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## Torts

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# **MONTANA SUPREME COURT SURVEY**

## **EDITOR'S NOTE**

Volume 41 continues the annual Montana Supreme Court Survey, analyzing opinions of the Montana Supreme Court during the period beginning October 1, 1978, and ending December 31, 1979. This year, the student authors and the faculty advisers have attempted to fashion cogent and scholarly discussions of legal changes, adopting the style of analysis traditionally reserved for case notes and comments. By use of such a method, the surveys can provide material to both the reader seeking a summary of recent developments and the legal researcher seeking authority for particular legal doctrines. The second half of the survey, covering Civil Procedure, Evidence, and Criminal Procedure, will appear in Volume 41, Number 2.

## **PART I**

### **TORTS**

**Carolyn Clemens**

#### **INTRODUCTION**

During the period of this survey, the Montana court handed down significant opinions regarding damages in tort actions, including cases involving apportionment of damages and contribution among multiple tortfeasors. In addition, the court clarified the burden of proof under the theory of *res ipsa loquitur* and struck down a commonly used jury instruction which it found inconsistent with the *res ipsa* doctrine. The court also indicated that attorneys bringing products liability actions against drug manufacturers must in some situations rely on expert testimony. Finally, the court made it clear that an insurance company that refuses to pay a claim found to be valid may be liable for both consequential and punitive damages.

## I. RES IPSA LOQUITUR

A. *Burden of Proof*

The Montana court attempted to resolve an inconsistency in prior Montana case law in deciding the procedural effect of the res ipsa loquitur doctrine.<sup>1</sup> Directly faced with the issue for the first time in *Helmke v. Goff*,<sup>2</sup> Justice Sheehy, writing for the majority, indicated that the application of that doctrine will not necessarily shift the burden to the defendant to prove an affirmative defense.<sup>3</sup> Rather, upon the establishment of a res ipsa case by the plaintiff, the jury must decide "whether the preponderance of the evidence is with the plaintiff."<sup>4</sup>

*Helmke* arose out of a single-car accident in which defendant's car, for no apparent reason, crossed the center line, skidded back, and rolled into a ditch.<sup>5</sup> At trial, both the driver and the plaintiff testified that they had no idea why the accident happened, and the defendant driver offered no explanation or defense. At plaintiff's request, the case was submitted to the jury on a res ipsa instruction, and the jury found for the defendant. Plaintiff appealed, contending that because the defendant was unable to rebut the presumption of negligence, the doctrine demanded a finding of liability.<sup>6</sup>

The supreme court noted that jurisdictions disagree on the allocation of the burden of proof in res ipsa cases, and indicated that the Montana court has gone both ways in this matter.<sup>7</sup> Other courts have justified their decisions by determining whether the jurisdiction is one following the "permissible inference" theory or the "rebuttable presumption" theory.<sup>8</sup> *Helmke* declined to follow ei-

1. See *Whitney v. Northwest Greyhound*, 125 Mont. 528, 531, 242 P.2d 257, 258 (1952) for a discussion of the two lines of Montana cases.

2. — Mont. —, 597 P.2d 1131 (1979).

3. The Montana court relied on the United States Supreme Court's decision in *Sweeney v. Erving*, 228 U.S. 233, 240 (1913).

4. *Helmke*, — Mont. —, 597 P.2d at 1132.

5. *Id.* at —, 597 P.2d at 1133.

6. See *Callahan v. Chicago B. & Q. R.R. Co.*, 47 Mont. 401, 415, 133 P. 687, 691 (1913) in which the court found that "proof of the happening of the event raises a presumption of the defendant's negligence, and casts upon the defendant the burden of showing that ordinary care was used." Cf. *Hickman v. First National Bank*, 112 Mont. 398, 415, 117 P.2d 275, 279 (1941) (approving a finding that res ipsa loquitur does not cast upon the defendant the burden of disproving negligence in the sense of making it incumbent upon him to establish freedom from negligence by a preponderance of the evidence).

7. *Whitney v. Northwest Greyhound*, 125 Mont. 528, 531, 242 P.2d 257, 258 (1952). See also Annot., 29 A.L.R. 2d 1390 (1953).

8. *Helmke*, — Mont. —, 597 P.2d at 1133, citing discussion in 2 HARPER & JAMES, LAW OF TORTS § 19.11 (1956). This discussion indicates that *Sweeney v. Erving*, 228 U.S. 233 (1913) is the leading case relying on the "permissible inference" theory. See generally W.

ther, finding that such a classification should not be the controlling factor.<sup>9</sup>

Rather, in reviewing the United States Supreme Court's opinion in *Sweeney v. Erving*, the Montana court found the Supreme Court's language to be dispositive:

[R]es ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference . . . ; that [the facts] furnish evidence to be weighed, not necessarily to be accepted as sufficient; that [the facts] call for an explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury.<sup>10</sup>

The court did indicate, however, that there could be some instances in which a court would be justified in directing a verdict in a res ipsa case. If the inference of negligence is "so strong that persons of reasonable minds could not reach differing conclusions as to the negligence of the defendant,"<sup>11</sup> the district court could grant a motion for a directed verdict.

### B. *Mere Happening Doctrine*

In *Helmke v. Goff*,<sup>12</sup> the trial court gave the jury a standard res ipsa loquitur instruction and a "mere happening" instruction:

The mere fact that an accident happened, considered alone, does not give rise to an inference that it was caused by negligence or that any party to this action was negligent.<sup>13</sup>

The Montana court decided on appeal that a trial court cannot give this instruction in res ipsa cases and emphasized that the instruction should be "given a decent burial" in ordinary negligence actions.<sup>14</sup>

Speaking for the majority, Justice Sheehy noted that in the earlier case of *Hunsaker v. Bozeman Deaconess Foundation*,<sup>15</sup> the Montana court recognized that in ordinary negligence cases the doctrine was "confusing to the jury and injected a straw issue into

PROSSER, HANDBOOK OF THE LAW OF TORTS § 40 (4th ed. 1971).

9. *Helmke*, — Mont. —, 597 P.2d at 1133. Justice Sheehy indicated that "[i]t is safe to say that the difference between an inference and a presumption escapes all but the most nimble legal minds . . ." The court found that it was unnecessary to classify Montana as a jurisdiction following either theory. *Id.*

10. *Sweeney*, 228 U.S. at 240.

11. *Helmke*, — Mont. —, 597 P.2d at 1134.

12. — Mont. —, 597 P.2d 1131 (1979).

13. *Id.* at —, 597 P.2d at 1132.

14. *Id.* at —, 597 P.2d at 1134.

15. — Mont. —, 588 P.2d 493 (1978).

the case.”<sup>16</sup> Referring to a 1967 Montana case dealing with the similar “unavoidable accident” instruction,<sup>17</sup> *Hunsaker* cited with approval the court’s earlier view that such an instruction “diverts the attention of the jury from the primary issue of negligence and creates the impression in the minds of the jurors of a second hurdle that plaintiff must overcome if he is to prevail.”<sup>18</sup> Although condemning the instruction in the ordinary negligence action, *Hunsaker* did approve the use of a modified form of that instruction in malpractice actions, finding that the instruction was not error in a “professional malpractice action.”<sup>19</sup>

Faced with this instruction in *Helmke*, a *res ipsa* case, the court found that giving the “mere happening” instruction required reversal.<sup>20</sup> The court feared confusion to the jurors, since they might believe that “they are foreclosed from considering the evidence provided by the happening of the accident itself.”<sup>21</sup> The very nature of the *res ipsa* case makes this necessary evidence, with the result that the instructions on *res ipsa loquitur* and “mere happening” are too incompatible to stand together.<sup>22</sup>

16. *Id.* at —, 588 P.2d at 506. See also Annot., 65 A.L.R. 2d 12 (1959).

17. In *Graham v. Rolandson*, 150 Mont. 270, 435 P.2d 263 (1967), the court considered the following unavoidable accident instruction:

[I]f you find from all the facts and circumstances, as shown by the evidence in this case, that the plaintiff’s injuries were the result of a pure and unavoidable accident, such as could not ordinarily be anticipated, and not the result of the negligence of either the defendant or the plaintiff, then the plaintiff cannot recover, and your verdict must be for the defendant.

*Id.* at 290, 435 P.2d at 272. The court held that this instruction was proper in so few situations that it should never be used. The court also noted that the Montana Jury Instruction Guide (MJIG) Instruction No. 12 recommended that the unavoidable accident instruction not be used. *Id.*

18. *Graham v. Rolandson*, 150 Mont. 270, 290, 435 P.2d 263, 273 (1967).

19. *Hunsaker*, — Mont. —, 588 P.2d at 506, citing CALIFORNIA JURY INSTRUCTION, CIVIL No. 602:

A physician or surgeon is not negligent merely because [his efforts are unsuccessful,] [he makes a mistake or] [he errs in judgment] in the matter for which he was engaged.

However, if the physician or surgeon was negligent as defined in these instructions it is not a defense that he did the best he could.

The court also indicated that this instruction would be proper in an action against an attorney. *Id.* at —, 588 P.2d at 506.

20. *Helmke*, — Mont. —, 597 P.2d at 1134.

21. *Id.*

22. *Id.* The court cited *Jensen v. Minard*, 44 Cal.2d 325, 282 P.2d 7 (1955) in which the defendant killed a child while shooting at birds in his garden. Justice Traynor indicated that an “unavoidable accident” instruction would have been prejudicial, in that the jury might then assume that the accident was unavoidable, and not owing to any negligence. *Id.* at —, 282 P.2d at 9.

## II. EXPERTS IN PRODUCTS LIABILITY

The Montana court has consistently required a plaintiff to introduce expert testimony to establish a malpractice claim.<sup>23</sup> This rule now has been extended to a strict liability claim based on the alleged failure of a drug manufacturer to warn of the dangers inherent in its product. The court held in *Hill v. Squibb & Sons*<sup>24</sup> that because the extent of the warning needed on a prescription drug is a subject about which a layman would have no knowledge, the court and jury must rely on evidence supplied by experts.<sup>25</sup>

In *Hill*, the plaintiff ingested large doses of steroids for nearly 20 years to treat an allergy. One of the drugs his physician prescribed was produced by Squibb and Sons. Plaintiff alleged that the drug was negligently manufactured and was "a defective product because the drug package inserts did not warn specifically enough of the dangerous side effects."<sup>26</sup> Squibb's motion for a directed verdict was granted because of the plaintiff's failure to introduce expert testimony to show that warnings contained on the drug were inadequate.<sup>27</sup> The supreme court affirmed, finding that the plaintiff failed to establish a prima facie case.<sup>28</sup>

The court appears<sup>29</sup> to adopt the rationale contained in "comment (j)" of Section 402A of the Restatement, which indicates that a manufacturer can escape liability for selling a dangerous product by providing an adequate warning on the product.<sup>30</sup> Additionally, the court found that the duty to warn could be discharged by warning the prescribing physician, rather than the patient.<sup>31</sup> To prove

23. *Llera v. Wisner*, 171 Mont. 254, 262, 557 P.2d 805, 810 (1976). The court noted that a plaintiff must establish a standard of medical practice by expert testimony and show defendant's deviation from that standard.

24. — Mont. —, 592 P.2d 1383 (1979).

25. The court referred to its holding in *Callahan v. Burton*, 157 Mont. 513, 520, 487 P.2d 515, 518-19, in which the court did not submit the issue of failure of proper diagnosis to the jury because the plaintiff introduced no expert testimony as to the doctor's alleged lack of skill. There the court noted that because the jury could have no knowledge about the diagnosis, the jury had to rely on expert testimony. See also Annot., 62 A.L.R. 2d 1426 (1958).

26. *Hill*, — Mont. —, 592 P.2d at 1386.

27. *Id.*

28. *Id.* at —, 592 P.2d at 1384.

29. The court relied on *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121, 127-29 (9th Cir. 1968), citing RESTATEMENT (SECOND) OF TORTS §402A, comment j (1965) and held that by providing an adequate warning the manufacturer can prevent the product from being deemed unreasonably dangerous.

30. RESTATEMENT (SECOND) OF TORTS §402A, comment j (1965) provides as follows:  
*Directions or warning.* In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use . . .

31. This was the holding in *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121 (9th Cir. 1968), in

that the warning to the physician was inadequate, a plaintiff must introduce expert testimony to establish the scope and content of a sufficient warning and the expert must testify to a deviation from that standard.<sup>32</sup>

### III. DAMAGES

#### A. Additur

In *Ferguson v. Town Pump, Inc.*,<sup>33</sup> decided in June 1978, the Montana Supreme Court noted in dictum that it was within the constitutional power of a trial court to condition denial of a plaintiff's motion for a new trial on defendant's consent to an increase in the jury award.<sup>34</sup> Six months later, in *Bohrer v. Clark*,<sup>35</sup> the court expressly overruled that portion of the *Town Pump* decision. The court found this practice of additur to be an impermissible interference with the plaintiff's right to trial by jury,<sup>36</sup> reaffirming the court's 1964 decision in *State Highway Commission v. Schmidt*.<sup>37</sup>

In *Town Pump*, the plaintiffs moved the district court to increase the damage award, or alternatively, to grant a new trial on the issue of damages. Similarly, the plaintiff in *Bohrer* alleged that the jury award of \$30,500 was contrary to the evidence at trial<sup>38</sup> and asked the district judge for relief. The district court amended the judgement, awarding Bohrer \$50,614.93. Both parties appealed.

The supreme court, again considering the practice of additur, concluded that the rule announced in *Schmidt* was correct and that the district court's reliance on *Zook Brothers' Construction Co. v. State of Montana*<sup>39</sup> was misplaced.<sup>40</sup> In *Zook*, the supreme court had

which the court indicated that a warning to a physician was adequate unless the drug was dispensed directly to consumers, over-the-counter, or at mass clinics "without an individualized balancing by a physician of the risks involved." *Id.* at 130-31.

32. In support of this holding, the court cited *Carlsen v. Javurek*, 526 F.2d 202 (8th Cir. 1975). The plaintiff in that case alleged an inadequate warning on a prescription drug. The court noted that all of the experts found the warning to be adequate and that the plaintiff offered no expert to refute that testimony. Based on this failure, the court allowed a directed verdict in favor of the manufacturer. *Id.*

33. — Mont. —, 580 P.2d 915 (1978).

34. *Id.* at —, 580 P.2d at 919-20. Although the question of additur was not raised on appeal in *Town Pump*, the court remarked that several jurisdictions allowed this practice and that it should be adopted in Montana. *Id.*

35. — Mont. —, 590 P.2d 117 (1979).

36. — Mont. —, 590 P.2d at 122, citing *Dimick v. Schiedt*, 293 U.S. 474, 486 (1934), which held that additur will "compel the plaintiff to forego his constitutional right to the verdict of a jury and accept an assessment partly made by a jury and partly made by a tribunal which has no power to assess."

37. 143 Mont. 505, 391 P.2d 692 (1964).

38. *Bohrer*, — Mont. —, 590 P.2d at 120.

39. 171 Mont. 64, 556 P.2d 911 (1976).

40. *Bohrer*, — Mont. —, 590 P.2d at 122.

increased an award following a non-jury trial merely to correct a mathematical miscalculation.<sup>41</sup> In refusing to extend the *Zook* doctrine to those cases in which a plaintiff asks the district court for relief following a jury trial, the court indicated that under Montana Rules of Civil Procedure 59(a)<sup>42</sup> the lower court could grant a new trial limited solely to the issue of damages. This would eliminate the need for additur, and preserve the right to a jury trial.<sup>43</sup>

The blow dealt additur apparently will not affect remittitur, which involves the reduction of an excessive jury award by the court. *Bohrer* reviewed the cases cited in *Zook*, in which a change in the jury award had been permitted, and found all of them to be distinguishable factually from *Bohrer* and *Town Pump*. The cases involved a reduction of the jury award, a practice recognized under previous case law where the award was not supported by the evidence.<sup>44</sup> The *Bohrer* court implied that Montana will continue to distinguish between additur and remittitur, based on the theory that in dealing with a reduction in damages, "the right to trial by jury is . . . not a controlling factor."<sup>45</sup>

### B. Consequential and Punitive Damages in Insurance Cases

The Montana Supreme Court this year approved a trend developing in other jurisdictions of punishing an insurance company for a willful refusal to pay a valid claim.<sup>46</sup> Allowing the insured party to recover both consequential and punitive damages in *Godard v. Bankers Union Life Insurance Co.*,<sup>47</sup> the court recognized that a single transaction may give rise to both a breach of the insurance contract and a tort claim, if a plaintiff can show the breach

41. *Zook*, 171 Mont. at 76, 556 P.2d at 918.

42. MONT. R. CIV. P. 59 (a) provides:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons provided by the statutes of the State of Montana.

43. *Bohrer*, — Mont. —, 590 P.2d at 123.

44. See, e.g., *Nesbitt v. City of Butte*, 118 Mont. 84, 94, 163 P.2d 251, 256 (1945), in which the court allowed remittitur, but indicated that a new trial would have been a better procedure. In *Klemens & Sons v. Reber Plumbing & Heating*, 139 Mont. 115, 126, 360 P.2d 1005, 1011 (1961), the court held that the reduction was made because of a mathematical error.

45. *Bohrer*, — Mont. —, 590 P.2d at 122. The court cited *State Highway Comm'n v. Schmidt*, 143 Mont. 505, 511, 391 P.2d 692, 695 (1964), a case which relied upon the following language from *Dimick v. Schiedt*, 293 U.S. 474, 486 (1934):

Where the verdict is excessive, the practice of substituting a remission of the excuse for a new trial is not without plausible support in the view that what remains is included in the verdict . . . in that sense that it has been found by the jury and that the remittitur has the effect of merely lopping [the excess].

46. See, e.g., *Kirk v. Safeco Ins. Co.*, 28 Ohio Misc. 44, 46, 273 N.E.2d 919, 921 (1970) (assessing punitive damages on a finding that the insurance company had no good faith intention of honoring its insured's claim); *Crisci v. Security Ins. Co. of New Haven, Conn.*, 58 Cal. Rptr. 13, 18-19, 426 P.2d 173, 178-79 (1967) (insurance company breached duty to accept offer of reasonable settlement). See also *Annot.*, 47 A.L.R. 3d 314 (1973).

47. — Mont. —, 593 P.2d 1040 (1979).



of a duty independent of the contract.<sup>48</sup>

The plaintiff in *Goddard* purchased a credit life and disability insurance policy from a Bozeman bank, in conjunction with the execution of a note and security agreement between Goddard and the bank to finance a car. The policy was issued by the bank as an agent of the insurance company. The policy guaranteed that the insurance company would pay the note if Goddard became unable to pay because of death or disability.<sup>49</sup>

The district court found that Goddard became disabled on October 5, and that his insurance policy came into existence on October 4 or 5.<sup>50</sup> Thus the refusal of the insurance company to pay the claim was found to be a willful refusal to pay, even though the insurance company claimed a good faith belief that the obligation did not take effect until October 7.<sup>51</sup> Because neither Goddard nor the insurance company paid the note, the bank repossessed Goddard's car and sued Goddard to recover the deficiency. Goddard in turn sued the insurance company for the amount due under the insurance contract and for consequential and exemplary damages.

The supreme court found that by violating the state statutory insurance provisions,<sup>52</sup> the insurance company became liable not only for the amount due on the contract, but also for damages which could compensate the plaintiff for the "detriment proximately caused [by the violation] whether it could be anticipated or not."<sup>53</sup> The court reasoned that the insurance company had breached its statutory duty of good faith and fair dealing,<sup>54</sup> a duty separate from that arising under the contract, and enforceable

48. *Id.* at 1047, citing *Battista v. Lebanon Trotting Assoc.*, 538 F.2d 111, 117 (6th Cir. 1967). The court defined those situations in which a breach of contract can also give rise to a tort action:

The tort liability of parties to a contract arises from the breach of some positive legal duty imposed by law, because of the relationship of the parties, rather than from a mere omission to perform a contract obligation.

49. *Id.* at \_\_\_, 593 P.2d at 1042.

50. The court found that the insurance obligation arose at the time Goddard signed the note and deposited it in the mail in Libby, Montana. Goddard testified that the date of deposit was either October 4 or 5. *Id.* at \_\_\_, 593 P.2d at 1042.

51. The insurance company contended that its obligation to pay did not arise until October 7, the date that the Bozeman bank received the signed instrument and issued the policy. The court rejected this contention. *Id.* at \_\_\_, 593 P.2d at 1045.

52. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 33-21-105 (1979) provides: "All claims shall be settled as soon as possible and in accordance with the terms of the insurance contract."

53. The court rejected both Goddard's claim that the damages should be determined by MCA § 27-1-311 (1979), defining the measure of damages for breach of contract, and the insurance company's contentions that MCA § 27-1-312 (1979), governing contracts to pay a liquidated sum, should apply. Rather, the court found that MCA § 27-1-317 (1979), allowing recovery for all detriment proximately caused in tort, should apply.

54. *Goddard*, \_\_\_ Mont. \_\_\_, 593 P.2d at 1047.

through tort liability.<sup>55</sup>

In assessing punitive damages, the court relied on the Montana case of *State ex rel. Larson v. District Court*.<sup>56</sup> In *Larson* the court had held that violation of a law carrying a criminal penalty — such as the Montana insurance law — allowed assessment of punitive damages, even though punitive damages normally are not allowed for breach of contract.<sup>57</sup> Although the insurance company contended that it should not be assessed for punitive damages because it did not act wantonly or maliciously,<sup>58</sup> the court found implied malice in the insurance company's refusal to pay. Because the company violated its statutory duty, its conduct was unjustifiable, and therefore malicious.<sup>59</sup>

### C. Apportionment of Damages

*Azure v. City of Billings*<sup>60</sup> provided the Montana Supreme Court with an opportunity to define the duty of the trial court in instructing a jury as to divisibility of injuries and apportionment of damages. In addition, the court clarified the procedural burdens of the parties in cases involving multiple tortfeasors, whether jointly and severally liable or proportionately liable.

In *Azure*, the plaintiff filed separate lawsuits against a Billings bar owner and the city police for incidents occurring in one night. He alleged injuries arising out of a bar fight and lack of medical care during subsequent incarceration. The bar owner settled out of court for \$10,000; the case proceeded to trial against the other defendant, the city of Billings.<sup>61</sup> At trial, the Billings police contended that the plaintiff's injuries were caused by the other defendant and denied any liability.<sup>62</sup> The jury instructions stated that if the city were found liable, the \$10,000 out-of-court settlement would have to be deducted from the verdict whether the city was wholly or only proportionately liable for divisible injuries.<sup>63</sup>

55. *Id.*

56. 149 Mont. 131, 423 P.2d 598 (1967).

57. *Id.* at 135-36, 423 P.2d at 600. The court noted that an insurance company may have both breached the insurance contract and violated Montana law.

58. Goddard, — Mont. —, 593 P.2d at 1048.

59. *Id.* at —, 593 P.2d at 1049.

60. — Mont. —, 596 P.2d 460 (1979).

61. The plaintiff alleged that he was assaulted in a Billings bar by the owner with a heavy blunt object. Seven hours later, in response to a reported burglary, the Billings police found the apparently intoxicated plaintiff at the scene of the burglary, and took him to the city jail. Although plaintiff showed signs of the barroom injury, the police provided no medical treatment for nearly sixteen hours. *Id.* at —, 596 P.2d at 462-63.

62. *Azure*, — Mont. —, 596 P.2d at 463.

63. *Id.* at —, 596 P.2d at 466.

On appeal, the court found that the instruction was prejudicial to the plaintiff<sup>64</sup> because it failed to distinguish between situations in which liability is joint and several<sup>65</sup> and cases in which liability is divisible.<sup>66</sup> Because a deduction is appropriate only in the case of joint and several liability, it is essential for a trial judge to determine the nature of the liability before submitting the case to the jury.<sup>67</sup> In a case of joint and several liability, the court noted that there may be facts that make it reasonable to inform the jury of an out-of-court settlement so that jurors may use this information in reaching a proper award.<sup>68</sup> But the court indicated that the preferable method of deduction in cases of joint and several liability, and the only proper method in cases of divisible liability, is the "court method."<sup>69</sup> To prevent prejudice to the plaintiff, the court should instruct the jury to find a total damage award, from which the court itself will deduct the amount of settlement.

The supreme court imposed on the defendants the duty to show the divisibility of injuries in the appropriate case. The court refused to increase the plaintiff's burden by requiring him to prove the portion of the total injury caused by each of the multiple tortfeasors.<sup>70</sup> Once the plaintiff has made out a prima facie showing that several defendants proximately caused his injuries, the defendant must "either deny all liability or . . . prove that the harm caused can be divided and the damages therefore apportioned."<sup>71</sup>

64. The jury might consider evidence of settlement as indicating that the defendant is free from fault. The court also feared prejudice to the defendant in that the "jury might imply his negligence from the admission of negligence by the [settling party]." *Luth v. Rogers and Babler Construction Co.*, 507 P.2d 761, 768 (Alas. 1973).

65. Deducting \$10,000.00 would be appropriate in the case of joint and several liability, because "if liability is joint and several, the plaintiff is entitled to only one recovery. In that event, deduction of an amount already paid by a joint tortfeasor is appropriate." *Azure*, — Mont. —, 596 P.2d at 468, *relying on* *Black v. Martin*, 88 Mont. 256, 266, 292 P. 577, 581 (1930).

66. "But if apportionment of damages applies, each defendant must pay his contribution to the whole, and therefore, a deduction is not allowed for what another tortfeasor has paid." *Azure*, — Mont. —, 596 P.2d at 469.

67. *Id.* at —, 596 P.2d at 471.

68. *Id.* at —, 596 P.2d at 467.

69. *Luth v. Rogers and Babler Construction Co.*, 507 P.2d 761, 768 (Alas. 1973) (judge should not inform jury of settlement, but merely deduct it himself after verdict is in).

70. *Azure*, — Mont. —, 596 P.2d at 469-70. Where the harm cannot be theoretically divided, or if the plaintiff cannot practically make a division among wrongdoers, the court does not want to prevent an innocent plaintiff from recovering merely because he cannot prove which of the multiple, tortious acts caused a single harm. *See generally* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 52 (4th ed. 1971).

71. *Id.* at —, 596 P.2d at 471 (court's emphasis).

### D. Contribution and Indemnity Among Joint Tortfeasors

The Montana Supreme Court decided that Montana will retain, in most instances, the common law rule that prevents contribution or indemnity among joint tortfeasors.<sup>72</sup> The court construed the Montana contribution statute<sup>73</sup> for the first time in *Consolidated Freightways Corp. v. Osier*,<sup>74</sup> delineating those few situations in which contribution or indemnity would apply.<sup>75</sup>

The plaintiff in *Consolidated* brought an action in United States District Court for injuries suffered in a collision between the car in which she was a passenger and a Consolidated truck. Consolidated then attempted to bring in the driver of the car as a third-party defendant on a claim of indemnity. After Judge Smith dismissed the third party complaint, Consolidated amended its complaint asking for contribution from the driver under the contribution statute.<sup>76</sup> In order to decide the issue in conformity with Montana law, Judge Smith certified the question as to contribution<sup>77</sup> to the Montana Supreme Court.

The supreme court indicated that in Montana there is no right to contribution among joint tortfeasors<sup>78</sup> and only with the passage

72. See Annot., 60 A.L.R.2d 1366 (1958), indicating that this is the majority view in the United States, although a minority of courts have found the rule unjust and allow contribution among joint tortfeasors in those instances in which none of the tortfeasors committed an intentional wrong.

73. MCA § 27-1-703 (1979) provides:

(1) Whenever the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party is jointly and severally liable for the amount awarded to the claimant but has the right of contribution from any other party against whom recovery is allowed. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed.

(2) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties against whom recovery is allowed is liable to contribute a proportional part of the unpaid portion of the non-contributing party's share and may obtain judgment in a pending or subsequent action for contribution from the non-contributing party.

74. — Mont. —, — P.2d —, 36 St. Rptr. 1810 (1979).

75. A few jurisdictions have allowed contribution without a statute when all tortfeasors are merely negligent. See, e.g., *Hobbs v. Hurley*, 117 Me. 449, 452-53, 104 A. 815, 817 (1918); *Ellis v. Chicago and N.W. Ry. Co.*, 167 Wis. 392, 410, 167 N.W. 1048, 1054 (1918). A majority of jurisdictions now allow contribution among joint tortfeasors by statute, though circumstances differ from state to state. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 51 (4th ed. 1971).

76. *Consolidated*, — Mont. —, — P.2d —, 36 St. Rptr. at 1811.

77. "As a matter of substantive Montana law, does a tortfeasor have a cause of action for contribution or indemnity against any joint tortfeasor not joined by the plaintiff as a party defendant?" *Id.* at —, — P.2d —, 36 St. Rptr. at 1811.

78. See *Panusuk v. Seaton*, 277 F.Supp. 979, 981 (D. Mont. 1965) in which Judge Jameson recognized the general rule that "one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the

of the contribution statute was there any reason to question this proposition.<sup>79</sup> The 1977 law provided for contribution, but the Montana court found that it has only limited application: “[The contribution statute] applies only in comparative negligence cases and only where recovery is allowed against more than one party.”<sup>80</sup> Thus contribution among defendants is not permitted in those cases in which the plaintiff’s negligence did not contribute to the accident;<sup>81</sup> nor may a defendant seek contribution from a party the plaintiff has not chosen to sue. The court acknowledged that Rule 14 of the Montana Rules of Civil Procedure permits third-party suits, but Justice Sheehy noted that Rule 14 is procedural only and not intended to change substantive rights under Montana law.<sup>82</sup>

After looking at the legislative history and finding no intent to radically change Montana law,<sup>83</sup> the court considered whether it should judicially change the contribution rule. Despite case law from other jurisdictions allowing contribution from both defendants and non-parties,<sup>84</sup> the Montana court preferred the approach taken by the Washington court in *Wenatchee Wenoka Growers Association v. Krack Corp.*<sup>85</sup> The Washington court found that although both contribution and comparative negligence are aimed at greater fairness by apportioning responsibility among the parties, the policy considerations underlying each are different.<sup>86</sup> For these reasons, the Montana court found that the adoption of the comparative negligence statute<sup>87</sup> did not necessarily mean that contribution

wrong done.” Later Montana cases cited *Panusuk* for this proposition. *Auto. Club Ins. Co. v. Toyota Motor Sales, U.S.A., Inc.*, 166 Mont. 221, 225, 531 P.2d 1337, 1339 (1975).

79. Consolidated, — Mont. —, — P.2d —, 36 St. Rptr. at 1811.

80. *Id.* at —, — P.2d —, 36 St. Rptr. at 1813.

81. This result does not appear to be consistent with the title of the act appearing in the original statutory text of REVISED CODES OF MONTANA 1947, § 58-607.2: “An act to provide that multiple defendants in negligence actions contribute to payment of the judgment in proportion to their comparative negligence.” See generally V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 16.7 (1974) for a discussion of the inapplicability of comparative negligence to contribution.

82. Consolidated, — Mont. —, — P.2d —, 36 St. Rptr. at 1813.

83. The supreme court discussed the legislature’s act of striking a proposal for “joinder of any parties whose negligence may have contributed as a proximate cause to the damages claimed by the plaintiff.” *Id.* at —, — P.2d —, 36 St. Rptr. at 1813.

84. *Bielski v. Schulze*, 16 Wis.2d 1, 8, 114 N.W.2d 105, 107 (1963); *Bedell v. Reagan*, 459 Me. 292, 192 A.2d 24, 26 (1963).

85. 89 Wash.2d 847, 576 P.2d 388 (1978).

86. *Id.* at —, 576 P.2d at 389-90. The Washington court noted that comparative negligence is directed at compensating a plaintiff who has suffered a tort-related loss and involves comparing the negligence of the plaintiff and the defendant. Contribution is directed at distributing the damages between or among tortfeasors and does not change the recovery which a plaintiff is entitled to receive.

87. MCA § 27-1-702 (1979).

should be allowed in all circumstances.<sup>88</sup>

Additionally, the court held that the contribution statute did not change the Montana law of indemnification.<sup>89</sup> Montana has consistently allowed a third-party claim by the defendant for indemnity against non-joined parties in those cases in which the defendant's liability arises from the relationship between the plaintiff and the defendant and not from the defendant's negligence.<sup>90</sup> In addition, the Montana court has recognized the distinctions between active or primary negligence and passive or secondary negligence, allowing indemnification to a passively negligent party<sup>91</sup> and denying it when the parties are found to be in *pari delicto*.<sup>92</sup>

In *Wright v. DeBeer Mechanical Construction Co.*,<sup>93</sup> decided shortly after *Consolidated*, the court relied on *Consolidated* to allow indemnification and to deny a claim for contribution. A plumber on a project at Big Sky of Montana was injured on the job and sued the subcontractor DeBeer, the general contractor Wright, and Big Sky. The subcontractor settled with the plumber for \$3,000, but the plumber continued the suit against the other two defendants. The contractor Wright paid the full amount of the

88. *Consolidated*, — Mont. —, — P.2d —, 36 St. Rptr. at 1815.

89. The court noted that indemnification has been defined as contribution in its most extreme form. *Id.*

90. In *Crosby v. Billings Deaconess Hosp.*, 149 Mont. 314, 426 P.2d 217 (1967), the Montana court allowed a claim of indemnity against a non-joined party. In that case, plaintiff sued the hospital for burns received when he put a television regulator switch in his mouth. The television equipment was leased and maintained by the Mid-West Leasing Co. The hospital filed a third-party claim against Mid-West, and Mid-West moved for summary judgment on the theory that the hospital was a joint tortfeasor and was barred from seeking contribution. The court reversed the summary judgment because the hospital raised the issue in the pleadings that the plaintiff's injury was caused solely by the negligence of Mid-West, and the hospital was thus entitled to indemnity.

91. The Montana Supreme Court has adopted Judge Jameson's statement in *Great Northern Ry. Co. v. United States*, 187 F. Supp. 690, 693 (D. Mont. 1968):

Where the parties are not *in pari delicto*, and an injury results from the act of one party whose negligence is the primary, active and proximate cause of the injury, and another party, who is not negligent or whose negligence is remote, passive and secondary, is nevertheless exposed to liability by the acts of the first party, the first party may be liable to the second party for the full amount of damages incurred by such acts.

See *Fletcher v. City of Helena*, 163 Mont. 337, 342, 517 P.2d 365, 368 (1973).

92. In *Fletcher*, the court found that the city as lessor was negligent in failing to inspect or repair a heater in the lessee's apartment, after the lessee notified the city that the heating was defective. The city's claim for indemnity from Montana Power Company was denied, because although Montana Power may have been negligent, the city was found to be actively negligent by its omission. The court found that "the difference in the gravity of the faults of the participants [was not] so great as to throw the whole loss upon [Montana Power]." *Id.* at 342, 517 P.2d at 368-69. See generally Annot., 88 A.L.R.2d 1355, 1356 (1963) (four situations allowing indemnity).

93. — Mont. —, 604 P.2d 323 (1979).

judgment and did not seek contribution from Big Sky.<sup>94</sup>

Wright then successfully sued the settling party DeBeer for indemnification based on a provision in their plumbing contract.<sup>95</sup> The court found that the language of the indemnification clause was broad enough to allow Wright to recover despite his negligence, whether active or passive.<sup>96</sup> The clause constituted "some other legal transaction between the parties" in addition to the obligations arising from their relationship.<sup>97</sup> Because the claim was not in tort, there was no need for the court to consider active/passive or primary/secondary negligence in shifting the burden to one party. Rather, the court viewed this as purely contractual indemnity in which tort standards for indemnification did not apply.<sup>98</sup>

The court also made it clear that defendant DeBeer had no right of contribution against defendant Big Sky. Because the judgment in the original suit was against Wright and Big Sky and did not involve DeBeer, the court noted that DeBeer had no standing to raise the contribution issue. In addition, because the original suit did not involve comparative negligence, under the *Consolidated* holding a right of contribution could not arise.<sup>99</sup>

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94. *Id.* at —, 604 P.2d at 325.

95. "(1) To indemnify and save harmless the contractor [Wright] from and against any and all suits, claims, actions, losses, costs, penalties, and damages, of whatsoever kind or nature, . . . arising out of, in connection with, or incident to the subcontractor's [DeBeer] performance of this subcontract." — Mont. —, 604 P.2d at 325.

96. *But cf.* *Rogers v. Western Airline*, — Mont. —, 602 P.2d 171, 173-74 (1979). In that case, plaintiff sued the airline for injuries at the Great Falls airport and the airline attempted to join the city for indemnification. By contract, the airline guaranteed to hold the city harmless unless the city was itself negligent. Interpreting this guarantee, the court found no implied right of indemnity running from the city to the airline and approved summary judgment in favor of the city. The court noted that if the airline were found to be negligent it could have no claim for indemnity against another tortfeasor. What the airline failed to show, and what appears to distinguish *Crosby v. Billings Deaconess Hosp.*, 149 Mont. 314, 320, 426 P.2d 217, 220 (1967), is "that the airline's liability to the plaintiff arose only because of the relationship between the first party indemnitee [airline] and the second party indemnitor . . . and not due to any negligence on the part of the first party claiming indemnity." *Id.* at —, 602 P.2d at 174.

97. *See Cordier v. Stetson-Ross, Inc.*, — Mont. —, 604 P.2d 86, 91 (1979).

98. *See Ferguson v. Town Pump, Inc.*, — Mont. —, 580 P.2d 915, 920 (1978).

99. *Wright*, — Mont. —, 604 P.2d at 326.