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## Torts

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## TORTS

John G. Hursh

### INTRODUCTION

During 1981 the Montana Supreme Court decided a number of significant cases concerning Montana tort law. The developments were primarily in the area of negligence, punitive damages and defamation. In particular, the court discussed the duty of care owed to a business invitee by the occupier of land and the duty of care of a general contractor to employees of his subcontractors. The continued viability of the "sudden emergency doctrine" and the "mere happening doctrine" in ordinary automobile accident cases were also reviewed. The court clarified both the relationship between actual and punitive damage awards in negligence cases and the effect of Montana's comparative negligence scheme on punitive damage awards. In a defamation action the court defined the scope of the "official proceeding" privilege as an affirmative defense. This survey examines each of these opinions and their effect on Montana tort law.

### I. DUTY OF CARE

#### A. *Accumulation of Ice and Snow*

The Montana Supreme Court recently reviewed the duty of care owed by the occupier of land to business invitees regarding accumulations of ice and snow on the premises. In *Cereck v. Albertson's, Inc.*,<sup>1</sup> the court held that a property owner may be liable for falls on ice and snow where the property owner took affirmative action with respect to the natural accumulation and thereby increased the natural hazard or created a new hazard, even where such a condition is actually known or obvious.<sup>2</sup>

In *Cereck*, the plaintiff drove to the defendant's store to do some shopping. She parked in the store's plowed parking lot. As a result of the plowing there was a large snow bank between Mrs. Cereck's car and the entrance to the store. Although a path had been cut through the snow bank, there was a large puddle in the path. Mrs. Cereck attempted to climb over the bank to avoid the puddle, but in doing so she slipped and fell, and seriously injured her leg and hip. She brought a damage action against the defendant alleging negligence in maintaining the parking lot.

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1. — Mont. —, 637 P.2d 509 (1981).

The trial court granted the defendant's motion for summary judgment on the ground that the defendant owed no duty to the plaintiff, a business invitee, because of the obvious nature of the condition which caused the plaintiff's injury.<sup>3</sup> After citing prior Montana decisions<sup>4</sup> for the proposition that no liability may be imposed upon a landowner when the damage is created by natural accumulations of ice or snow because their dangers are universally known,<sup>5</sup> the supreme court nevertheless reversed the trial court's grant of summary judgment because the defendant had taken affirmative action to alter the natural condition. The defendant's action, according to the court, created a jury question as to whether the slippery condition was the result of natural accumulation or the result of the defendant's carelessness.<sup>6</sup>

Justice Morrison's concurring opinion<sup>7</sup> focuses on two troubling aspects of the majority opinion. The first involves the dichotomy between the potential liability of one who attempts to remedy a dangerous condition created by the natural accumulation of ice and snow, as compared to the freedom from liability of one who makes no attempt to minimize the danger created by such natural accumulations. Justice Morrison suggested a better rule: impose a duty on a possessor of land to act prudently with regard to both natural and unnatural accumulations of ice and snow.<sup>8</sup> The second aspect involves the court's apparent resurrection of categories of injured parties for determining the liability of the possessor of the land. Although the traditional rules of liability distinguish between licensees, invitees and trespassers and the duty owed to each,<sup>9</sup> the Montana court had previously indicated that a general duty of care would be applied without regard to the status of the injured party.<sup>10</sup> *Cereck* demonstrates that the different degrees of duty are still retained.<sup>11</sup>

3. *Id.*

4. *Dunham v. Southside National Bank*, 169 Mont. 466, 548 P.2d 1383 (1976); *Luebeck v. Safeway Stores, Inc.*, 152 Mont. 88, 446 P.2d 921 (1968).

5. — Mont. —, 637 P.2d at 511.

6. *Id.*; see, e.g., *Willis v. St. Peter's Hospital*, 157 Mont. 417, 486 P.2d 593 (1971).

7. *Id.* at —, 637 P.2d at 512.

8. *Id.* Justice Morrison pointed to RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965), which provides:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

9. See W. PROSSER, LAW OF TORTS § 357 (4th ed. 1971) [hereinafter cited as PROSSER].

10. See *Corrigan v. Janney*, — Mont. —, 626 P.2d 838 (1981).

11. See e.g., *Krone v. McCann*, — Mont. —, — P.2d —, 39 St. Rptr. 10 (1982).

### B. General Contractors

In *Stepanek v. Kober Construction*,<sup>12</sup> the court addressed the question of whether a general contractor owes a duty of care to the employees of his subcontractors. The court held that if a general contractor agrees to maintain and supervise job safety on the project in its contract with the owner, then that duty extends to employees of the subcontractor and cannot be delegated by the general contractor.<sup>13</sup>

Defendant Kober Construction had a contract with Yellowstone County to build a recreational facility. The contract provided that the defendant would be "responsible for initiating, maintaining, and supervising all safety precautions and programs" connected with the construction.<sup>14</sup> Defendant's contracts with subcontractors contained a provision purporting to delegate the responsibility for safety precautions to the subcontractor.<sup>15</sup>

Plaintiff, an employee of the masonry subcontractor on the project, was injured in a fall from the subcontractor's scaffolding while doing masonry work. He brought this damage action against the general contractor for breach of duty under the contract, the Montana Scaffolding Act<sup>16</sup> and Montana's Safe Place Statute.<sup>17</sup> The trial court granted defendant's motion for summary judgment without stating the reasons therefor.

12. \_\_\_ Mont. \_\_\_, 625 P.2d 51 (1981).

13. *Id.* at \_\_\_, 625 P.2d at 55.

14. *Id.* at \_\_\_, 625 P.2d at 52.

15. The contract provision required the subcontractors to comply with all applicable safety laws and to:

provide all safeguards, safety devices, and protective equipment and take any other needed actions on his own responsibility; or as the contractor may determine reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered herein.

*Id.*

16. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 50-77-101 (1981) provides:

All scaffolds erected in this state for use in the erection, repair, alteration, or removal of buildings shall be well and safely supported, of sufficient width, and properly secured so as to ensure the safety of persons working on them or passing under them or by them and to prevent them from falling or to prevent any material that may be used, placed or deposited on them from falling.

17. MCA § 50-71-201 (1981) provides:

Every employer shall furnish a place of employment which is safe for employees therein and shall furnish and use and require the use of such safety devices and safeguards and shall adopt and use such practices, means, methods, operations, and processes as are reasonably adequate to render the place of employment safe and shall do every other thing reasonably necessary to protect the life and safety of employees.

The Montana court had previously recognized the general rule<sup>18</sup> that a general contractor is not liable for injuries to a subcontractor's employees, unless the general contractor retains some control over the subcontractor's method of operation.<sup>19</sup> Relying on this rule, the parties presented considerable evidence on whether the defendant retained control over safety precautions or had delegated that responsibility to the subcontractor. After lengthy discussion, the supreme court held that the control issue was not dispositive in light of the safety provision in the contract between the general contractor and Yellowstone County. The court had previously held that such contractual arrangements created a non-delegable duty of care that extended to persons not employed by the subcontractors.<sup>20</sup> In reversing the district court in *Stepanek*, the court extended this non-delegable duty to cover the employees of subcontractors.

The Montana court rejected the holding in *West v. Morrison-Knudsen Co.*,<sup>21</sup> where the Ninth Circuit court held that the non-delegable duty extended to only third parties and not to employees of subcontractors. The Montana Supreme Court supported its position by noting that *West* was decided before the passage of the new Montana Constitution, which eliminated the distinctions between a subcontractor's employees and third parties.<sup>22</sup>

*Stepanek* may cause general contractors to be wary about entering into contracts that give them responsibility for job safety precautions. Apparently, in the absence of a safety maintenance provision or the exercise of actual control over subcontractor's operations, the general contractor will be shielded from liability to a subcontractor's employee who is injured on the job.

Another interesting aspect of the court's opinion involves the relationship between per se negligence and a violation of Occupational Health and Safety Act regulations. Although a violation of a statute or ordinance intended to protect the plaintiff from an injury is generally considered negligence per se,<sup>23</sup> in *Stepanek* the court held that the violation of safety regulations, such as those

18. RESTATEMENT (SECOND) OF TORTS § 414 (1965).

19. \_\_\_ Mont. \_\_\_, 625 P.2d at 53 (quoting *Shannon v. Howard S. Wright Constr. Co.*, \_\_\_ Mont. \_\_\_, 593 P.2d 438, 441 (1979)).

20. *Ulmen v. Schwieger*, 92 Mont. 331, 12 P.2d 856 (1932).

21. 451 F.2d 493 (9th Cir. 1971).

22. MONT. CONST. art. II, § 16 provides in pertinent part that "No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him . . . ."

23. PROSSER, *supra* note 9, at § 200.

promulgated under the Occupational Health and Safety Act, did not constitute negligence *per se* but were only evidence of negligence.<sup>24</sup>

## II. JURY INSTRUCTIONS

### A. *The Sudden Emergency Doctrine*

The issue of the applicability of the sudden emergency doctrine in automobile accident cases was once again before the Montana court in *Eslinger v. Ringsby Truck Lines, Inc.*<sup>25</sup> Although the court, in a four-three decision, rejected the doctrine's application in *Eslinger*, it refused to signal the demise of the doctrine in every negligence case, or even in every automobile case.<sup>26</sup>

*Eslinger* was a wrongful death action arising out of a highway collision between decedents' automobile and a tractor-trailer driven by defendant's employee. Road conditions were icy at the time of the accident, and evidence at trial indicated that the driver of the automobile had lost control of his vehicle prior to the collision. The truck driver slammed on his brakes and also lost control. There was contradictory evidence on whether the collision occurred in defendant's or decedents' lane of traffic.

At the trial, the defendant's primary defense was that Eslinger's loss of control of his vehicle created an emergency and that the truck driver's application of his brakes was an appropriate response under the circumstances.<sup>27</sup> Over plaintiff's objection the trial court gave the jury a sudden emergency instruction.<sup>28</sup> The jury returned a defense verdict. The plaintiff appealed on the ground that the trial court erred in applying the sudden emergency doctrine to the case.

The supreme court has recognized the sudden emergency doc-

24. — Mont. —, 625 P.2d at 56. *Contra*, Kelley v. Howard S. Wright Constr. Co., 90 Wash. 2d 323, 582 P.2d 500 (1978).

25. — Mont. —, 636 P.2d 254 (1981).

26. *Id.* at —, 636 P.2d at 260.

27. *Id.* at —, 636 P.2d at 256.

28. The trial court's instruction read:

A sudden emergency exists when the driver of a motor vehicle is suddenly placed in a position of imminent peril, great mental stress, or danger which situation has not been brought about by his own negligence, but in which instant action is necessary to avoid a threatened danger. But the driver must use that care which the ordinary prudent person would exercise under like or similar circumstances. One suddenly confronted with a peril through no fault of his own, who in attempting to escape does not choose the best or safest way should not be held negligent because of such choice, unless it was so hazardous that an ordinary prudent person would not have made [it] under similar circumstances.

*Id.* at —, 636 P.2d at 257.

trine since at least 1927, when the court decided *Peabody v. Northern Pacific Railway Co.*<sup>29</sup> In *Peabody* the court stated the rule as follows:

One who, in a sudden emergency, acts according to his best judgment, or who, because of want of time in which to form a judgment omits to act in the most judicious manner, is not chargeable with negligence. Such . . . act or omission . . . may be called a mistake, but not carelessness.<sup>30</sup>

The application of the doctrine in automobile accidents has been considered by the court twice in the last few years,<sup>31</sup> most recently in the 1977 case of *Kudrna v. Comet Corp.*<sup>32</sup> In *Kudrna*, the court emphasized the limited application of the sudden emergency doctrine in negligence cases and cautioned trial courts, stating:

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.<sup>33</sup>

In *Kudrna* the court's rejection of the doctrine was based on facts indicating that the defendant created the emergency. In *Eslinger* the court remanded the case for a new trial, ruling that under the circumstances of the case it was error to give the sudden emergency instruction. The court recognized that in the operation of a motor vehicle some emergencies must be anticipated, that drivers must be prepared to meet those emergencies, and that the sudden emergency doctrine would be inapplicable in those situations.<sup>34</sup> Trial courts were admonished not to give the instruction in ordinary automobile accident cases and were told that the ordinary rules of negligence afforded a sufficient gauge by which to appraise conduct.<sup>35</sup>

The court also pointed out that the doctrine is merely a particularization of the rule that the conduct required is that of a reasonable man under the same circumstances and that the emergency is but one of the circumstances a jury must consider.<sup>36</sup>

29. 80 Mont. 492, 261 P. 261 (1927).

30. *Id.* at 497, 261 P. at 262.

31. See *Erickson v. Perrett*, 169 Mont. 167, 545 P.2d 1074 (1976).

32. 175 Mont. 29, 572 P.2d 183 (1977).

33. *Id.* at —, 572 P.2d at 190 (quoting *Fuler v. Wiley*, 103 N.J. Super. 95, 103, 246 A.2d 715, 719 (1968) (emphasis supplied by the court)).

34. — Mont. —, 636 P.2d at 258.

35. *Id.* at —, 636 P.2d at 260.

36. *Id.*

Despite the court's stated belief that a sudden emergency instruction is confusing to the jury, the doctrine is apparently still available in extraordinary automobile accidents as well as other negligence cases.<sup>37</sup>

### B. *The Mere Happening Doctrine*

For the third time in as many years the supreme court considered the use of the mere happening instruction in negligence cases. In *Sampson v. Snow*,<sup>38</sup> the court held that the instruction was a proper statement of the law and was not grounds for reversal,<sup>39</sup> but the court again recommended that the instruction not be given in the future because it can confuse the jury.<sup>40</sup>

*Sampson* involved an automobile accident in which the plaintiff, a rural mail carrier, made a left turn off a busy street and was struck by the defendant's vehicle as she attempted to pass the plaintiff. The plaintiff brought a damage action for personal injuries sustained in the accident. Over plaintiff's objection the court gave the jury the mere happening instruction, which reads:

The mere fact that an accident happened, considered alone, does not give rise to legal inference that it was caused by negligence or that any party to this action was negligent or otherwise at fault.<sup>41</sup>

The jury returned a special verdict for the defendant, and the plaintiff appealed, alleging that giving the instruction was reversible error.

In *Sampson*, the court noted that the instruction has been given in numerous negligence cases since at least 1915,<sup>42</sup> that it is a correct statement of the law and, consequently, that it would be unacceptable to hold that the jury should not be informed of this rule of law.<sup>43</sup> In reaching its result the court reviewed two recent Montana cases, *Hunsaker v. Bozeman Deaconess Foundation*<sup>44</sup> and *Helmke v. Goff*,<sup>45</sup> in which the propriety of the instruction was at issue. In *Hunsaker*, a 1978 case, the court considered the mere happening instruction in a medical malpractice context, and al-

37. Justice Shea, in his concurring opinion in *Eslinger*, stated that "it is time for the demise of the sudden emergency instruction in any situation." *Id.* at \_\_\_, 636 P.2d at 261.

38. \_\_\_ Mont. \_\_\_, 632 P.2d 1122 (1981).

39. *Id.* at \_\_\_, 632 P.2d at 1125.

40. *Id.* at \_\_\_, 632 P.2d at 1124.

41. *Id.*

42. *Id.* at \_\_\_, 632 P.2d at 1125. See *Lyon v. Chicago, M. & St. P. Ry. Co.*, 50 Mont. 532, 148 P. 386 (1915).

43. \_\_\_ Mont. \_\_\_, 632 P.2d at 1125.

44. 179 Mont. 305, 588 P.2d 493 (1976).

45. \_\_\_ Mont. \_\_\_, 597 P.2d at 1131 (1979).

though the instruction was upheld, the court concluded that in ordinary negligence cases the instruction should be given a "decent burial."<sup>46</sup> The following year the Montana court reversed a jury's verdict in *Helmke*,<sup>47</sup> a *res ipsa loquitur* case, because the mere happening instruction had been given. The *Helmke* court again suggested that the instruction should be laid to rest in ordinary negligence cases, but restricted its holding to *res ipsa* cases.<sup>48</sup>

Last year's decision in *Sampson v. Snow* does not help to clarify the issue. The court again recommended that the mere happening instruction not be given even though, under the facts of *Sampson*, it was not reversible error to give it. The court, however, implied that any failure to clearly and explicitly instruct the jury on the acts or omissions that would constitute negligence, when combined with a mere happening instruction, would constitute reversible error.<sup>49</sup> The practical effect of the *Sampson* decision is to maintain the *status quo*: defense attorneys will continue to offer the instruction in ordinary negligence cases, judges will continue to give it, and losing plaintiffs will continue to raise the issue on appeal in hope that under the facts of their case, the instruction will be grounds for reversal.

### III. DAMAGES

#### A. Actual and Punitive Damages

In *Lauman v. Lee*,<sup>50</sup> the Montana Supreme Court was asked to reverse a punitive damage award on the ground that the jury failed to award actual or compensatory damages. In affirming the award of punitive damages, the court held that as long as an identifiable basis for actual damages exists, an award of punitive damages will be upheld notwithstanding the jury's failure to fix a monetary value on actual damages.<sup>51</sup>

*Lauman* involved an automobile accident in which the plain-

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46. *Id.* at 328, 588 P.2d at 506-07. The Montana court quoted the California appellate court's holding in *Gagosian v. Burdick's Television & Appliances*, 254 Cal. App. 2d 316, 62 Cal. Rptr. 70, 73 (1967), which eliminated the mere happening instruction, stating:

Since it elucidates the obvious to the jury, and need not be given to meet any rule of appellate procedure, we join heartily in the recommendation to its authors for its "decent burial." The trial judge, who strikes the "mere happening" instruction from his instruction book and completely crosses it from his memory will save time in instruction and much in retrial after reversal.

47. — Mont. —, 597 P.2d 1131 (1979).

48. *Id.* at —, 597 P.2d at 1134.

49. — Mont. —, 632 P.2d at 1126.

50. — Mont. —, 626 P.2d 830 (1981).

51. *Id.* at —, 626 P.2d at 833.

tiff's vehicle struck defendant's vehicle as plaintiff attempted to turn left across defendant's lane of traffic. Defendant Lee's stepson was driving defendant's automobile at the time of the accident. Plaintiff claimed he could not see defendant's oncoming vehicle because its headlights were either not illuminated or were so obscured by mud as to be ineffective. Defendant Lee came to the scene of the accident while the investigation was in progress. The defendant began wiping mud off one of the headlights but the investigating officer ordered him to stop. When the officer stepped away, the defendant backed up to his automobile and began wiping the other headlight. Because of the defendant's conduct the officer was unable to test the illuminating characteristics of the headlights.<sup>52</sup>

The plaintiff, who was seriously injured in the accident, brought a damage action against the driver of the defendant's vehicle for negligence and against the defendant on a claim for exemplary or punitive damages. The jury found the driver of defendant's vehicle was not negligent, but it awarded \$17,500 in punitive damages against the defendant for his destruction of critical physical evidence.<sup>53</sup> The defendant appealed the award, contending that the jury's failure to award actual damages precluded any award of punitive damages.

The general rule in Montana, as in most jurisdictions,<sup>54</sup> is that an award of actual damages is a precondition to any award of exemplary damages.<sup>55</sup> On at least two previous occasions, however, the court has upheld punitive damage awards despite the jury's failure to fix a monetary amount on actual damages. In one case the court relied on the trial judge's finding of actual damages to support the award.<sup>56</sup> In the other the court noted that the jury had not been properly instructed on the law governing damage awards, and speculated that if the jury had been properly instructed they would have assessed actual damages.<sup>57</sup>

The *Lauman* court carried the law of punitive damages one step further. In construing the Montana statutes on actual<sup>58</sup> and

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52. *Id.* at —, 626 P.2d at 832.

53. *Id.*

54. PROSSER, *supra* note 9, at § 13-14.

55. *See, e.g.*, *Gilham v. Devereaux*, 67 Mont. 75, 78, 214 P. 606, 607 (1923).

56. *Miller v. Fox*, 174 Mont. 504, 510, 571 P.2d 804, 808 (1977).

57. *Fauver v. Wilkoske*, 123 Mont. 228, 241, 211 P.2d 420, 427 (1949).

58. MCA § 27-1-202 (1981) provides:

Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefore in money, which is called damages.

punitive damages,<sup>59</sup> it held that if there is an identifiable basis on which actual damages could have been assessed, the failure of the jury to assess actual damages will not preclude an award of exemplary damages.<sup>60</sup> Although the *Lauman* jury was fully instructed on damages and the judge made no finding of actual damages, the supreme court believed that the defendant's wanton acts, which deprived the plaintiff of the illumination tests, provided an identifiable basis for actual damages.<sup>61</sup> The court considered the issue of actual damages impliedly resolved by the jury's award of punitive damages.<sup>62</sup> Under *Lauman*, a jury can now assess punitive damages without first assessing actual damages, provided an identifiable basis for actual damages exists.

### B. *Punitive Damages and Contributory Negligence*

In *Shahrokhfar v. State Farm Mutual Automobile Insurance Co.*<sup>63</sup> the Montana Supreme Court allowed a punitive damage award of \$80,000 against the defendant insurance company, because defendant's attorney mistakenly sued the plaintiff in a separate action. The court held that although the plaintiff was found to be contributorily negligent, the trial court could not reduce the punitive damage award by the percentage of plaintiff's contributory negligence.<sup>64</sup>

Plaintiff's brother had been in an automobile accident with a State Farm automobile insurance policyholder. Defendant State Farm paid its insured and then exercised its subrogation rights to bring an action against the plaintiff's brother. Defendant's attorney mistakenly sued the plaintiff, Shahram Shahrokhfar, instead of plaintiff's brother, Bahram Shahrokhfar. Although the plaintiff notified the defendant that it had sued the wrong person, the defendant took a default judgment against the plaintiff and subsequently had plaintiff's driver's license revoked. Plaintiff filed this action for actual and punitive damages based on the negligence of defendant and its attorney.

The jury, in answering a special jury verdict form, found the

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59. MCA § 27-1-221 (1981) provides:

In an action for a breach of obligation not arising from contract where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.

60. — Mont. —, 626 P.2d at 833.

61. *Id.*

62. *Id.*

63. — Mont. —, 634 P.2d 653 (1981).

64. *Id.* at —, 634 P.2d at 658-59.

plaintiff 16 percent contributorily negligent. Actual damages were set at \$850 while punitive damages totalled \$80,000. The trial judge reduced both the actual and punitive damage awards by the 16 percent contributory negligence of the plaintiff. The defendant appealed the judgment, alleging numerous errors by the trial court, and the plaintiff cross-appealed, alleging only that the trial court erred in reducing the punitive damage award.<sup>65</sup>

After rejecting all defendant's allegations of error, the court cited two federal district court decisions<sup>66</sup> in support of its holding that the trial court erred in reducing the punitive damage award.<sup>67</sup> In reaching the decision, the Montana court noted that since the purpose of punitive damages is not compensatory, but is to punish the defendant, there is no logical relationship between plaintiff's conduct and the award of punitive damages. The only thing surprising about the decision is that the Montana Supreme Court appears to be the first appellate court in the nation to face this issue.

The court's decision in *Shahrokhfar* leaves in doubt the status of the assumption of risk defense in Montana. Although the defendant claimed the plaintiff assumed the risk of the default judgment by failing to hire an attorney, the trial court refused to give the jury the defendant's offered instruction on the defense.<sup>68</sup> The supreme court held that the trial court did not abuse its discretion by refusing the instruction because there was no evidence on the record that the plaintiff appreciated the risk of not obtaining legal counsel.<sup>69</sup> The court cited a 1978 products liability case for a definition of assumption of risk,<sup>70</sup> but did not mention the 1980 negligence case of *Kopischke v. First Continental Corp.*,<sup>71</sup> in which the court stated in dictum that, in the future, assumption of risk would be treated like any other form of contributory negligence in apportioning fault under Montana's comparative negligence statute.<sup>72</sup> The court's comments in *Shahrokhfar* cast doubt on the apparently unequivocal position it took in *Kopischke*. Perhaps in the near future the court will conclusively settle the issue of whether assumption of risk is still a separate defense in negligence cases, or

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65. *Id.* at \_\_\_, 634 P.2d at 655-56.

66. *Amoco Pipeline Co. v. Montgomery*, 487 F. Supp. 1268 (W.D. Okla. 1980); *Tampa Electric Co. v. Stone & Webster Eng'g Corp.*, 367 F. Supp. 27 (M.D. Fla. 1973).

67. \_\_\_ Mont. \_\_\_, 634 P.2d at 659.

68. *Id.*

69. *Id.* at \_\_\_, 634 P.2d at 657-58.

70. *Brown v. North Am. Mfg. Co.*, 176 Mont. 98, 576 P.2d 711 (1981).

71. *Kopischke v. First Continental Corp.*, \_\_\_ Mont. \_\_\_, 610 P.2d 668 (1980). See Survey, 1980 Montana Supreme Court Tort Decisions, 42 MONT. L. REV. 423, 428 (1981).

72. MCA § 27-1-702 (1981).

if the plaintiff's subjective appreciation and assumption of risk is merely a form of contributory negligence.

#### IV. DEFAMATION

*Skinner v. Pistoria*<sup>73</sup> provided the Montana Supreme Court with an opportunity to define the scope of the official proceeding privilege as a defense to a defamation claim. In construing Montana's privileged communication statute,<sup>74</sup> the court held that the publication of defamatory matter in an official proceeding entitles the speaker to absolute immunity from liability for defamation, even though the speaker may have been motivated by actual malice.<sup>75</sup>

Defendant Paul Pistoria, an outspoken critic of Great Falls city government, received numerous anonymous telephone calls in which the callers alleged that certain members of the Great Falls Police Department were misusing government funds. Defendant wrote a letter to the Great Falls City Commission, Police Chief and City Manager in which he named the police officers allegedly involved in the misconduct. Instead of mailing the letter, the defendant attended a regularly scheduled public meeting of the City Commission and read the letter to the assembly. The defendant made copies of the letter available to members of the press who attended the meeting, and the content of the letter was subsequently reported in the media.

The plaintiff, one of the police officers accused in the letter, was denied a promotion for approximately one year due to defendant's allegations, which were ultimately shown to be unfounded. The plaintiff brought a defamation action against the defendant alleging that the defendant was motivated by malice. The jury agreed and awarded plaintiff \$1,294 in actual damages and \$25,000 in punitive damages. The defendant appealed the judgment, contending that the publication of the letter was a privileged commu-

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73. — Mont. —, 633 P.2d 672 (1981).

74. MCA § 27-1-804 (1981) provides:

A privileged communication is one made:

- (1) in the proper discharge of an official duty;
- (2) in any legislative or judicial proceeding or any other official proceeding authorized by law;
- (3) in a communication without malice to a person interested therein by one who is also interested or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent or who is requested by the person interested to give the information;
- (4) by a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

75. *Skinner*, — Mont. —, 633 P.2d at 675-76.

nication, which was cloaked with absolute immunity under Montana law.<sup>76</sup>

The general rule, adopted by the majority of jurisdictions, is that communications made to those who may be expected to take official action for the protection of the public interest are entitled to a qualified privilege.<sup>77</sup> The distinction between a qualified privilege and an absolute privilege is that a qualified privilege is forfeited if publication is made with actual malice, whereas malice is irrelevant if the privilege is absolute.<sup>78</sup> The Montana court acknowledged that most jurisdictions had adopted a "qualified privilege" rule and noted that the absolute privilege could in some situations cause substantial injury.<sup>79</sup> The court, however, looking to the plain meaning of the language used in Montana's privileged communication statute,<sup>80</sup> decided that the legislature intended to confer an absolute privilege on all publications made in an "official proceeding authorized by law."<sup>81</sup> Balancing the competing interests, the court commented that "[t]he advantages gained by the freedom to comment and criticize are sufficient to outweigh the danger that the reputation of public officers may suffer."<sup>82</sup>

While the court's construction of the privileged communication statute cannot be faulted, their holding could cause unnecessary and irreparable harm to diligent public servants. Presumably, a person can now go before the proper official body, and with the press in attendance, make malicious and unfounded accusations about a public servant without being subjected to liability for those defamatory remarks.<sup>83</sup>

76. *Id.* at \_\_\_, 633 P.2d at 674.

77. PROSSER, *supra* note 9, at § 791.

78. *Id.* at § 794.

79. \_\_\_ Mont. \_\_\_, 633 P.2d at 676.

80. MCA § 27-1-804 (1981). See *supra* note 74 for text of this statute.

81. \_\_\_ Mont. \_\_\_, 633 P.2d at 675-76. The court noted that subsections (3) and (4) of the privileged communication statute expressly require lack of malice in the publication of defamatory matters, while subsections (1) and (2) of the statute, the "official duty" and "official proceedings" privileges, are silent on the presence of malice. The court had previously held on the same grounds that subsection (1) conferred an absolute privilege on communications made in the discharge of an official duty. *Storch v. Board of Dir. of East Mont. Reg. Five M.H.C.*, 169 Mont. 176, 181, 545 P.2d 644, 647 (1976).

82. *Skinner*, \_\_\_ Mont. \_\_\_, 633 P.2d at 676.

83. Many jurisdictions have taken a more equitable position, which grants the speaker a qualified privilege to present defamatory matters to the proper officials, and which raises a rebuttable presumption that the publication was made in good faith. The defamation will be actionable only if the aggrieved party can carry the burden of showing that the publication was made with actual malice. See, e.g., *Nuyen v. Slater*, 372 Mich. 654, 127 N.W.2d 369 (1964); *Dempsey v. Double*, 386 Pa. 542, 126 A.2d 915 (1956).

