tort actions.[84]

The tort-contract distinction has significance in this context because of the different standards applied by the courts under §24-113.1(a) and §24-113.1(b). For jurisdiction under §24-113.1(a), the Georgia courts have required some actual entry into Georgia which is significant to the plaintiff's cause of action,[85] while "tortious act" jurisdiction has been predicated on mere foreseeability by the defendant that Georgia interests would be affected.[86] Thus, in *Interstate Paper Corp. v. Air-O-Flex Equipment Co.*[87] and *Unistrut Georgia, Inc. v. Faulkner Plastics, Inc.*,[88] which involved the manufacture and sale of products outside of Georgia causing injury in Georgia, jurisdiction was denied because the complaints were for breach of warranty and the defendants could not be deemed to have transacted business in Georgia. It is probable that if the claims had been characterized as tortious, as were the claims in *Scott v. Crescent Tool Co.*[89] and *Standard v. Meadors*,[90] which also involved the sale of goods causing injury in Georgia, there would have been sufficient forseeability of contact with Georgia to justify jurisdiction under §24-113.1(b).

Even if there were a substantial difference between liability for breach of warranty and liability for product defect (and, as discussed above,[91] there is not), it is difficult to understand how any such difference is relevant to the principal concern under the long-arm statute of whether the defendant has sufficient contacts with the state to justify forcing it to defend there.[92] It may be that the *kind of injury* is relevant, but not whether the liability is based on a promise or on a representation. Certainly the language of both §24-113.1(a) and §24-113.1(b) is sufficiently flexible to permit like treatment of tort and contract cases. Ga. Code Ann. §24-113.1(a) is not limited in terms to contract cases and, since "tortious"

84. *See* Interstate Paper Corp. v. Air-O-Flex Equip. Co., 426 F. Supp. 1323 (S.D. Ga. 1977); Standard v. Meadors, 347 F. Supp. 908 (N.D. Ga. 1972); Scott v. Crescent Tool Co., 296 F. Supp. 147 (N.D. Ga. 1968); Unistrut Ga., Inc. v. Faulkner Plastics, Inc., 135 Ga. App. 305, 217 S.E.2d 611 (1975).

85. *See* O.N. Jonas Co. v. B & P Sales Corp., 232 Ga. 256, 206 S.E.2d 437 (1974); Unistrut Ga., Inc., v. Faulkner Plastics, Inc., 135 Ga. App. 305, 217 S.E.2d 611 (1975).

86. *See* Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58, 195 S.E.2d 399 (1973); Value Eng'r Co. v. Gisell, 140 Ga. App. 44, 230 S.E.2d 29 (1976). *See also* for comparisons of the operation of §24-113.1(a) and §24-113.1(b), Shellenberger v. Tanner, 138 Ga. App. 399, 227 S.E.2d 266 (1976); Beaird and Ellington, *Annual Survey of Georgia Law: Trial Practice and Procedure*, 25 MERCER L. REV. 265, 271 (1974).

87. 426 F. Supp. 1323 (S.D. Ga. 1977).

88. 135 Ga. App. 305, 217 S.E.2d 611 (1975).

89. 296 F. Supp. 147 (N.D. Ga. 1969).

90. 347 F. Supp. 908 (N.D. Ga. 1972).

91. *See* notes 25-32, *supra*, and accompanying text.

92. *See* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L. FORUM 533 (1963).

is not defined in the statute, the courts are free to supply a meaning which is consistent with the intent of the statute. For example, §24-113.1(b) and §24-113.1(c) could be interpreted as being limited to personal injury, a standard type of "tortious" injury, and a type of injury which justifies a broader exercise of jurisdiction.

In fact, there are some signs that the tort-contract distinction may be disappearing from the Georgia jurisdiction cases. In *Davis Metals, Inc. v. Allen*[93] the supreme court, in dictum, stated the test for jurisdiction in terms unrelated to tort and contract, a point which was noted in a later federal case.[94] Additionally, in *Mack Trucks, Inc. v. Arrow Aluminum Castings Co.*[95] the Fifth Circuit Court of Appeals held that a court with "tortious act" jurisdiction could also exercise jurisdiction over a related warranty claim. This involves at least some recognition of the relatedness of tort and contract causes of action.

III. Conclusion

The distinction between tort and contract is not as clear as has been supposed by the courts, particularly in the borderland areas of the sales of goods and services. From the standpoint of the tort-contract distinction in general, we have seen that a continued insistence on making the distinction inevitably leads to inconsistent results in similar cases. Once the focus shifts to the specific questions being decided with the use of the tort-contract distinction, we see that the distinction is irrelevant to what should be the decisive factors, and that in many cases, the courts, while speaking in the language of tort and contract, are, in fact, influenced more by these other factors. To the extent that the tort-contract distinction is persuasive, the cases are being wrongly decided. To the extent that the results are merely phrased in terms of tort and contract while being determined by other factors, the opinions are confusing. While this article has discussed only a few of the issues with respect to which the tort-contract distinction has been made, the same conclusions could be reached with respect to other issues, such as the statute of limitations or choice of laws.

It is true that, in certain situations, such as in cases involving the statute of limitations or jurisdiction points, the courts must operate within statutes which speak in terms of tort and contract. It is hoped, first, that the courts will not assume that these words have absolute meanings and that there is an immutable difference between the two concepts, and begin interpreting such terms flexibly, consistent with the policies underlying the statutes, in the manner suggested above with respect to the long arm statute.[96] In other words, "tort" and "contract" need not necessarily refer

93. 230 Ga. 623 at 625, 198 S.E.2d 285 at 287 (1973).
94. Atlanta Coliseum, Inc. v. Carling Brewing Co., 411 F. Supp. 253, 255 (N.D. Ga. 1976).
95. 510 F.2d 1029, 1031-2 (5th Cir. 1975).
96. *See* note 92, *supra*, and accompanying text.

to two different theories of recovery, but, for example, to non-business or business cases, or personal injury or property damage, if such distinctions are consistent with legislative policy. Secondly, it is hoped that legislatures will stop using such terms, and eliminate the necessity for such judicial gymnastics.

Prosser, in noting the flexibility of the tort-contract distinction, said "When the ghosts of case and assumpsit walk hand in hand at midnight, it is sometimes a convenient and comforting thing to have a borderland in which they may lose themselves."[97] The best solution would be to dispatch both the ghosts and the borderland.

97. W. PROSSER, *The Borderland of Tort and Contract*, in SELECTED TOPICS ON THE LAW OF TORTS (1953).