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Torts

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TORTS

Bart Dzivi

This survey presents a brief discussion of some recent cases which have affected the development of tort law in Montana. The topics discussed include *res ipsa loquitor*, strict liability in tort, defamation, damages, and assumption of risk. The purpose of this survey is to summarize the facts, reasoning, and policies contained in the cases which brought forth important modifications or clarifications of tort law.

I. RES IPSA LOQUITOR

In *Thompkins v. Northwestern Trust Co.*¹ the Montana Supreme Court held that it was reversible error for the trial court to refuse a *res ipsa loquitor* instruction in a wrongful death action arising out of an airplane crash.² In reaching that result, the court effectively overruled the line of Montana cases³ which held that exclusive control of the defendant was a necessary element of *res ipsa loquitor*. The court later stated in *Brothers v. General Motors Corp.*,⁴ that the issue of exclusive control would be given weight in determining which situations are appropriate for application of *res ipsa loquitor*.⁵

The pilot in *Thompkins* was relatively inexperienced.⁶ On September 19, 1978, he rented a plane for the purpose of taking three passengers from Missoula to Bozeman. At approximately 4:00 p.m., a half hour after take-off, the plane crashed into a 5500 foot hill fifteen miles southwest of Drummond. The wreckage of the plane, beginning with the tail cone, spread out along a 2075 foot line.⁷

The passengers' heirs brought an action against the pilot's es-

1. ___ Mont. ___, 645 P.2d 402 (1982).

2. "Without any evidence, other than the happening of the accident itself, *res ipsa* applies where an airplane crashes into the side of a hill." *Id.* at ___, 645 P.2d at 408.

3. *Id.* at ___, 645 P.2d at 413 (Weber, J., dissenting). Justice Weber states that in addition to overruling *Knowlton v. Sandaker*, 150 Mont. 438, 436 P.2d 98 (1968); *Little v. Grizzly Mfg.*, ___ Mont. ___, 636 P.2d 839 (1981); and *Whitney v. N.W. Greyhound Lines*, 125 Mont. 528, 242 P.2d 257 (1952), the decision has the effect of placing the entire status of *res ipsa loquitor* in doubt.

4. ___ Mont. ___, 658 P.2d 1108 (1983).

5. *Id.* at ___, ___ P.2d at 1111.

6. Pilot Herschel Moore had a total of seventy-one hours of flying time, of which twenty-three hours were solo time. Moore was not instrument rated. He had received his pilots' license just one month before the accident. His instructor, however, described Moore as an excellent student pilot. *Thompkins*, ___ Mont. ___, 645 P.2d at 403.

7. *Id.* at ___, 645 P.2d at 408.

tate. At trial, the plaintiffs' expert⁸ testified that he believed this case was a classic example of an inexperienced pilot becoming disoriented in bad weather⁹ and putting the plane into a nose-down spiral turn. During such a spiral, a plane would exceed its structural capabilities and break apart. The expert assumed the tail cone fractured first because of its position in the trail of wreckage.¹⁰ The defense's experts¹¹ testified about the sequence of the breakup. Based upon the trail of wreckage, they did not believe it was possible that the tail cone broke off first. They testified that equipment failure, not pilot disorientation, caused the accident.¹²

The case went to the jury, but the trial court refused to give a *res ipsa loquitor* instruction.¹³ The trial court was following the rationale of *Mets v. Granrud*¹⁴ in which the supreme court held that the *res ipsa loquitor* doctrine was inapplicable in one-car accidents with no eyewitness testimony and conflicting expert testimony about the cause.¹⁵ The jury in *Thompkins* apparently found the defense's theory of equipment failure more convincing than the plaintiffs' theory of pilot error. One of the issues raised on plaintiffs' appeal was whether or not a *res ipsa loquitor* instruction should have been given.

The theory behind *res ipsa loquitor* is that negligence may be

8. Jeffrey Morrison, an experienced flyer in the region, testified as to the cause of the accident. *Id.* at ____, 645 P.2d at 409.

9. A meteorologist testified about the weather conditions in Drummond on the day of the accident. From 1:30 p.m. to 3:45 p.m., there was a ceiling of broken clouds which had lifted from 3500 to 4000 feet. Visibility was twelve miles. There was precipitation in an area fifteen to twenty miles southwest of Drummond. *Id.* at ____, 645 P.2d at 404.

10. *Id.* at ____, 645 P.2d at 409.

11. Sheldon Roberts and James R. "Bob" Jensen were engineering consultants from California. Justice Sheehy, in a separate concurrence, based his decision on the fact "that the jury was flim-flammed by the impressive degrees and background of the two wise men from California." *Id.* at ____, 645 P.2d at 408-09.

12. *Id.*

13. *Id.* at ____, 645 P.2d at 404.

14. __ Mont. ____, 606 P.2d 1384 (1980).

15. *Id.* at ____, 606 P.2d at 1387-88. *Mets* involved a car crash into a telephone pole. The passenger was killed and the driver suffered an extensive injury causing his memory to lapse. The accident occurred on a dry curve, with no skid marks left from the accident. A Montana Highway Patrolman testified that the cause of the accident was the failure of the pitman arm. Another expert testified that the pitman arm broke upon the impact of the collision. The court stated:

In such a situation, the balance of probabilities between, first, causes of an accident involving the vehicle which are due to lack of care on the part of the driver, and second, causes of an accident not due to lack of reasonable care are so nearly equal that a conclusion that the driver was negligent cannot reasonably be found and would be mere speculation. This conclusion is further supported by the conflicting opinions of the experts . . . concerning the accident.

inferred in some accidents simply from the circumstances.¹⁶ In *Thompkins*, the court expressly overruled *Mets*, adopted the rationale of the *Restatement (Second) of Torts*¹⁷ and stated that “[e]xclusive control is merely one fact which establishes the responsibility of the defendant; and if it can be established otherwise, exclusive control is not essential to a *res ipsa loquitor* case.”¹⁸ The court refused to strictly follow the reasoning in *Campbell v. First National Bank*¹⁹ in which a federal district court decided that *res ipsa loquitor* did not apply to a case where the pilot lacked exclusive control because he had rented the plane. Instead, the court relied on an aircraft crash case²⁰ in which multiple defendants had sought to avoid application of *res ipsa loquitor* because they shared control over the airplane. Exclusive control was deemed to include joint control by *codefendants*.²¹ This analogy is not persuasive, as Justice Weber pointed out in his dissent, because *Thompkins* concerned a single defendant.²²

In *Brothers v. General Motors Corp.*,²³ the court put to rest any notion that the *Thompkins* rule on exclusive control was an aberration limited to aircraft cases. In *Brothers*, the plaintiffs were traveling in a station wagon on Interstate 90 when the driver attempted to negotiate a curve and the steering wheel did not respond. No evidence of any defect was found. After defendant’s motion for summary judgment was granted, plaintiffs appealed.²⁴ In reaching its decision that *res ipsa loquitor* did not apply, the supreme court cited *Thompkins* for the proposition that although “exclusive control over the situation is not a necessary element of a *res ipsa* case, we have nevertheless acknowledged that exclusive

16. See W. PROSSER, LAW OF TORTS § 39 (4th Ed. 1971) [hereinafter cited as PROSSER].

17. RESTATEMENT (SECOND) OF TORTS § 328 D provides:

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when

(a) the event is of a kind which does not occur in the absence of negligence;
 (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence;
 (c) the indicated negligence is within the scope of the defendant’s duty to the plaintiff.

(2) It is the function of the jury to determine whether the inference is to be drawn where different conclusions may be reasonably reached.

18. *Thompkins*, ___ Mont. at ___, 645 P.2d at 406 (quoting from RESTATEMENT (SECOND) OF TORTS § 328 D, comment g). In adopting this rationale, the court was forced to expressly overrule *Mets*, *Id.* at ___, 645 P.2d at 408.

19. 370 F. Supp. 1096 (D. N.M. 1973).

20. *Stoddard v. Long-Temco-Vought, Inc.*, 513 F. Supp. 314 (C.D.Cal. 1980).

21. *Id.* at 321.

22. *Thompkins*, ___ Mont. at ___, 645 P.2d at 413.

23. ___ Mont. ___, 658 P.2d 1108.

24. *Id.* at ___, 658 P.2d at 1109.

control helps to establish the probable cause of the accident."²⁶

Thompkins and *Brothers* illustrate a factual distinction important in *res ipsa loquitor* cases. In *Knowlton v. Sandaker*²⁶ the court stated that a *res ipsa loquitor* instruction should not be given when a defendant offers an equally plausible explanation.²⁷ The decedent in *Knowlton* was killed when he was welding in a petroleum tank that exploded. In both *Brothers* and *Knowlton*, the injured parties' conduct was a possible contributing factor in the accident. The court in *Thompkins* stated that because the passengers did not contribute to the accident, the defendant could not argue equally probable alternatives based only on conflicting expert testimony.²⁸

It appears the court has two different standards for determining when control is sufficiently exclusive. When the cause of the accident is a joint responsibility of a defendant and a plaintiff, the court will declare that the defendant's control was insufficient to mandate a *res ipsa loquitor* instruction. When the cause of the accident is a joint responsibility of a defendant and a third party, the court will reject a narrow construction of exclusive control and declare that *res ipsa loquitor* is applicable.

II. STRICT LIABILITY IN TORT

In *Thompson v. Nebraska Mobile Homes Corp.*,²⁹ the Montana Supreme Court held that a cause of action for strict liability in tort is sufficient even though the only injury was to the product itself.³⁰ In allowing Neoma Thompson a claim for the damage to her mobile home, the court extended the doctrine of strict liability in tort as originally announced in *Brandenburger v. Toyota Motor Sales*.³¹

On September 25, 1971, Neoma Thompson purchased a mobile home manufactured by Nebraska Mobile Homes Corporation (Nebraska). Nebraska put a ninety-day warranty on every unit produced, but consistently honored warranties for up to one year. Thompson's home malfunctioned from the day it was installed.³² During the first winter, Thompson was constantly bothered by cold

25. *Id.* at ____, 658 P.2d at 1111.

26. 150 Mont. 438, 436 P.2d 98 (1968).

27. *Id.* at 447, 436 P.2d at 103.

28. *Thompkins*, ____, Mont. at ____, 645 P.2d at 408.

29. ____, Mont. ____, 647 P.2d 334 (1982).

30. *Id.* at ____, 647 P.2d at 334.

31. 162 Mont. 506, 513 P.2d 268 (1973).

32. *Thompson*, ____, Mont. ____, 647 P.2d at 334-35.

drafts blowing through the home. After perhaps a year,³³ a factory representative came out to apply caulk to her bedroom floor. By June 1976, the ceiling had a four-inch sag. The local dealer contacted Nebraska, but the company refused to do anything because of the time that had expired since the purchase.³⁴

Thompson filed suit alleging negligence, breach of warranty, fraud, and strict liability in tort. At trial, defendants' motion to dismiss the strict liability claim was granted and the jury found for defendants on the issues of fraud, negligence, and breach of warranty. The sole issue presented for appeal was whether the district court had erred in granting the motion to dismiss.³⁵

In extending strict liability in tort to cases where the only injury is to the defective product, the court relied on the policy considerations stated in *Brandenburger*. The reasons stated for placing the economic burden on the manufacturer include: (1) he is best able to guard against future occurrences; (2) he can obtain insurance to cover the cost; (3) he can cover the cost by distributing it among all the consumers; and (4) he is primarily responsible for the injury.³⁶

The court stated that the inequality in bargaining position was more pronounced in cases where the only injury was to the product itself. The difficulty in pursuing a remedy through other theories of recovery, compounded by an attorney's reluctance to take cases with limited damages, makes other forms of recovery impractical.³⁷ Apparently the court hopes that by making the case easier to prove, it will reduce the amount of time necessary to prepare such a case and increase the chance of recovery. These factors would increase a case's settlement value and give an attorney more economic incentive to take such a case.

This decision is consistent with the doctrine of strict liability set forth in the *Restatement (Second) of Torts*, section 402A which limits damages to "physical harm." As one leading commentator has stated, "[t]here can be no doubt that the seller's liability includes not only personal injury, but also property damage to the

33. *Id.* at ____, 647 P.2d at 335. Thompson was injured in 1966 and still suffered memory loss during the trial. Some of the dates of occurrences are approximations.

34. *Id.*

35. *Id.* at ____, 647 P.2d at 336.

36. *Thompson*, ____, Mont. ____, 647 P.2d 336.

37. *Id.* at ____, 647 P.2d at 337. The court also cited a number of cases from other jurisdictions which had applied strict liability in tort where the only injury was to the product. *Hügel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975); *Gauthier v. Mayo*, 77 Mich. App. 513, 258 N.W. 748 (1977); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). *But see Seely v. White Motor Co.* 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Nobility Homes, Inc. v Shivers*, 557 S.W. 2d 77 (Tex. 1977).

defective chattel itself. . . ."³⁸

III. DEFAMATION

In *Williams v. Pasma*,³⁹ an action for libel, the Montana Supreme Court held that the trial court did not err in finding that Larry Williams was a public figure.⁴⁰ In sustaining the summary judgment, the court limited the apparently broad powers of a jury in a libel action.⁴¹ This decision gives the judge the power to decide a question of fact—the person's alleged status as a public figure.

In 1979, Joe Pasma issued a press release to respond to a comment made by an official of the State Republican Committee, Kenneth Dunham. This political counter-attack against Dunham contained a reference to Williams, who had joined former Governor Tim Babcock in heading a committee to promote the presidential campaign of John Connally. The release said in part, "all three [Williams, Babcock, and Connally] have at one time or another been under federal indictment for political and financial shenanigans. . . ."⁴²

This statement was incorrect because Williams had not been indicted, but had been charged with violating federal securities regulations.⁴³ Pasma refused to make a formal retraction and Williams filed a libel action. Pasma moved to dismiss, alleging that Williams was a "public figure" and no malice had been alleged. Summary judgment was granted for Pasma, even though Williams had amended his complaint to allege malice. An issue raised on appeal was whether the court erred in holding that as a matter of law Williams was a public figure.⁴⁴

In *New York Times v. Sullivan*,⁴⁵ the United States Supreme Court stated that the principles of the Constitution require that a public official prove malice before recovering damages for libel. Later, the Court extended this rule to public figures.⁴⁶ In *Williams*, the Montana Supreme Court, quoting from *Gertz v. Robert Welch, Inc.*,⁴⁷ recognized that there are two types of public figures:

'In some instances an individual may achieve such pervasive

38. PROSSER, *supra* note 16, at § 101.

39. — Mont. —, 656 P.2d 212 (1982).

40. *Id.* at —, 656 P.2d at 216.

41. *See infra* text accompanying notes 52-54.

42. *Williams*. at —, 656 P.2d at —, 39 St. Rptr. at 2334.

43. *Id.*

44. *Id.* at —, 656 P.2d at 214.

45. 376 U.S. 254 (1964).

46. *Curtis Publishing Co. v. Butts*, 338 U.S. 130 (1967).

47. 418 U.S. 323 (1974).

fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.⁴⁸

In the present case, the court determined that Williams' activities as a politician and investment advisor made him a public figure for all purposes.⁴⁹

Chief Justice Haswell dissented because he did not agree that the evidence supports the contention that Williams is as a matter of law a public figure for all purposes.⁵⁰ Persons such as Johnny Carson or William Buckley may be "all-purpose public figures," but Chief Justice Haswell stated that the case should have gone to the jury because there was a genuine issue as to the material fact of Williams' status as a public figure.⁵¹

The Montana Constitution states that "[i]n all suits . . . for libel . . . the jury, under the direction of the court, shall determine the law and the facts."⁵² In *Madison v. Yunker*,⁵³ a libel case in which the defendants referred to the plaintiff as a public figure, the court stated, "[w]hatever his status, it is a question for the jury to determine, because of the constitutional provision that the jury under the instructions of the court is the judge of both the law and the fact."⁵⁴ In the present case, the court stated that this interpretation did not apply. The court relied on the earlier case of *Griffin v. Opinion Publishing Co.*,⁵⁵ which stated that "the function of the court and jury is not greatly different in the trial of libel from what it is in other cases."⁵⁶

A possible approach not taken by the court, would be to declare that Williams was as a matter of law a public figure for a "limited range of issues" because he was "drawn into a particular public controversy." Surely it could be argued that Williams was drawn into the Pasma-Dunham exchange because of his high visibility as a former candidate for the United States Senator and his

48. *Williams*, ___ Mont. at ___, 656 P.2d at 215.

49. *Id.* at ___, 656 P.2d at 216.

50. *Id.* at ___, 656 P.2d at 218 (Haswell, J., dissenting).

51. *Id.*

52. MONT. CONST. art. II, § 7 (1972).

53. 180 Mont. 54, 589 P.2d 126 (1978).

54. *Madison*, 185 Mont. at 56, 589 P.2d at 133.

55. 114 Mont. 502, 138 P.2d 580 (1943).

56. *Williams* at ___, 656 P.2d at 215 (quoting from *Griffin v. Opinion Publishing Co.*,

114 Mont. 502, 512, 138 P.2d 580, 586 (1943)).

position in the Connally committee. Such an approach could protect the idea of open political expression contained in *Sullivan* and at the same time protect persons similarly situated to Williams from libelous comments made outside of the political forum.

IV. DAMAGES

In two recent cases the Montana Supreme Court faced the issue of what amount of damages is appropriate in cases where a defendant has harassed the plaintiff with unmeritorious litigation. In *Miller v. Watkins*,⁵⁷ the defendant had caused criminal proceedings to be instituted against the plaintiff. In *Johnson v. Murray*,⁵⁸ the defendant filed a number of purported "common law liens" against the plaintiff. In both cases, the supreme court affirmed large damage awards for the defamation suits brought in response to the harassment suits.

Miller evolved from a dispute between partners in a horse breeding business. The owners of the mares and the owners of the stallions were to each take half of the resulting offspring. Miller, however, refused to divide the colt crop in accordance with the terms of the contract. Watkins, the owner of the stallions, refused to accept any more mares for breeding. In 1978, Miller told brand inspectors that Watkins stole some of his horses. Actually, all of the allegedly stolen horses had either been sold, traded, or given as a distribution pursuant to the contract. Miller and the brand inspectors then approached county attorneys, who filed a number of horse theft charges against Watkins. The police arrested Watkins and he spent a night in jail. All criminal charges were eventually dismissed with prejudice.⁵⁹

Miller brought an action for breach of contract. Watkins counter-claimed for malicious prosecution, libel and slander. The trial court, sitting without a jury, found for Watkins and awarded damages of \$30,000 for malicious prosecution; and for the libel and slander it awarded \$25,000 in actual damages and \$50,000 punitive damages.⁶⁰

One of the issues raised on Miller's appeal was the amount of the damages. The record indicated that Watkins suffered humiliation, embarrassment, and damage to business resulting from the

57. ___ Mont. ___, 653 P.2d 126 (1982).

58. ___ Mont. ___, 656 P.2d 170 (1982).

59. *Miller*, ___ Mont. ___, 653 P.2d at 128-30.

60. *Id.* at ___, 653 P.2d at 127. The trial court also awarded Watkins \$23,000 for breach of contract, set off against \$1500 due to Miller for the payment of one horse.

defamatory statements and malicious prosecution.⁶¹ The supreme court upheld the \$55,000 general damages and cited *Keller v. Safeway Stores, Inc.*,⁶² in support of the proposition that defamation awards would rarely be changed.⁶³ Since \$30,000 of this amount resulted from malicious prosecution, the court has apparently decided to give these damages the same preferential treatment that it gives defamation awards.

In discussing punitive damages, the court stated that the Montana statute⁶⁴ allowed such damages "for the sake of example and by way of punishing the defendant."⁶⁵ The court relied on *Smith v. Krutar*⁶⁶ to state that the statute allows such damages where the acts were willful. Because Miller knowingly made false accusations over a period of three years, the court held this was a proper case for punitive damages.⁶⁷

The supreme court had a further opportunity to expound its position on damage awards on a suit for defamation and slander of title in *Johnson v. Murray*.⁶⁸ In a four to three decision the court upheld a default judgment of \$100,000 in general damages and \$100,000 in punitive damages.⁶⁹

Duane Bratland, a highway patrolman subordinate to Ron Johnson, gave Daniel Murray a five dollar speeding ticket. In response, Murray filed a document—prepared without assistance of counsel—demanding \$1,050,007 from Ron Johnson and his wife, Marilee. The charges, basically claiming intimidation, were dismissed by the justice court for lack of jurisdiction. Murray also filed documents purporting to put a common law lien upon the Johnson's real property and to attach their personal property. The Johnsons unsuccessfully attempted to get Murray to remove the alleged liens.⁷⁰

On May 27, 1981, the Johnsons filed suit for defamation and slander of title. Murray's answer was not filed in time, because he

61. *Id.* at ____, 653 P.2d at 132.

62. 111 Mont. 28, 41, 108 P.2d 605, 612-13 (1940).

63. *Miller*, __ Mont. at ____, 653 P.2d at 132.

64. MONT. CODE ANN. § 27-1-221 (1981) which provides:

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

65. *Miller*, __ Mont. at ____, 653 P.2d at 132.

66. 153 Mont. 325, 457 P.2d 459 (1969).

67. *Miller*, __ Mont. at ____, 653 P.2d at 132.

68. __ Mont. ____, __ P.2d ____, 39 St. Rptr. 2257 (1982)

69. Justices Morrison, Weber, and Shea dissented.

70. *Johnson*, at __ Mont. at ____, 656 P.2d at 172.

was late in paying the filing fee. On September 16, 1981 a default judgment was entered, and thirteen days later the district court held a hearing at which it determined the extent of the damages. The only testimony given at the hearing was presented by the Johnsons and a licensed abstractor. The Johnsons testified about the humiliation they suffered; the abstractor testified that their title to real property had been clouded. The judge awarded a total of \$201,500.⁷¹

An issue raised on Murray's appeal was the amount of the damages awarded. The supreme court stated that the record shows the market value of the Johnsons' property was diminished, and that they suffered humiliation and embarrassment. The court characterized Murray's attitude as "utter disregard for the rights and privacy of the Johnsons. . . ."⁷² The court noted that harassment was the only possible motive for bringing suit against Marilee Johnson.⁷³ By affirming both the general and punitive damages, the court gave a clear signal that it would not tolerate misuse of the judicial system by those "asserting dark and ominous common law rights superseding our constitution and our statutes."⁷⁴

V. ASSUMPTION OF RISK

The defense of assumption of risk has traveled a tortuous trail in its recent journeys through the Montana Supreme Court. Montana's comparative negligence statute⁷⁵ ended the all or nothing approach of contributory negligence, but left questions regarding the status of assumption of risk.⁷⁶ The Montana Supreme Court's first statement on the matter was the dictum in *Kopischke v. First Continental Corp.*⁷⁷ where the court stated, "we will follow the

71. *Id.* at ____, 656 P.2d at 171, 39 St. Rptr. at 2258, 2269. The plaintiff was also awarded \$1500 in attorney fees, but the defendant did not appeal that issue.

72. *Johnson*, ____, Mont. at ____, 656 P.2d at 177, 39 St. Rptr. at 2265.

73. *Id.*

74. *Id.*

75. MONT. CODE ANN. § 27-1-702 which provides:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

76. As used in this article, the term assumption of risk will be used to mean implied assumption of risk, which is voluntarily and knowingly incurring risk. Other situations also described as assumption of risk include some type of waiver or agreement by the plaintiff which releases the defendant of his responsibility. See *supra* PROSSER, note 16, § 68.

77. ____, Mont. ____, 610 P.2d 668 (1980). See Survey, 1980 Montana Supreme Court Decisions, 42 Mont. L. Rev. 423 (1981).

modern trend and treat assumption of risk like any other form of contributory negligence and apportion it under the comparative negligence statute."⁷⁸ The court, however, held in *Abernathy v. Eline Oil Field Services, Inc.*,⁷⁹ that jury instructions in negligence actions could not contain the standards used in assumption of risk. The court stated "that the doctrine of implied assumption of risk is no longer applicable in Montana."⁸⁰ This ruling expressly left undecided the issue of the doctrine's applicability to products liability cases.⁸¹ In *Zahrte v. Sturm Ruger & Co.*⁸² the court held that assumption of risk was a defense, but not a complete bar, to an action based on strict liability.⁸³

On January 19, 1979, David Abernathy was driving his son to school. The road was bare, but snow was blowing. Abernathy's car got stuck in a snow drift when he tried to drive through a snow plow cut. After attempting to drive out, he left the car and examined the front wheels, which were buried in snow. The car was stuck perpendicular to the traffic. At the moment Abernathy reached into the car to get a shovel, an eight-ton truck hit the car. Abernathy was injured and his son was killed.⁸⁴

At trial, defendant offered an instruction which contained the elements of assumption of risk, but was phrased in terms of contributory negligence.⁸⁵ The trial court gave the instruction, and the jury awarded a verdict of \$20,000, but barred recovery by finding that Abernathy was seventy-five percent negligent.⁸⁶ In *Abernathy*, the supreme court stated that the policy and reasoning in *Kopischke* are contrary to such an instruction.⁸⁷ The court found

78. *Kopischke*, ___ Mont. at ___, 610 P.2d at 687.

79. ___ Mont. ___, 650 P.2d 772 (1982).

80. *Id.* at ___, 650 P.2d at 775-76.

81. *Id.* at ___, 650 P.2d at 776.

82. ___ Mont. ___, 661 P.2d 17 (1983).

83. *Id.* at ___, 661 P.2d at 19

84. *Abernathy*, ___ Mont. ___, 650 P.2d at 773-74.

85. *Id.* at ___, 650 P.2d at 774. The jury instruction was:

In considering whether or not David J. Abernathy was contributorily negligent, you may consider, among other aspects of contributory negligence the question whether he placed himself in a position to chance known hazards. Thus one aspect of contributory negligence exists if you find

1. That the plaintiff had knowledge, actual or implied, of the conditions which existed at the time of and after plaintiff's vehicle became stuck in the snow drift.
2. That he appreciates the condition as dangerous.
3. That he voluntarily remained or continued in the fact of the known dangerous condition.
4. That injury resulted as the usual or probable consequence of this dangerous condition.

86. *Id.* at ___, 650 P.2d at 773.

87. *Id.* at ___, 650 P.2d at 774.

that the objective standard, contained in the negligence instruction, conflicted with the subjective standard, contained in the assumption of risk instruction.⁸⁸ A jury could determine that the plaintiff's conduct satisfied the reasonable person standard, but that the plaintiff's subjective knowledge also met the elements necessary to establish assumption of risk.⁸⁹ Thus, because the court was unwilling to accept the notion of a defense of reasonable assumption of risk, it totally rejected the defense of assumption of risk, even where the plaintiff's conduct might be unreasonable.

In *Zahrte*, the court decided the issue it had left open in *Abernathy*. The Ninth Circuit Court of Appeals, understandably uncertain about the status of Montana law, certified a question to the Montana Supreme Court.⁹⁰ The court was asked if "the defense of assumption of risk still exist[s] as a complete bar to plaintiff's recovery in a products liability action."⁹¹ In answering no, the court stated:

[t]he defense as applied in a strict liability case involves *unreasonable* exposure to the danger created by the defective product. Plaintiff must have a subjective knowledge of the danger and then voluntarily and unreasonably expose himself to that danger. . . . If those elements are found to exist the defense becomes operative and must be compared with the conduct of the defendant. The mechanics of comparison are the same as in comparison for contributory negligence.⁹²

Thus the court has expressly rejected the approach of section 402A, comment n of the *Restatement (Second) of Torts* which states that assumption of risk is a complete defense. The comment n approach had been adopted by the court in *Brown v. North American Mfg. Co.*⁹³ under facts predating the enactment of the comparative negligence statute.

The *Zahrte* decision has injected an element of uncertainty into an already confused area of the law. Juries faced with products liability claims in which the assumption of risk defense is

88. *Id.* at ____, 650 P.2d at 775.

89. *Id.*

90. *Zahrte*, __ Mont. at ____, 661 P.2d at 17 arose from an accidental discharge of a revolver manufactured by the defendant. The plaintiff had picked up the gun out of a truck and put it on a porch. The gun discharged and shot plaintiff in the head. Plaintiff alleged the gun was defective. The jury found for the defendant and indicated on the verdict form that the plaintiff had assumed the risk of his injury. 498 F. Supp. 389, 390 (1980).

91. *Zahrte*, __ Mont. at ____, 661 P.2d at 17.

92. *Id.* at ____, __ P.2d at ____, 40 St. Rptr. at 318-19.

93. 176 Mont. 98, 576 P.2d 711 (1978).

raised must compare the conduct of the plaintiff with the condition of the product. A defendant with an admittedly dangerous product may be fortunate enough to have the plaintiff *unreasonably* expose himself and thus avoid liability. The same defendant with the same product might also be faced with a plaintiff who only reasonably exposes himself to the danger, resulting in liability for the defendant. It appears the assumption of risk defense as now used is contrary to the policies stated by the court when it first adopted strict liability in tort.⁹⁴

94. See *supra* text accompanying note 34.

