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MONTANA SUPREME COURT SURVEY

EDITOR'S NOTE

This issue presents the first annual "Montana Supreme Court Survey," an analysis of the opinions of the Montana Supreme Court in major fields of law during the period beginning October 1, 1977, and ending October 1, 1978. With this survey, the Board of Editors intends to supplement the overviews of various fields of law presented in the general survey articles in Volume 38 and Volume 39, as well as to discuss developments in other areas of law faced by the court. The authors have taken a variety of approaches, depending upon the subject matter, the opinions of the court, and personal style.

PART I: PRIVATE LAW

TORTS

Monte D. Beck and John B. Spooner

INTRODUCTION

The most significant tort law developments during the period of this survey were confined principally to the products liability and defamation areas. The court has with all probability eliminated ordinary contributory negligence as a defense in products liability cases. In the area of defamation, the court ruled unconstitutional a statute which requires retraction of alleged defamations before suit may be brought.

This survey examines two cases concerning liability based on ownership and liability based on the sale of liquor. The survey also notes developments in the areas of mental suffering, indemnity between joint tortfeasors, and the sudden emergency doctrine in relation to ordinary auto accidents.

I. SUDDEN EMERGENCY

The Montana Supreme Court recently questioned the usefulness of the sudden emergency doctrine in an ordinary automobile accident case. In *Kudrna v. Comet Corp.*,¹ the court ruled that a party may not obtain the benefit of the doctrine if the emergency itself was created by the actor's negligent conduct.²

1. ___ Mont. ___, 572 P.2d 183 (1977).

2. *Id.* at ___, 572 P.2d at 189.

In *Kudrna*, plaintiff's husband was a passenger in a van which collided with an oncoming semi-truck trailer. The driver of the semi-truck, in order to avoid a rear-end collision, attempted to pass a stalled semi-truck and had nearly returned to his proper lane when the left front portion of the van struck the rear axle of the defendant's trailer. Plaintiff brought suit against the owners of the passing semi-truck, Comet Corporation, and the stalled semi-truck, Mid-West Coast Company, for failure to observe traffic regulations and negligence.³

Comet Corporation's defense was that any statutory violations were excused by a sudden emergency created by the immobilized Mid-West Coast truck⁴ and that the proximate cause of Kudrna's death was Mid-West Coast's negligence. Comet Corporation argued that the statutory violations of its driver for following too closely were excused by the sudden emergency created by the unanticipated stop of the West Coast semi-truck.

Although the trial court allowed an instruction to this effect,⁵ the supreme court ruled that the lower court erred in giving the instruction.⁶ It reasoned that there was no evidence which showed that a sudden emergency had confronted the Comet truck. "The situation confronting the Comet truck driver was 'sudden' only with respect to his realization that the Mid-West Coast truck was not moving and that he was too close behind it to avoid a collision. . . ."⁷

3. Violation of the following sections of Montana law was alleged: MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 61-8-329(1) (1978) (formerly codified at REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 32-2160(a)), which provides:

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway;

MCA § 61-8-325(1) (1978) (formerly codified at R.C.M. 1947, § 32-2155), which provides in pertinent part:

No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken.

4. ___ Mont. at ___, 572 P.2d at 188.

5. The trial court's instruction read:

You are instructed that when a person is faced with a sudden emergency which is not created by his own negligence, his conduct is to be tested by what an ordinarily prudent person would have done under the same or similar circumstances, and he is not chargeable with negligence for failing to adopt the most judicious course as disclosed by subsequent events.

Id. at ___, 572 P.2d at 194.

6. *Id.*

7. *Id.* at ___, 572 P.2d at 189-90.

On a more important level, the court restated the rule that a party cannot utilize the sudden emergency doctrine as a defense if the emergency was created by his negligent conduct.⁸ Comet's negligence began when its "truck driver carelessly placed himself in a position of not being able to stop behind the Mid-West Coast truck without colliding with it. . . ." On the basis of this evidence the court held Comet Corporation liable as a matter of law¹⁰ and remanded to the trial court the issue of the concurrent liability of Mid-West Coast.¹¹

The holding in *Kudrna* suggests the limited usefulness of the sudden emergency doctrine as applied to most auto accidents. The supreme court conveyed the message that drivers must "be prepared" to meet emergencies which should be anticipated.¹² The more a driver is obligated to anticipate emergencies, such as the appearance of obstacles in the highway, the less likely the emergency will be considered "sudden" and "unexpected."¹³

Frequently, accidents are the result of an everyday traffic problem for which one of the drivers should have been prepared. For most automobile accidents, the ordinary rules of negligence are sufficient to measure the conduct of parties. Apparently the court believes the sudden emergency doctrine is more apt to confuse the jury since it approvingly quoted language from a case criticizing the concept:

Further we entertain grave doubt whether a sudden emergency charge should ever be given in an *ordinary automobile accident case*. There is a modern view that it is *argumentative, unnecessary, and confusing*, and should be eliminated.¹⁴

In short, the supreme court, while it did not reject the sudden emergency doctrine, warned trial courts that they should be very cautious in allowing the instruction.

8. *Id.* at ____, 572 P.2d at 189.

9. *Id.* at ____, 572 P.2d at 193.

10. *Id.*

11. *Id.* at ____, 572 P.2d at 195.

12. The court quoted this passage from W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 170 (4th ed. 1971):

A further qualification [to the sudden emergency rule] which must be made is that some 'emergencies' must be anticipated, and the actor must be prepared to meet them when he engages in an activity in which they are likely to arise. Thus under present day traffic conditions, any driver of an automobile must be prepared for the sudden appearance of obstacles in the highway

13. See 21 U. FLA. L. REV. 667, 672 (1969).

14. ____, Mont. at ____, 572 P.2d at 190, quoting *Finley v. Wiley*, 103 N.J. Super. 95, 103, 246 A.2d 715, 719 (1968) (emphasis added by the court).

II. STRICT LIABILITY

Strict liability was not formally recognized in Montana until 1973.¹⁵ Since then, the supreme court has confined the doctrine principally to products liability cases;¹⁶ little attention has been given to the tort areas to which strict liability has been applied in other jurisdictions. The supreme court during the survey period failed to mention strict liability in three cases involving liability based on the supplying of chattels and for the sale of alcohol. Since other courts have treated these situations under the rubric of strict liability,¹⁷ these cases have been collected under that label. The Montana Supreme Court did not ground any of these decisions upon strict liability, so this classification is purely academic. Despite the absence of explicit strict liability analysis, however, the Montana court offered some intriguing clarifications of areas of law other than strict liability, including the effect of regulatory prohibition upon civil liability.

A. Liability Based on Ownership

The Montana court held in two cases that a vehicle owner is not liable for injuries incurred through an unauthorized operator's negligence. In *Forrester v. Kuck*¹⁸ an employee driving defendant's truck injured another employee riding a motorcycle. The unfortunate cyclist recovered under workers' compensation, then sued the owner of the truck, claiming that the owner was the driver's employer. The court found that there was no employment relationship and restated the common law rule against the imposition of liability based merely upon ownership,¹⁹ a rule which effectively eliminates any ownership liability without fault.

The plaintiff in the second case, however, insisted that the Montana legislature had imposed strict liability for ownership of an aircraft. In *Haker v. Southwestern Railway Co.*,²⁰ the Montana court interpreted for the first time the liability of airplane owners under the Montana Aeronautical Regulatory Act.²¹ In *Haker*, an Arizona business executive contracted with a flight school to have its instructor accompany him to Tacoma in the executive's plane.

15. *Brandenburger v. Toyota Motor Sales*, 162 Mont. 506, 513, 513 P.2d 268, 271 (1973).

16. *See id.* at 513, 513 P.2d at 272; *Brown v. North American Manufacturing*, ___ Mont. ___, ___, 576 P.2d 711, 716 (1978); *Stenberg v. Beatrice Foods*, ___ Mont. ___, ___, 576 P.2d 725, 728 (1978).

17. *See* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, 539, 634 (4th ed. 1971).

18. ___ Mont. ___, 579 P.2d 756 (1978).

19. *Id.* at ___, 579 P.2d at 759. Since the court cited no Montana cases as upholding this rule, the case appears to be one of first impression.

20. ___ Mont. ___, 578 P.2d 724 (1978).

21. MCA §§ 67-1-101 to 106 (1978) (formerly codified at R.C.M. 1947, § 1-101 to 606).

They agreed that the instructor would be allowed to take a short trip alone to Stanford, Montana. While in Stanford, the instructor took some friends, including the plaintiff's decedent, for an airplane ride, during which the plane crashed and killed all on board. The Aeronautical Regulatory Act defines "operator" as one "who causes or authorizes the operation of aircraft."²² Some courts, in interpreting either the federal statute or an identical state statute, have held that this provision protects the public from financially irresponsible pilots by making a plane's owner liable for the pilot's negligence.²³ In *Haker*, however, the Montana court followed the majority view that the statutory provision does not make the negligence of a pilot imputable to an owner.²⁴

Instead, the court concluded that the Aeronautical Act's purpose is to impose criminal penalties only.²⁵ The court also decided that REVISED CODES OF MONTANA (1947) § 1-1603, prohibiting reckless operation only by "pilots," refutes the notion that an "operator" is liable and thus makes the definition of "operator" inapplicable.²⁶ Montana's holding follows the national pattern of refusing to recognize a new civil remedy in derogation of the common law.²⁷ The court implied that aircraft owners are not liable for the pilot's negligence in the absence of a master-servant relationship between owner and pilot.²⁸ Thus, the plane crash victim, like the automobile collision victim in *Forrester*, must find other grounds besides ownership of the plane or automobile upon which to base a claim for recovery.

B. Liability Based on Sale of Alcohol

The court had little difficulty resolving the question of a tavern keeper's liability for the death of a minor consumer in *Folda v. City of Bozeman*,²⁹ in which it relegated the discussion of this issue to one paragraph at the close of the opinion. Seventeen-year-old Mary

22. MCA § 67-1-101(29) (1978) (formerly codified at R.C.M. 1947, § 1-102(11) (Supp. 1977)).

23. See, e.g., *Hays v. Morgan*, 221 F.2d 481, 483 (5th Cir. 1955) (applying Mississippi law).

24. See, e.g., *Farrari v. Byerly Aviation, Inc.*, 131 Ill. App.2d 747, 751, 268 N.E.2d 558, 561 (1971). *Contra*, *Sanz v. Renton Aviation, Inc.*, 511 F.2d 1027, 1029 (9th Cir. 1975); *Lockwood v. Astronautics Flying Club, Inc.*, 437 F.2d 437, 439 (5th Cir. 1971); *Nachsin v. DeLaBretonne*, 17 Cal. App. 3d 637, 641, 95 Cal. Rptr. 227, 229 (1971).

25. ___ Mont. at ___, 578 P.2d at 728.

26. *Id.*

27. See Annot., 11 A.L.R. Fed. 901, 903 (1972). Some state courts, however, have found that the state legislature intended to permit just such a civil remedy. See, e.g., *Hoebee v. Howe*, 98 N.H. 168, 172, 97 A.2d 223, 226 (1953).

28. ___ Mont. at ___, 578 P.2d at 728.

29. ___ Mont. ___, 582 P.2d 767 (1978).

Folda, after being served liquor in the defendant's bar, staggered from an adjacent parking lot and drowned in Bozeman Creek. The plaintiff, in *Folda*, like the plaintiff in *Haker*, requested that the court permit imposition of civil liability based upon a standard of care derived from a regulatory statute. The statute in *Haker* prohibited the reckless operation of aircraft,³⁰ whereas the statute in *Folda* prohibited the sale of liquor to minors.³¹ The jury absolved the bar owner from liability and the supreme court affirmed, finding that Folda's contributory negligence was the proximate cause of her death.³² Despite the apparent ease with which the Montana court dismissed the problem of a bar owner's liability for the death of a minor consumer, other courts have had considerably more difficulty with the issue. Several courts have held a tavern keeper liable in jurisdictions which, like Montana, have no Dram Shop Act imposing liability.³³

The cursory discussion of voluntary intoxication leaves some doubt whether the court will be receptive to the imposition of liability against tavern keepers. Two decisions, *Deeds v. United States*,³⁴ a Montana federal district court case, and *Vesely v. Sager*,³⁵ a California Supreme Court case, suggest that such liability might be imposed for injuries to third-party plaintiffs. The two cases dealt with automobile crash victims' recovery against tavern keepers who served liquor to the drivers at fault. The *Deeds* court predicted that the Montana Supreme Court would impose liability once the question arose.³⁶ The supreme court, however, declined to follow this rationale in two recent decisions.³⁷ Although neither case explicitly

30. MCA § 67-1-204 (1978) (formerly codified at R.C.M. 1947, § 1-603).

31. MCA § 16-6-305(1) (1978) (formerly codified at R.C.M. 1947, § 4-6-104). The court explicitly says it is using the statutory violation to prove negligence per se.

32. The court said, "Voluntary intoxication will not excuse the degree of care that a person must take for his or her own safety." — Mont. at —, 582 P.2d at 772.

33. See, e.g., *Davis v. Shiappacossee*, 155 So.2d 365, 367-68 (Fla. 1963) (reversing dismissal of plaintiff's complaint). *Contra*, *Moore v. Bunk*, 154 Conn. 644, 648, 228 A.2d 510, 512 (1967); *McNally v. Addis*, 65 Misc.2d 204, 317 N.Y.2d 157, 173 (1970).

34. 306 F. Supp. 348, 361 (D. Mont. 1969). Judge Jameson labels such liability negligence per se. *Id.* at 359.

35. 5 Cal. 3d 153, 168, 486 P.2d 151, 160, 95 Cal. Rptr. 623, 632 (1971). Citing *Deeds*, the California Supreme Court stated that the sale of alcoholic beverages may be the proximate cause of injuries to a third party by an intoxicated customer. *Id.* at 162, 486 P.2d at 157, 95 Cal. Rptr. at 629.

36. 306 F. Supp. at 361.

37. In *Swartzenberger v. Billings Labor Temple Assn.*, — Mont. —, 586 P.2d 712 (1978), the court distinguished *Deeds* as involving an injured third-party plaintiff and not an intoxicated consumer-plaintiff. *Id.* at —, 586 P.2d at 715. In *Runge v. Watts*, — Mont. —, 589 P.2d 145 (1979), a case which involved a third-party plaintiff, the court again distinguished *Deeds* as imposing liability upon a commercial vendor and not upon a hostess of a private party. The court implied, however, that the absence of "proximate causation" in such cases would eliminate the liability of a tavern-keeper. *Id.* at —, 589 P.2d at 146-47.

rejected *Deeds*, one opinion suggests the court is skeptical of imposing any tort liability at all upon a tavern keeper where his only culpable conduct involves serving liquor to a driver who caused the plaintiff's injuries.³⁸

III. PRODUCTS LIABILITY

The Montana Supreme Court made it clear during the period of this survey that a plaintiff's contributory negligence would not preclude recovery in a products liability case. In *Brown v. North American Manufacturing Co.*,³⁹ the supreme court ruled that while assumption of risk would operate to bar recovery in strict liability cases, contributory negligence would not.⁴⁰ Also during this period, the court in *Stenberg v. Beatrice Foods Co.*⁴¹ attempted to clarify the key phrase "defective condition unreasonably dangerous." It found the task difficult, to say the least.

A. *Brown v. North American Manufacturing Co.*

In *Brown*, the plaintiff's leg was amputated in an auger of a self-unloading feed wagon manufactured by the defendant. The plaintiff, after climbing the machine to look in the bin, stepped back down, intending to place his foot on an access door he used when he mounted the machine. In the meantime, unknown to the plaintiff, the access door had come open causing him instead to step directly into the auger.⁴² The plaintiff alleged the machine was defectively designed and unreasonable dangerous to the user.⁴³ The defendant maintained the machine was nondefective and asserted that the proximate cause of plaintiff's injury was his own conduct.⁴⁴ The defendant argued that the plaintiff assumed the risk of injury when he voluntarily mounted the machine without first turning off the power to the auger system.⁴⁵

The supreme court disagreed, finding that while the plaintiff's actions amounted to a degree of contributory negligence, he did not assume the risk as a matter of law.⁴⁶ The court notes that the defen-

38. *Runge v. Watts*, ___ Mont. ___, ___, 589 P.2d 145, 147 (1979).

39. ___ Mont. ___, 576 P.2d 711 (1978).

40. *Id.* at ___, 576 P.2d at 719.

41. ___ Mont. ___, 576 P.2d 725 (1978).

42. ___ Mont. at ___, 576 P.2d at 715.

43. An expert testified that the feeder did not conform to safety design requirements because of the machine's "(a) failure to hinge the access door at the top, (b) failure to warn of the hazard, and (c) failure to provide steps or other access for mounting the equipment." *Id.* at ___, 576 P.2d at 718.

44. *Id.* at ___, 576 P.2d at 719.

45. *Id.* at ___, 576 P.2d at 720.

46. *Id.*

dant failed to establish the plaintiff's actual knowledge of the dangerously exposed auger.⁴⁷ At most, the plaintiff was guilty of "failing to discover the defect or guard against its possible existence."⁴⁸

At the least, it would appear that the Montana Supreme Court has adopted Comment n of Section 402A of the Restatement (Second) of Torts, which provides:

Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably encountering a known danger, and commonly passes under assumption of risk, is a defense under this section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.⁴⁹

The court's definition of contributory negligence appears to encompass the type defined in Comment n because it ruled that a plaintiff's lack of due care for his safety is not a defense.⁵⁰

The court made clear in *Brown* that assumption of risk is to be measured by a subjective standard. It stated:

Henceforth, in product liability cases the defense of assumption of risk, will be based on a subjective standard rather than that of the reasonable man test.⁵¹

Therefore, if assumption of risk is raised as a defense, the defendant must establish the plaintiff's actual knowledge and appreciation of the dangerous condition. In short, to bar recovery, the defendant must prove the plaintiff realized the risk involved and voluntarily and unreasonably proceeded to use the product.⁵²

The *Brown* decision is a significant development in Montana products liability law. For the first time the court said contributory

47. *Id.*

48. *Id.*

49. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

50. The court's discussion of contributory negligence as not being a bar to recovery in a products liability case focused on an instruction given by the trial court. While somewhat misleading to jurors, the instruction had the effect of eliminating contributory negligence as a defense. The instruction provided in pertinent part: "you are not to consider whether or not the plaintiff exercised due care for his own safety . . ." *Id.* at ____, 576 P.2d at 720. For a detailed analysis of the *Brown* decision, see Note, *Products Liability in Montana: At Last a Word on Defense*, 40 MONT. L. REV. No. 2.

51. ____, Mont. at ____, 576 P.2d at 719.

52. *Id.* at ____, 576 P.2d at 719-20. See Justice Shea's concurring opinion, wherein he states that Montana has adopted the definition of assumption of risk which includes the requirement that the plaintiff proceed *unreasonably* to make use of a product even though he knows it to be defective and dangerous. *Id.* at ____, 576 P.2d at 723 (Shea, J., concurring).

negligence on the part of the plaintiff will not excuse a manufacturer from producing unsafe products. The underlying policy of strict liability in tort is that "it affords the consuming public the maximum protection from dangerous defects in manufactured products by requiring the manufacturer to bear the burden of injuries and losses enhanced by such defects in its products."⁵³ The *Brown* decision is consistent with this policy.

B. *Stenberg v. Beatrice Foods Co.*

The touchstone for recovery in a products liability case is to prove the product was in a defective condition unreasonably dangerous to the user or consumer when it left the defendant.⁵⁴

The phrase "defective condition unreasonably dangerous" was the key issue in *Stenberg*, in which the main issues involved the adoption of the Restatement's definition of "unreasonably dangerous" and the meaning of "defective condition."⁵⁵

The latter issue arose when the trial court refused to instruct on the definition of "defective condition," leaving the jury with no guidance as to the meaning of this term.⁵⁶ The supreme court concluded that "defective condition" must be defined,⁵⁷ but it was either unwilling or unable to attempt a definition. Thus, it appears Montana law is still silent on the guidelines for evaluating what is or what is not a defective product.

Justice Shea contended in his specially concurring comment to the opinion that "defective condition" escapes precise definition.⁵⁸ He argued that the term "can be effectively eliminated without taking any of the meaning away from the basic thrust of strict liability."⁵⁹ The basic thrust of products liability law, according to Justice Shea, "is to protect the public, or give them redress against manufacturers whose products for some reason are rendered unreasonably dangerous."⁶⁰

The "unreasonably dangerous" issue arose as a result of the plaintiff's objection to an instruction which adopted the Restatement's definition of that phrase.⁶¹ The plaintiff argued that the

53. *Id.* at _____, 576 P.2d at 716-17 citing *Brandenburger v. Toyota Motor Sales*, 162 Mont. 506, 517, 513 P.2d 268, 275 (1973).

54. See RESTATEMENT (SECOND) OF TORTS § 402A (1965); *Brandenburger v. Toyota Motor Sales*, 162 Mont. 506, 513 P.2d 268 (1973).

55. *Id.* at _____, 576 P.2d at 727.

56. *Id.* at _____, 576 P.2d at 729.

57. *Id.* at _____, _____, 576 P.2d at 729, 731.

58. *Id.* at _____, 576 P.2d at 731.

59. *Id.*

60. *Id.*

61. *Id.* at _____, 576 P.2d at 729.

practical effect of the Restatement's definition of the term would be to hold that an open and obvious condition could never be unreasonably dangerous. The defendant's instruction which incorporated part of Comment i⁶² to Section 402A said "unreasonably dangerous" means "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to the product's characteristics."⁶³

The injurious condition in *Stenberg* was a clearly visible grain auger which lacked a protective shield. The plaintiff admitted he saw the auger and realized it was dangerous.⁶⁴ Therefore, it was contended the grain auger was not unreasonably dangerous because it was open and obvious and the plaintiff contemplated what he had seen.⁶⁵

Justice Shea, writing for the court, rejected this type of an instruction, stating that with this definition "it would be virtually impossible for an open and obvious condition to be unreasonably dangerous."⁶⁶ The court noted there are no policy reasons for denying recovery when the condition is open and obvious.⁶⁷

Finally, the plaintiff argued that the unreasonably dangerous requirement should be discarded as an element of proof in strict liability cases, since it rings of negligence concepts.⁶⁸ The court rejected that position and remanded the case for a consideration of plaintiff's assumption of the risk.⁶⁹

IV. MENTAL SUFFERING

An attorney seeking damages for mental suffering should scrutinize *Harrington v. Holiday Rambler Corp.*,⁷⁰ in which the Montana court announced liberal standards for proof of damages for mental suffering. In *Harrington*, the plaintiff claimed damages for mental suffering caused by gas leaks in a trailer manufactured by the defendant. The only evidence of these damages was his wife's testimony about nausea and fatigue suffered by her family. The supreme court held this testimony sufficient to prove damages for

62. Comment (i) states in pertinent part:

The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics

63. ___ Mont. at ___, 576 P.2d at 729.

64. *Id.* at ___, 576 P.2d at 730.

65. *Id.*

66. *Id.* at ___, 576 P.2d at 730-31.

67. *Id.* citing *Brown v. North Am. Mfg. Co.*, ___ Mont. ___, 576 P.2d 711 (1978).

68. ___ Mont. at ___, 576 P.2d at 729.

69. *Id.* at ___, 576 P.2d at 730.

70. ___ Mont. ___, 575 P.2d 578 (1978).

mental suffering, relying upon *McGuire v. American Honda Co.*⁷¹ In that case, however, the "lay testimony" by the plaintiff and his relatives was not used to prove their suffering from physical illness; it was used to show that the trailer defect actually caused his damages.⁷² Certainly, the testimony admitted in *Harrington* is more objectionable than that admitted in *McGuire*, where the testimony merely supported the plaintiff's theory of causation. In *Harrington* the testimony was the sole evidence by which the plaintiff established damages for mental suffering. This is especially troubling considering the fact that damages for mental suffering are highly suspect because they can be so easily fabricated.⁷³ Thus, the supreme court in *Harrington*, by expanding *McGuire* may have eased considerably the burden of proving damages for mental suffering.

V. JOINT TORTFEASORS

The Montana court has not yet had an opportunity to construe the 1977 Montana statute on the liability of joint tortfeasors.⁷⁴ *Ferguson v. Town Pump, Inc.*⁷⁵ suggests, however, that the court will disregard the statute when indemnity is sought for breach of contract rather than for negligence. The new statute presumably supersedes the common law principles of indemnification for active/passive, or primary/secondary negligence.⁷⁶ Under this common law theory, an active wrongdoer cannot recover at all, although a passive wrongdoer may recover from an active wrongdoer.⁷⁷ The new joint tortfeasor statute permits contribution proportional to a party's negligence, even in the case of active wrongdoers.

In *Ferguson* the Montana Supreme Court held that plenary rather than proportional indemnity is possible when founded upon breach of contract rather than negligence. Several homeowners sued a gasoline station lessor for contamination of their water wells adjacent to the station's gasoline tanks. The lessor then sought indemnification from the construction contractor on the theories of breach

71. ___ Mont. ___, 566 P.2d 1124 (1977).

72. *Id.* at ___, 566 P.2d at 1127.

73. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 54 (4th ed. 1971).

74. MCA § 27-1-703 (1978) (formerly codified at R.C.M. 1947, § 58-607.2 (Supp. 1977)), makes multiple defendants jointly and severally liable for their negligence. When one defendant is found liable he has a right of contribution against the other joint tortfeasors proportional to their negligence. The court has not yet interpreted the language of the statute specifying when it is applicable: "[W]henever . . . recovery is allowed against more than one party." This seems to imply that contribution is not possible where a joint tortfeasor is not joined in the original action.

75. ___ Mont. ___, 580 P.2d 915 (1978).

76. See, e.g., *Great Northern Ry. Co. v. United States*, 187 F. Supp. 690, 694 (D. Mont. 1969); *Fletcher v. City of Helena*, 163 Mont. 337, 346, 517 P.2d 365, 369 (1973).

77. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 312, n. 1 (4th ed. 1971).

of contract and breach of warranty. Because the cause of action in *Ferguson* arose in 1974, the 1977 contribution statute did not apply. Yet the language in *Ferguson* may be significant when the court interprets the new statute. Relying upon prior case law dealing with express contracts for services,⁷⁸ it held that the active/passive theories of indemnification did not apply to liability based upon breach of contract.⁷⁹ If one tortfeasor can establish a contractual relationship which provides for indemnification by a fellow tortfeasor, he may be indemnified fully despite his own wrongdoing.

VI. DEFAMATION

The supreme court substantially refashioned Montana libel law in *Madison v. Yunker*⁸⁰ by declaring the Montana compulsory retraction statute unconstitutional. In that case, the editor of the University of Montana student newspaper accused the director of the newspaper's print shop of being a "congenital liar" and an "incompetent." The printer sued without demanding a retraction as required by statute.⁸¹ The case was dismissed by the district court and the printer appealed, alleging that the statute violated several sections of the Montana constitution, including those dealing with liability for abuse of free speech⁸² and the guarantee of a speedy remedy for injuries.⁸³ The defendant contended that the statute did not prohibit libel actions but only established a retraction demand as a condition precedent to maintaining a suit. The supreme court decided that the statute did, in fact, deny the plaintiff a remedy for his libeled reputation and remanded the case for a trial.⁸⁴

The Montana retraction statute requires that a libeled person offer the party responsible for the libel a "reasonable opportunity to correct" the libelous remarks by immediate publication of a retraction. If such a retraction is published, the plaintiff can recover actual, but not punitive, damages.⁸⁵ There are no cases interpreting the validity of a statute exactly like Montana's. At the turn of the century, several retraction statutes were declared unconstitutional.⁸⁶ More recent cases analyzing retraction statutes have held

78. *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563, 569 (1958); *Hill v. George Engine Co.*, 190 F. Supp. 417, 420 (D. La. 1961).

79. ___ Mont. at ___, 580 P.2d at 920.

80. ___ Mont. ___, 589 P.2d 126 (1978).

81. MCA § 27-1-814 (1978) (formerly codified at R.C.M. 1947, § 64-207.1).

82. MONT. CONST. art. II, § 7 (new in the 1972 Constitution).

83. MONT. CONST. art. II, § 16.

84. ___ Mont. at ___, 589 P.2d at 133.

85. MCA § 27-1-814 (1978) (formerly codified at R.C.M. 1947, § 64-207.1 (Supp. 1977)).

86. See, e.g., *Hanson v. Krehbiel*, 68 Kan. 670, 677, 75 P. 1041, 1043 (1904); *Park v. Detroit Free Press*, 72 Mich. 560, 565, 40 N.W. 731, 733 (1888). For cases speculating that

laws similar to that of Montana valid.⁸⁷ But neither the older, invalidated statutes nor the newer, sustained statutes prohibited filing suit unless a retraction was requested.

The *Madison* court devoted little discussion to balancing the freedom of the press with an individual's right to recover for libel, even though these are the precise factors which the court weighed. The court did, however, affirm several constitutional freedoms to which the press is entitled, recognizing the protections against libel suits by public officials afforded by *New York Times v. Sullivan*.⁸⁸ This reassured the defendant and the Montana press that their privilege of criticizing public officials will easily protect them if the jury finds the printer to be a public official. At the same time, the court expressed skepticism as to whether the director of the print shop could be termed a public official.⁸⁹ But even in the absence of explicit discussion of freedom of the press, it is obvious that, by invalidating a statute designed to preserve that freedom, *Madison* severely limits the scope of the freedom of the press in Montana.

The Montana court in *Madison* did not even consider these constitutional commonplaces of "due process" and "equal protection;" it concentrated instead upon the seldom-litigated provisions of the Montana constitution dealing with free speech, the consequent liability for its abuse, and the guarantee of a speedy remedy for injuries. It is ironic that the court employed the free speech guaranty of the Montana Constitution to strike down a statute designed to ensure freedom of the press.

Even more striking is the court's expansive interpretation of the right to a speedy remedy: "Thus the state constitution fixes the right to a remedy and where it may be sought. The legislature is without power to provide otherwise."⁹⁰ Such a broad statement could easily be applied to areas of civil liability other than defamation. Moreover, the court implies that the constitutional guaranty of a right to a remedy could allow *any* plaintiff who is deprived of recovery by statute to successfully challenge that statute's validity.⁹¹

The *Madison* court held unequivocally that a plaintiff need no

such a statute might be unconstitutional, *see Ellis v. Brockton Publishing Co.*, 198 Mass. 538, 543, 84 N.E. 1018, 1020 (1908); *Neafie v. Hoboken Printing & Publishing Co.*, 75 N.J. 564, 567, 68 A. 146, 147 (1907); *Osborn v. Leach*, 135 N.C. 628, 639, 47 S.E. 811, 815 (1904).

87. *See, e.g., Werner v. Southern Cal. Associated Newspapers*, 35 Cal. 2d 121, 216 P.2d 825, 835 (1950); *Ross v. Gore*, 48 So. 2d 412, 415 (Fla. 1950); *Holden v. Pioneer Broadcasting Co.*, 228 Ore. 405, 417, 365 P.2d 845, 851 (1969).

88. 376 U.S. 254, 279-80 (1964), *cited in Madison*, ___ Mont. at ___, 589 P.2d at 133.

89. *Id.* at ___, 589 P.2d at 132-33.

90. *Id.* at ___, 589 P.2d at 131.

91. *Id.*

longer demand a retraction before commencing a libel action.⁹² The court's opinion is less clear as to precisely what effect a published retraction will now have in the computation of damages. The court, in finding that the "right" of a libeled individual to obtain a retraction . . . is [not] in itself a remedy,"⁹³ implies that there will be no effect at all. The court, however, relies upon *Gertz v. Robert Welch, Inc.*⁹⁴ for the holding that punitive damages may only be recovered where there is proof of malice or a "reckless disregard of the truth."⁹⁵ It may be, then, that a retraction by a publisher or broadcaster is still advisable, since it might make malice more difficult to prove and so prevent recovery of punitive damages. In the case of a private plaintiff, it might reduce damages, and in the case of a plaintiff who is a public figure, eliminate damages altogether.

Madison is in accord with a nation-wide return to litigation, rather than alternative measures such as compulsory publication, as a remedy for defamation.⁹⁶ In 1964, the U.S. Supreme Court held that certain damage awards in libel actions involving public figures cannot be constitutionally imposed because of possible infringement upon freedom of the press.⁹⁷ Since then, the court has expanded its definition of that freedom by rejecting the validity of any compelled publication in *Miami Herald Publishing Co. v. Tornillo*.⁹⁸ Although the court in *Madison* does not cite *Tornillo*, the Montana Supreme Court may see itself as part of a national *Tornillo* trend of rejecting compelled publication of any kind. While *Tornillo* protects the press from being forced to print replies, *Madison* invalidates a statute protecting the press from liability. The U.S. Supreme Court has prohibited compulsory publication in order to protect freedom of the press; the Montana Supreme Court has prohibited compulsory publication in order to protect the individual's right to sue the press for libel. Although the actual holdings of the two courts may seem parallel, the goals sought to be achieved are in flagrant opposition.

92. *Id.*

93. *Id.*

94. 418 U.S. 323 (1974).

95. *Id.* at 349.

96. See Speranza, *Reply and Retraction in Actions against the Press for Defamation: The Effect of Tornillo and Gertz*, 43 *FORD. L. REV.* 223, 238 (1974).

97. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

98. 418 U.S. 241 (1974).