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Georgia's New Battleground: Five Georgia Law Professors Examine the State's New Tort Legislation

Lonnie T. Brown, Jr.
University of Georgia School of Law, ltbrown@uga.edu

Ronald L. Carlson
University of Georgia School of Law, leecar@uga.edu

Thomas A. Eaton
University of Georgia School of Law, teaton@uga.edu

C. Ronald Ellington
University of Georgia School of Law, cre@uga.edu

Michael L. Wells
University of Georgia School of Law, mwells@uga.edu

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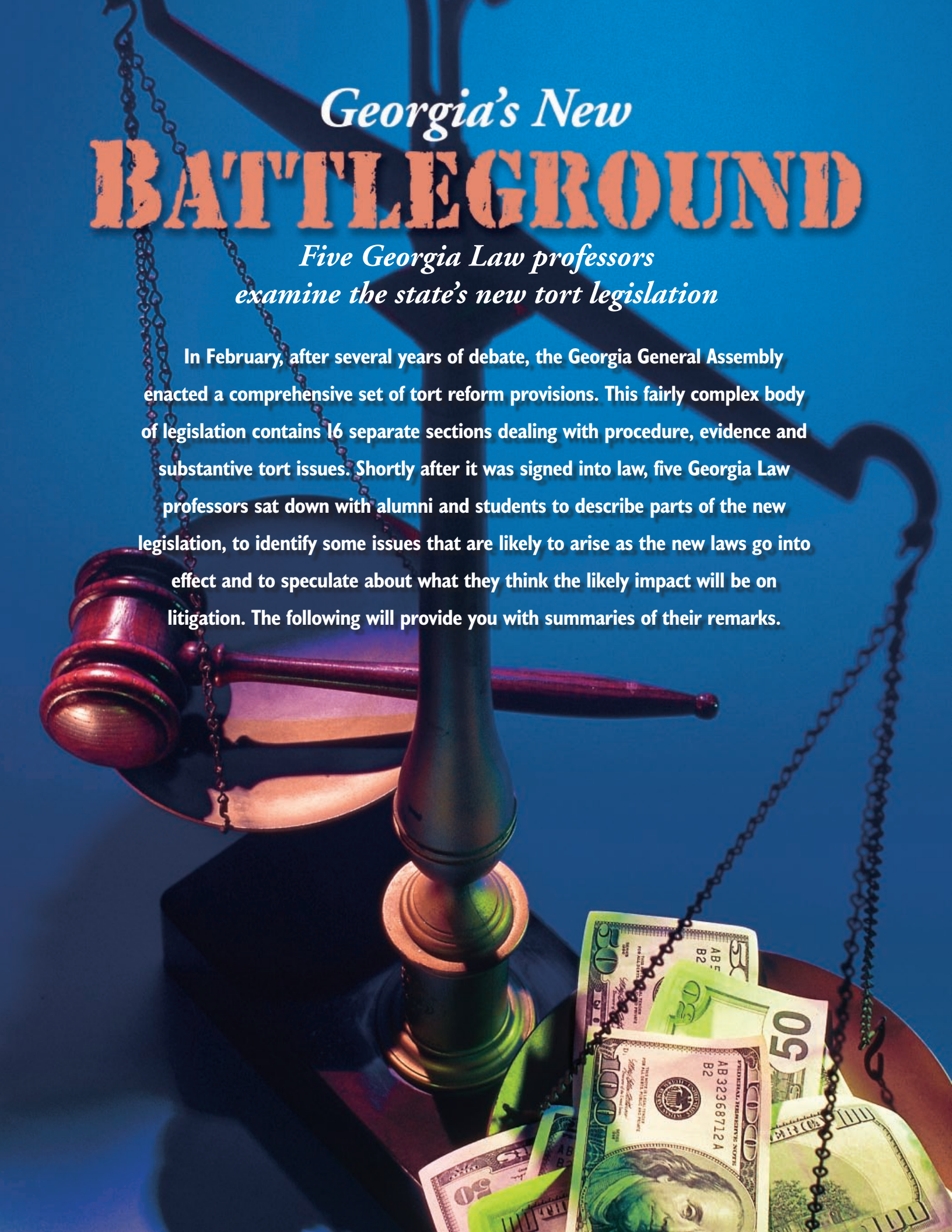
In February, after several years of debate, the Georgia General Assembly enacted a comprehensive set of tort reform provisions. This fairly complex body of legislation contains 16 separate sections dealing with procedure, evidence and substantive tort issues. Shortly after it was signed into law, five Georgia Law professors sat down with alumni and students to describe parts of the new legislation, to identify some issues that are likely to arise as the new laws go into effect and to speculate about what they think the likely impact will be on litigation. The following will provide you with summaries of their remarks.



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Offers of Judgment by Lonnie T. Brown, Jr., Associate Professor of Law

Until the enactment of O.C.G.A. 9-11-68, Georgia was one of only a handful of states that did not provide for offers of judgment. Most states' "offer of judgment" rules are modeled after Federal Rule of Civil Procedure 68. The purpose for "offer of judgment" rules is to encourage the early settlement of cases, which in turn helps conserve judicial resources.

Many lawyers and commentators, however, are of the opinion that Rule 68-type offers of judgment do not provide a very meaningful incentive for assuring attainment of this goal because they only create the potential for the recovery of litigation costs. As a result, some state provisions also permit the awarding of certain special fees, such as expert witness fees, in addition to typical costs. And, a relatively small number of states have gone even further by allowing for the recovery of reasonable attorney's fees – Georgia is now included in that select group.

Federal Rule 68 may be characterized as moderately confusing, but it's "child's play" compared to Georgia's new "offer of judgment" statute, which is extremely lengthy and laden with numerous undefined terms and confusing provisions that will, no doubt, be the subject of much satellite litigation in the future. Here is a general description of how it is seemingly supposed to operate.

First, Section 9-11-68 allows for both plaintiffs and defendants to make "offers of judgment" – not just defending parties, as provided for in Federal Rule 68. Offers may not be made before 30 days have elapsed from the date of service of the summons and complaint in an action, and may not be made less than 30 days before the date of trial (or 20 days before trial if it is a counteroffer). Once an offer is made (in writing), the offeree has 30 days within which to accept (in writing).

If the offeree rejects the offer, or otherwise fails to accept it within the specified time period, he or she may be on the hook for the reasonable attorney's fees and costs incurred after the date the offer was deemed to have been rejected.

Under what specific circumstances will such fees and costs be recoverable? Unfortunately, this aspect of the statute contains conflicting language that suggests two possible approaches for answering this all-important "triggering" question.

Subsection (b) provides that: "... if the offeree rejects or does not accept the offer and the *judgment* finally obtained by the offeree *was not at least 25 percent more favorable than the last offer*, the offeree shall pay the offeror's reasonable attorney's fees and costs incurred after the rejection of the last offer" (O.C.G.A. 9-11-68(b) (emphasis added)).

Subsection (d)(1), on the other hand, indicates that if a court determines that: "... the *offer* of judgment *was 25 percent more favorable than the monetary award*, the court shall award reasonable attorney's fees and costs ..." (O.C.G.A. 9-11-68(d)(1) (emphasis added)).

Without going into the math, the important point is these inconsistent and confusing provisions will produce different triggering amounts.

The imposition of fees and costs is mandatory if the "trigger" is satisfied, and a timely motion is made. But, there is one significant proviso with regard to the operation of the statute - the trial judge has been granted discretion to disallow an award of fees and costs that is technically called for under the terms of the statute, if the court determines that the offer was not made in "good faith" (which is not defined).

There is also one additional component to the offer of judgment statute that has absolutely nothing to do with offers of judgment. Section 9-11-68(e) allows for the prevailing party, at the time of the verdict or judgment, to request the "finder of fact" to determine whether the opposing party's claim or defense was frivolous (which is defined in the statute, but in a very confusing and awkward fashion).

If the request is made, the court is required to conduct a "separate bifurcated hearing" at which the "finder of fact" shall determine whether the claim or defense was frivolous, and then whether damages should be awarded.

The subsection further provides that these "damages" may include "reasonable and necessary attorney's fees and expenses of litigation" in addition to any other damages that might be established.

Subsection (e) is very interesting, or perplexing, for a host of reasons. For one thing, there is already a statute (O.C.G.A. 9-15-14) that allows for the recovery of such fees and expenses in civil litigation under similar circumstances, and Subsection (e) expressly indicates that a party must choose between the two. As a result, is Section 9-11-68(e) simply overkill?

In addition, Subsection (e) allows for the possibility that a party, against whom an award of attorney's fees and costs can be made under the "offer of judgment" subsections, could nevertheless obtain an award of his or her own attorney's fees and costs (or other damages). This is theoretically possible because one only needs to be a "prevailing party" in order to seek recovery under this subsection (e.g., a plaintiff can prevail, but still not satisfy the 25 percent more favorable requirement).

Finally, and perhaps most significantly, Subsection (e) seems to allow for the "frivolousness" determination to be made by a jury, rather than the court. The subsection uses the phrase "finder of fact" rather than "court," which seems to connote "sometimes jury, sometimes judge." Thus, in many instances, cases may end with a separate "mini" jury trial, which obviously has the potential to elongate and unduly complicate the process, and certainly presents an opportunity for abuse.

Expert Opinions by Ronald L. Carlson, Callaway Chair of Law Emeritus

Few cases of any dimension are tried without the assistance of at least one, if not several, expert witnesses.

Georgia's new legislation cuts broadly across the landscape of expert witness law.

Not simply restricted to medical cases, the 2005 statute makes clear it

amends courtroom practice for experts across the board in civil cases from products liability to contract disputes.

Section 7(a) of the 2005 act provides: "The provisions of this Code section shall apply in all civil actions." It goes on to amend O.C.G.A. 24-9-67 with new language, and then adds a new code section O.C.G.A. 24-9-67.1.

Mirroring much of Federal Evidence Rule 703, the statute states: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted."

Clearly under new O.C.G.A. 24-9-67.1(a), an expert can rely upon trustworthy written hearsay. For example, expert A can rely upon reports from expert B when A testifies. A medical doctor can give her opinions about a patient based upon her treatment of the patient as well as a written diagnosis supplied by another doctor, *even though the latter doctor does not testify in the case*. An expert in aviation accidents can rely upon reports of official boards of inquiry in order for the expert to reach his own conclusions regarding the cause of an air crash. Such an opinion in Georgia is no longer subject to an "opinion based on hearsay" objection.

What about indications at other points in the new act that may seem to be contrary to the foregoing conclusions?

These emanate from Section 7(b) that provides that the expert's opinions should be drawn from data "which are or will be admitted into evidence." Because this language is at odds with the language previously quoted from section 7(a), which provision controls?

As I noted earlier, Section 7(a) mirrors federal rule language.

New Georgia Section 7(f) directs courts of this state to draw from the decision in *Daubert v. Merrell Dow Pharmaceuticals* to interpret the new act.

Since *Daubert* is based upon the Federal Rules of Evidence, the Georgia legislature seems to intend for local courts to follow federal expert witness law in areas of questionable interpretation.

Because of the legislation's apparent desire to align Georgia with federal practice, a conclusion seems inescapable that the new Statute 7(a) (the federal model) prevails over Statute 7(b)(1) (the old common law pattern).

In qualifying experts under the new act, there are special expert requirements in medical malpractice actions. The expert must be a member of the same profession as the defendant doctor. Also, he or she must have actively practiced the specialty for three of the past five years or been a teacher of the topic for the same period.

A pretrial hearing on these questions is mandated, upon motion of a party.

Finally, in civil actions by patients against doctors, any apologies made by the doctor for bad surgical or medical work shall not be viewed as party admissions against the physician - Section 6(c).

A lingering question relates to the standard for novel scientific proof in civil cases. For many years, Georgia practice has been controlled in both civil and criminal cases by the *Harper* test. Now, civil case practitioners are directed to the *Daubert* standard - Section 7(f).

As a result, it may be forcefully argued that *Harper* has been replaced by *Daubert* in product liability, personal injury and other civil actions.

Emergency Healthcare Liability by Thomas A. Eaton, Hosch Professor of Law

Section 10 of Senate Bill 3 limits its liability for emergency room-based malpractice claims. This provision creates a new Code section, O.C.G.A. 51-1-29.5.

There are three main features of this legislation. First, the level of culpability needed to support liability is increased from negligence to gross negligence. Second, the plaintiff's burden of proof is increased from a preponderance of evidence to clear and convincing evidence. Third, the statute requires certain jury instructions be given in emergency room cases.

Subsection (d) provides the court "shall instruct the jury to consider" whether or not the health care provider had a full medical history of the patient, whether or not there was a preexisting doctor-patient relationship, the circumstances constituting the emergency, and the circumstances surrounding the delivery of emergency medical care.

The scope of these new rules may be both broader and more narrow than one might think. They may be broader in the sense that they apply not only to tort claims arising from emergency medical care provided in an emergency room, but also to medical care provided in "an obstetrical unit or in a surgical suit immediately following the evaluation or treatment of a patient" in a hospital emergency room.

The new rules may be narrower in the sense that they are not triggered unless there is a genuine emergency. The phrase "emergency medical care" is defined in terms of an acute medical condition and not merely the location of where the care is provided.

In order to constitute an emergency, "the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part" (O.C.G.A. 51-1-29.5(a)(5)).

Thus, the gross negligence, clear and convincing burden of proof, and mandatory jury instruction provisions would not apply to patients who receive medical care in the emergency room, but to those whose condition satisfies the definition of a bona fide emergency. The limited definition of "emergency medical care" should prevent this new statute from becoming a de facto immunity in the unfortunately all too common situation in which poor people receive non-emergency care in local emergency rooms.

It is ironic, or perhaps tragic, that this legislation provides greater insulation from tort liability to those claims arising from the single location of a hospital where negligence is most likely to occur. In the most far reaching empirical study of treatment-induced injuries ("adverse events"), researchers from the Harvard School of Public Health concluded that over 70 percent of adverse events in an emergency room were the result of negligence. O.C.G.A. 51-1-29.5 will make such claims more difficult to pursue.

Section 11 of Senate Bill 3 substantially eliminates the doctrine of apparent agency in the hospital setting. For a bit of background, most physicians are not employees of the hospitals in which they practice. They are considered independent contractors. Consequently, hospi-

tals are not, as a general matter, vicariously liable for the torts committed by physicians.

An exception to this general rule has been recognized under Georgia law. Under the doctrine of apparent agency, a hospital can be rendered vicariously liable for the negligence of a physician if the physician is deemed to be the "apparent agent" of the hospital.

Apparent agency may be found when the hospital represents that the doctor is its agent and the patient relies on that representation. The doctrine of apparent agency is most often invoked in the context of hospital-based practices, such as emergency rooms, pathology, radiology and anesthesiology.

Section 11, which will be codified as O.C.G.A. 51-2-5.1, prescribes how a hospital can avoid liability under apparent agency for these and a number of other health care professionals. However, the impact of this provision on medical liability may be relatively limited.

Hospitals remain potentially liable for their own acts of institutional negligence and vicariously liable for the negligence of their actual agents. Moreover, the physicians who, in the absence of the statute, might previously have been deemed apparent agents are subject to liability for their individual acts of negligence. Moreover, such physicians usually have sufficient insurance or other assets to provide compensation. Thus, the impact of Section 11 on the ability of a patient to secure compensation should be minimal.

Venue by C. Ronald Ellington, Cleveland Chair of Legal Ethics and Professionalism

What changes in the law governing venue (where civil actions can be tried) does the 2005 Georgia tort reform legislation make? Let's take a simple example: Suppose a person from Athens-Clarke County is involved in an automobile collision with two other motorists from Fulton County and Cobb County respectively. The accident happens on I-85 in Gwinnett County.

Where could the plaintiff bring one action against the other two drivers? Prior to the enactment of Senate Bill 3, one could answer confidently that the plaintiff could sue both the other drivers in either Fulton or Cobb county if it were alleged their separate, independent acts of negligence combined naturally to cause an indivisible injury to the plaintiff. This result followed from the provision in Article 6, Section 2, Paragraph 4 of the Georgia Constitution that reads "suits against joint obligors, joint tort-feasors, joint promisors, copartners, or joint trespassers residing in different counties may be tried in either county."

Suppose the plaintiff selects Fulton County and brings suit there against both defendants. Under the Constitution, as alleged joint tortfeasors, venue would be proper as to both. But what if the resident defendant from Fulton County is dismissed from the action before trial or a verdict is returned for that defendant but against the non-resident defendant from Cobb County?

For over 100 years, the answer in Georgia case law was that venue vanished as to the non-resident defendant. The court lost jurisdiction to enter a judgment on the verdict against the non-resident defendant only, and the plaintiff would have to re-try the case in Cobb County where the defendant resides.

Six years ago, the General Assembly acted to eliminate what it described as "the waste of time and resources to courts and parties under the vanishing venue doctrine." Old O.C.G.A. 9-10-31(c), adopted in 1999, effectively ended the possibility that venue would vanish when a defendant was discharged "after the commencement of trial" by requiring the consent of all parties (including the victorious plaintiff) before the action could be transferred.

Plainly, the 2005 Tort Reform Act undoes the 1999 statute and restores vanishing venue in O.C.G.A. 9-10-31(d). Accordingly, plaintiffs must carefully weigh once again whether the case against the resident defendant is a strong one, for if the resident defendant is not held by a judgment, any verdict against a resident of a different county sued there, because joined with the resident defendant, will be wasted.

This assumes the two co-defendants from Fulton and Cobb can still be sued together in the county where either resides in the first place. Can they today? O.C.G.A. 9-10-31(a) and (b) appear to assume they can.

But, whether the plaintiff may constitutionally sue them in a single action is potentially called into question by Section 12 of Senate Bill 3 dealing with joint and several liability. If, as most readers assume, O.C.G.A. 51-12-31 and 51-12-33(b) eliminate joint and several liability, then the constitutional underpinning that allows defendants from Fulton and Cobb counties to be sued together in one action in either county may be removed.

If these defendants are no longer jointly liable, but only individually liable for their own percentage of fault, then we can expect nonresident defendants to object to venue when the action is filed by arguing they are not "joint tortfeasors" and hence each has the constitutional right under Article 6, Section 2, Paragraph 6 to be sued in the county of his or her own residence.

Of course, it may be plausible to conclude that even if the two defendants are no longer jointly liable, they still remain "joint tortfeasors" for the purpose of the constitutional rule so long as their individual acts of negligence have combined to produce an indivisible injury. But, there is reason for at least some argument on this score because some Georgia cases can be read to rest the right to sue joint tortfeasors, joint obligors or copartners residing in different counties in the county where any one resides on the principle that they are jointly liable.

Without joint liability, the whole edifice may collapse. Quite plainly, the fact the Civil Practice Act treats defendants against whom claims arising from a single collision are asserted as proper parties for a single action does not mean venue would also be proper. Statutes, such as the Civil Practice Act, cannot expand or vary the constitutional rules governing venue.

While the legislature can eliminate joint liability for tortfeasors, one provision in O.C.G.A. 9-10-31 is constitutionally suspect. New Subsection (c) allows, in medical malpractice actions, a nonresident defendant to require the case be transferred to the county of that defendant's residence if the tortious act giving rise to the lawsuit occurred in that county.

If the nonresident defendant is a joint tortfeasor with a resident defendant, Article 6, Section 2, Paragraph 4 of the Georgia Constitution provides venue is proper where either defendant resides. The Supreme Court ruled in *Glover v. Donaldson* that a statute could not limit the plaintiff's choice to only one of the counties

in the case of joint tortfeasors. Relying on *Glover*, the State Court of DeKalb County ruled in *Turner v. Beaird* on March 21, 2005, that O.C.G.A. 9-10-31(c) was thus unconstitutional.

Finally, O.C.G.A. 9-10-31.1 gives Georgia courts authority, for the first time, to order transfers of civil actions from one county to another for the convenience of parties or witnesses and in the interest of justice. Applying factors typically used in forum non conveniens analysis such as "relative ease of access to sources of proof," "possibility of viewing the premises when appropriate" and "administrative difficulties for forum courts," the statute allows transfer to a "different county of proper venue." What exactly this means is not free from doubt. Does "proper venue" mean a county where a plaintiff has the right to sue or can a defendant create a different county of proper venue by consent?

Surprisingly O.C.G.A. 9-10-31.1 also substantially duplicates a 2003 statute, O.C.G.A. 50-2-21, which authorizes a Georgia court to dismiss an action if a more convenient forum exists outside the state. Whereas, O.C.G.A. 50-2-21 only applies to actions filed on or after its effective date of July 1, 2003, the provision in O.C.G.A. 9-10-31.1 purports to be applicable to actions already pending when the new tort reform law became effective on Feb. 16.

Whether the new law authorizing forum non conveniens dismissals or transfers can be applied retroactively to cases already filed is likely to provoke serious constitutional challenges.

Joint Liability Rules by Michael L. Wells, Carter Chair in Tort and Insurance Law

In tort law, the rule of joint liability holds that two or more defendants who are each causally responsible for a single "indivisible" injury may be held "jointly" liable for it. That is, in such a case, the plaintiff may recover *all* of his damages from any of the defendants. At the same time, the plaintiff is entitled to only one full recovery. Once he obtains this, the judgment is satisfied and he gets nothing from anyone else.

Some years ago, the Georgia legislature modified this rule. The legislature distinguished between cases where the plaintiff was at fault and cases where plaintiff was not at fault. It abandoned joint liability in the former situation but not the latter.

In February 2005, the legislature passed a statute that modified the provisions bearing on joint liability. Some people, including legislative leaders who were behind the enactment of the new statute, say the new statute abolishes joint liability altogether.

I think this is a hasty, and probably incorrect, judgment. To begin with, we need to recall certain basic principles of statutory interpretation. First, it is generally agreed that the aim of statutory interpretation is to carry out the intention of the legislature. There is plenty of evidence the legislative leaders meant to abolish joint liability, based on what they said about the legislation. But this seems to me to be irrelevant, for reasons that are, in part, distinctive to statutory interpretation in Georgia.

Given that, in Georgia, one determines legislative intent by looking at the statute and the history of the statute, i.e., the way it has been amended over time. One also looks at the common law background of the statute as well as the structure of the statute, i.e., the way various parts of it relate to one another.

One reason to question the assertion the new statute wholly abolishes joint and several liability is the statute contains no *explicit* language to that effect. The abolitionist argument, then, is the amendments must *implicitly* abolish joint liability. But it is far from clear that the amendments do any such thing.

One section thought to abolish the joint liability rule is the amendment to O.C.G.A. 51-12-31. This section used to provide, in relevant part, that "except as provided in Code Section 51-12-33, where an action is brought jointly against several trespassers, the plaintiff may recover damages for the greatest injury done by any of the defendants against all of them."

Now, it provides that "where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury." Left unchanged are the last two sentences of Section 31: "In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally."

The new version describes the people one obtains damages against in the second part rather than the first, where it used to specify "trespassers." This change has nothing to do with joint liability.

The other change is taking out "the greatest injury done" and "all of them," replacing that language with "an injury caused" [by any of the defendants]. This amendment does not touch joint liability either.

Joint tortfeasors *all* cause an indivisible injury. Thus, they are *all* covered by the new language just as they were by the old language. *All* of them are covered by "only the defendant or defendants liable for the injury."

What the amendments do is to remove the confusing suggestion in the old law that there may only be joint liability against a less responsible defendant ("the greatest injury done") for harm done by a more responsible defendant.

What the *language* of the new statute does is to make clear that there is joint liability under the common law rule against *all* defendants, those who bear responsibility for more of the negligence as well as those who bear responsibility for less of it.

The other provision that was changed is O.C.G.A. 51-12-33. The prior version of this is the statute that abolished joint liability when the plaintiff is at fault. One thing the new statute does is to divide the old statute up into three parts, with some of its propositions now appearing in (a), some in (b) and some in (g). The central point is 51-12-33 does not address the broad issue of whether joint and several liability remains the rule in cases where the plaintiff is not at fault.

Another feature of the statute bears on whether it should be interpreted as abolishing joint liability. Nothing was done to O.C.G.A. 51-12-32, the section in between the two we have looked at. That statute, as interpreted by the Georgia Supreme Court, authorizes "pro rata" contribution among joint tortfeasors. This provision would be a nullity if there were no joint liability.

If the intent of the legislature was to repeal joint liability, the framers of the statute surely would have repealed Section 32. As matters stand, the partisans of the "abolition" thesis have to resort to reading this section as saying "except for [always] the following rules will apply." The abolitionist view turns Section 32 into a superfluous passage. Yet, the Georgia Supreme Court avoids constructions that turn statutory language into "mere surplusage." ■