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Martel v. Montana Power Company: Liberating and Enlightening the Montana Comparative-Negligence Jury

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MARTEL V. MONTANA POWER COMPANY: LIBERATING AND ENLIGHTENING THE MONTANA COMPARATIVE-NEGLIGENCE JURY

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I. INTRODUCTION

Basing its decision on the bold proclamation that "Montana juries can and should be trusted with the information about the consequences of their verdicts,"[1] the Montana Supreme Court in *Martel v. Montana Power Co.*[2] ruled that a jury could compare "all forms of conduct amounting to negligence" and should be "informed of the effect of its verdict."[3] The court specifically overruled the holding in *Derenberger v. Lutey*[4] that conduct amounting to ordinary negligence could not be compared to willful or wanton conduct under Montana's comparative-negligence statute.[5] The court also reversed its long-standing tradition of not informing juries of the effect of comparative negligence. This decision to inform juries of the effect of comparative negligence brings Montana in line with a developing national trend favoring informed juries.[6]

This note first traces the development of comparative negligence in Wisconsin, the jurisdiction from which Montana borrowed its statute. Second, the note discusses the historical development of comparative negligence in Montana and evaluates the court's rationale in allowing comparison of all kinds of conduct.[7] Third, the note analyzes the Montana Supreme Court's decision to instruct juries as to the effect of comparative negligence. Finally, the note

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1. Martel v. Montana Power Co., 231 Mont. 96, 752 P.2d 140 (1988).
2. *Id.* at 100, 752 P.2d at 143.
3. *Id.* at 106, 752 P.2d at 146.
4. 207 Mont. 1, 674 P.2d 485 (1983).
5. MONT. CODE ANN. § 27-1-702 (1989).
6. H. WOODS, COMPARATIVE FAULT, § 18:2 (2d ed. 1987).
7. For the purpose of this paper, "kinds of conduct" refer to "all forms of conduct amounting to negligence in any form including but not limited to ordinary negligence, gross negligence, willful negligence, wanton misconduct, reckless conduct, and heedless conduct." *Martel*, 231 Mont. at 100, 752 P.2d at 143. Some jurisdictions outside Montana have developed "degrees of negligence" in lieu of "kinds of negligence." *See* Draney v. Bachman, 138 N.J. Super. 503, 351 A.2d 409 (1976). "The thought is that the difference between willful and wanton misconduct and ordinary negligence is one of kind rather than degree in that the former involves conduct of an entirely different order . . . ." *Derenberger*, 207 Mont. at 15, 674 P.2d at 491.

highlights particular problems that could result in the area of punitive damages and proposes a solution to those problems that is consistent with the ideals propounded in *Martel*.

II. FACTS

During the early evening hours of July 7, 1979, nineteen-year-old Terry Hawthorne Martel and three friends drove to Montana Power Company's (MPC) Old Piedmont Substation south of Whitehall, Montana.[8] The substation's forty-foot metal tower supports electrical lines carrying 100,000 volts of electricity.[9]

After he drank two beers, Martel climbed to the top of the tower after one of his friends had also climbed the tower.[10] Witness testimony conflicted over whether he licked his fingers before he reached toward an electrical line and said, "watch this."[11] In any event, when he was five to ten inches from the line, electricity arced, causing third-degree burns over thirty-six percent of his body.[12]

MPC purchased the tower in 1974 and, after performing an initial inspection of the tower, determined that it complied with the National Electric Safety Code.[13] In 1975 and 1976, MPC formally inspected the tower.[14] Additionally, an employee drove by and examined the substation and tower at least monthly.[15]

The substation tower consisted of crisscrossed metal brackets and rested on a concrete footing planted in the ground.[16] No barricades surrounded the footing to prevent access.[17] Near the tower, a wooden sign—once painted over, but still legible—displayed the word "danger."[18]

Near the closing of Martel's case-in-chief, the judge ruled that Martel had established a prima facie case of MPC's willful or wanton misconduct.[19] Based on this initial ruling, the judge later instructed the jury that it could find that MPC acted willfully or

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8. *Martel*, 231 Mont. at 98, 752 P.2d at 142.
9. *Id.*
10. *Id.*
11. Brief for Appellant at 7, Martel v. Montana Power Co., 231 Mont. 96, 752 P.2d 140 (1988) (No. 85-251).
12. *Martel*, 231 Mont. at 99, 752 P.2d at 142.
13. Brief for Respondent at 5, Martel v. Montana Power Co., 231 Mont. 96, 752 P.2d 140 (1988) (No. 85-251).
14. *Id.*
15. *Id.*
16. *Martel*, 231 Mont. at 99, 752 P.2d at 142.
17. *Id.*
18. *Id.*
19. *Id.*

wantonly toward Martel.[20] Although willful or wanton misconduct had been established, the judge denied Martel's proposed Jury Instruction Number 48.[21] This instruction, based on the holding in *Derenberger*,[22] stated that comparative negligence did not apply if the defendant had acted willfully or wantonly and the plaintiff had been only ordinarily negligent.[23]

By special verdict, the jury found Martel seventy-five percent negligent and MPC twenty-five percent negligent.[24] The jury set total damages at $200,000.[25] On March 13, 1985, the judge denied Martel's motion for a new trial.[26]

After the court denied Martel a new trial, he appealed to the Montana Supreme Court, contending, in part, that because he had proved MPC's willful and wanton conduct, the trial court erred when it declined to instruct the jury that comparative negligence did not apply.[27] Again citing *Derenberger*, Martel's attorney denounced the trial court for refusing to instruct the jury that the court would reduce Martel's damage award if the jury found him negligent.[28]

III. HOLDING

Overruling *Derenberger*, the Montana Supreme Court affirmed the trial court's decision disallowing Jury Instruction Number 48.[29] The court stated that "all forms of conduct amounting to negligence in any form including but not limited to ordinary negligence, gross negligence, willful negligence, wanton misconduct, reckless conduct, and heedless conduct, are to be compared with any conduct that falls short of conduct intended to cause injury or damage."[30]

Rejecting the Wisconsin rule against informing the jury of the

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20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Special Verdict, Martel v. Montana Power Co., (5th Jud. Dist. Ct., Jefferson County, Jan. 25, 1985) (Cause No. 7182).
25. *Id.* Note: A discrepancy exists in the amount of damages awarded in *Martel.* The reported case states damages of $290,000, the Special Verdict $200,000, and Appellant's Brief $250,000.
26. Order Denying Motion for a New Trial, Martel v. Montana Power Co., (5th Jud. Dist. Ct., Jefferson County, Mar. 13, 1985) (Cause No. 7182).
27. *Martel*, 231 Mont. at 98, 752 P.2d at 141.
28. Brief for Appellant at 8, 18-25, Martel v. Montana Power Co., 231 Mont. 96, 752 P.2d 140 (1988) (No. 85-251).
29. *Martel*, 251 Mont. at 99, 752 P.2d at 142.
30. *Id.* at 100, 752 P.2d at 143.

effect of comparative negligence on its verdict[31] and adopting the Idaho Supreme Court's reasoning in *Seppi v. Betty*,[32] the Montana Supreme Court held: "Upon the request of a party, the court must [inform the jury of the effect of comparative negligence] unless it finds the issue so complex as to confuse the jury."[33]

IV. EVALUATION OF THE COURT'S REASONING

A. *Development of Comparative Negligence in Montana*

1. *Origin and Forms of Comparative Negligence*

Forty-four states have adopted a form of comparative negligence either by statute or through case law.[34] The effect of comparative negligence in a particular jurisdiction depends on whether the courts follow a pure or modified form of comparative negligence.[35] The pure form, which the Mississippi Supreme Court implemented in 1910,[36] provides that a plaintiff recovers the amount of damages proportionate to the defendant's negligence regardless of the extent of the plaintiff's own negligence.[37]

In 1931, Wisconsin developed modified comparative negligence,[38] which generally has two forms: "less than" and "not greater than." In "less than" jurisdictions, the plaintiff recovers only if his or her negligence is *less than* the defendant's.[39] For example, if a court finds a plaintiff and defendant each fifty-percent negligent, then the plaintiff's negligence is not *less than* the defendant's and the plaintiff, therefore, recovers nothing. In "not greater than" jurisdictions, the plaintiff recovers only if his or her negligence is *not greater than* the defendant's.[40] Therefore, in the

31. *Id.* at 105, 752 P.2d at 146.
32. 99 Idaho 186, 579 P.2d 683 (1978).
33. *Martel*, 231 Mont. 106, 752 P.2d at 146.
34. H. WOODS, COMPARATIVE FAULT, § 1.11 (2d ed. 1987). Six states—Alabama, Delaware, Maryland, North Carolina, South Carolina, and Virginia—have not enacted the doctrine of comparative negligence. *Id.* Maryland, however, allows comparative negligence in the area of strict liability by recognizing RESTATEMENT (SECOND) OF TORTS § 402A (1977). Phipps v. General Motor Corp., 278 Md. 337, 363 A.2d 955 (1976). North Carolina also makes an exception allowing comparative negligence to railroad employees engaged in intrastate commerce. N.C. GEN. STAT. § 62-242(c) (1982). Virginia makes two exceptions and allows comparative negligence to railroad employees in intrastate commerce, VA. CODE ANN. § 8.01-58 (1982), and to railroad-crossing accidents when the statutory signals are not given, VA. CODE Ann. § 56-416 (1986).
35. *Id.* at §§ 1:11.
36. MISS. CODE ANN. § 11-7-15 (1972).
37. H. WOODS, COMPARATIVE FAULT app. at 657.
38. 1931 Wis. Laws 242.
39. H. WOODS, COMPARATIVE FAULT § 4:3 (2d ed 1987).
40. *Id.* at § 4:4.

example above, the plaintiff who is fifty-percent negligent will recover fifty percent of his or her damages because the plaintiff's negligence is *not greater than* the defendant's. Wisconsin currently follows a "not greater than" form of comparative negligence,[41] which Montana subsequently adopted.[42] To understand fully Montana's system, one must examine Wisconsin's experience.

2. *Wisconsin's Development of Comparative Negligence*

Before 1931, the Wisconsin Supreme Court followed the doctrine of contributory negligence, which bars a plaintiff guilty of *any negligence*, no matter how slight, from recovering damages.[43] The Wisconsin Supreme Court developed several doctrines to reduce the harshness of contributory negligence. One doctrine to mitigate such harshness consisted of allowing the court to compare what will be termed "kinds of conduct." Such kinds of conduct include: willful conduct, wanton conduct, gross misconduct, and reckless conduct.[44] When a plaintiff could prove that a defendant had been grossly negligent and the plaintiff only ordinarily negligent, then the different kinds of conduct prevented application of contributory negligence and the plaintiff recovered *all* proven damages.[45]

In 1931, Wisconsin replaced contributory negligence with a system of comparative negligence.[46] From 1931 through 1962, the Wisconsin Supreme Court, however, mistakenly held that different kinds of conduct could not be compared under comparative negligence.[47] In other words, different kinds of conduct, which were developed under contributory negligence, survived and allowed circumvention of the doctrine of comparative negligence whenever a court ruled that a defendant's conduct differed *in kind* from that of the plaintiff.

In Wisconsin's 1962 landmark case of *Bielski v. Schulze*,[48] the court held that a jury may compare all the various kinds of plaintiff's conduct with all the various kinds of defendant's conduct. In deciding *Bielski*, the court deemed as faulty the application of kinds of conduct to a system of comparative negligence, because it

41. WIS. STAT. ANN. § 895.045 (West 1983).
42. MONT. CODE ANN. § 27-1-702 (1989).
43. Astin v. Chicago, M & St. P. R.R., 143 Wis. 477, 128 N.W. 265 (1910).
44. *See* Barlow v. Foster, 149 Wis. 613, 136 N.W. 822 (1912).
45. *Astin*, 143 Wis. at 485, 128 N.W. at 268-69.
46. WIS. STAT. ANN. § 895.045 (1931).
47. *See* Tomasik v. Lanferman, 206 Wis. 94, 97, 238 N.W. 857, 858 (1931); Twist v. Aetna Casualty & Sur. Co., 275 Wis. 174, 180-81, 81 N.W.2d 523, 527 (1957).
48. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

allowed the same harsh all-or-nothing verdicts that existed under contributory negligence.[49]

The Wisconsin Supreme Court also concluded that a judge should not inform a jury that comparative negligence affects a damage award.[50] The court reasoned that sympathy for an injured plaintiff could encourage jurors to manipulate their calculations of negligence to ensure an injured plaintiff's recovery.[51] Before one analyzes the Wisconsin rule against informing juries, however, a discussion of Montana's development of comparative negligence is necessary.

3. *Montana's Development of Comparative Negligence*

Montana followed the doctrine of contributory negligence until 1975[52] when it adopted Wisconsin's "not greater than" modified form of comparative negligence.[53] A well-known rule of statutory construction provides that when the Montana Supreme Court adopted Wisconsin's statute, the court also adopted the Wisconsin Supreme Court's interpretation of that statute.[54] Following this rule, as enunciated in *Dunham v. Southside National Bank*,[55] the Montana Supreme Court presumably agreed that a court should not inform a jury of the effect of comparative negligence on a verdict.

Before adopting comparative negligence, Montana developed different kinds of conduct to lessen the severity of contributory negligence.[56] Although Wisconsin initially applied different kinds of conduct to its comparative-negligence statute, the Wisconsin Supreme Court realized its error and abandoned kinds of conduct in 1962.[57] After adopting comparative negligence in 1975, however, the Montana Supreme Court did not rule on the status of different kinds of conduct under comparative negligence for five years. Following the rule in *Dunham*, the court should have abolished kinds

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49. *Id.* at 16, 114 N.W.2d at 112-13.

50. Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963).

51. *Id.* at 19, 121 N.W.2d at 265.

52. See Comment, *Comparative Negligence in Montana*, 37 MONT. L. REV. 152 (1976) (authored by Mae Nan Ellingson), for a brief history of contributory and comparative negligence in Montana.

53. REVISED CODES OF MONTANA § 58-607.1 (1947) (enacted 1975). This statute was amended in 1987 to address an issue outside the scope of this case note. MONT. CODE ANN. § 27-1-702 (1989).

54. Dunham v. Southside Nat'l Bank, 169 Mont. 466, 473, 548 P.2d 1383, 1386-87 (1976).

55. *Id.*

56. Mihelich v. Butte Elec. Ry., 85 Mont. 604, 281 P. 540 (1929).

57. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

of conduct under comparative negligence as Wisconsin previously had done in *Bielski*.[58]

The Montana Supreme Court, however, refused to follow Wisconsin case law and retained kinds of conduct under comparative negligence.[59] In the 1983 case of *Derenberger v. Lutey*,[60] the court cemented its retention of different kinds of conduct under comparative negligence. The court held that the comparative-negligence statute did not allow comparison of a plaintiff's ordinary negligence and a defendant's willful or wanton conduct.[61] Three years later, the Montana Supreme Court limited the application of the comparative-negligence statute to cases in which the plaintiff's and defendant's conduct were of the same or similar kind.[62]

In March 1988, in *Martel*, the Montana Supreme Court expressly overruled the *Derenberger* interpretation of comparative negligence,[63] holding that a jury can compare all kinds of conduct on the part of the plaintiff to all kinds of conduct on the part of the defendant.[64] After expressly straying from Wisconsin case law for five years, Montana once again aligned itself with Wisconsin precedent.

In another important way, however, the *Martel* court has rejected Wisconsin case law once again. The court concluded that blindfolding jurors as to the effect of comparative negligence on a verdict served no legitimate purpose.[65] Moreover, the court reasoned that such blindfolding possibly fostered jury speculation about, and manipulation of, a verdict.[66] By reaching this conclusion, the Montana Supreme Court rejected Wisconsin case law that prohibited informing a jury as to the effect of comparative negligence on a verdict. In so doing, the court has chosen a path never before charted by Wisconsin.

The effect of eliminating the doctrine of kinds of negligence and informing the jury as to the effect of comparative negligence must be examined in detail before a conclusion as to the appropriateness of the Montana Supreme Court's decision in *Martel* can be evaluated.

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58. *Id.*
59. Wollaston v. Burlington N. Inc., 188 Mont. 192, 612 P.2d 1277 (1980).
60. *Derenberger*, 207 Mont. 1, 674 P.2d 485 (1983).
61. *Id.* at 4-5, 674 P.2d at 487.
62. Simonson v. White, 220 Mont. 14, 22, 713 P.2d 983, 988 (1986).
63. *Martel*, 231 Mont. 96, 99, 752 P.2d 140, 142 (1988).
64. *Id.* at 100, 752 P.2d at 142-43.
65. *Id.* at 105, 752 P.2d at 146.
66. *Id.*

B. Elimination of Kinds of Conduct

A fundamental problem with the analysis of kinds of conduct lies in the individual classifications themselves. The difficulty in formulating standards or tests to differentiate between willful conduct, wanton misconduct, heedless conduct, gross negligence and reckless conduct has led to inconsistent precedent at best. For example, in *Owens v. Parker Drilling Co.*,[67] the court held that a person's conduct is willful, wanton or reckless "[w]hen a person knows or has reason to know of the facts which create a high degree of risk of harm to . . . another, and either deliberately proceeds to act in conscious disregard of . . . that risk, or recklessly proceeds in unreasonable disregard of . . . that risk." This definition of negligence not only equates "willful," "wanton," and "reckless," but defines these terms using words such as "knowing" and "intentional." Interestingly, the court propounds this "carefully defined standard of conduct" to remove confusion "generated by inconsistent use of loosely defined terms such as willfulness, wantonness, recklessness, gross negligence, and unjustifiable conduct."[68] This case demonstrates the inherent difficulty in trying to slice negligence into separate and distinct kinds of conduct.

Prior to *Martel*, attempts to define different kinds of conduct with ambiguous terms resulted in limited and unpredictable application of Montana's comparative-negligence statute. Use of indefinite kinds of conduct created a mechanism that allowed judicial control over juries and facilitated the insertion of judicial discretion into the decision-making process.

In *Martel*, the court based its decision on a resurrection of Justice Gulbrandson's dissenting and specially concurring opinion in *Derenberger*.[69] In that opinion, Justice Gulbrandson called attention to Montana's rule of statutory construction: the presumption that when Montana borrows a statute from another state, it also borrows the interpretation of that statute made by that state's highest court.[70]

Because Montana borrowed Wisconsin's statute, Justice Gulbrandson examined Wisconsin case law. In particular, Justice Gulbrandson focused on the Wisconsin Supreme Court's decision in *Bielski*.[71] In *Bielski*, the court reasoned that under comparative

67. 207 Mont. 446, 451, 676 P.2d 162, 164 (1984).

68. *Id.*

69. *Martel*, 231 Mont. at 100, 752 P.2d at 142-43. *See also* Derenberger v. Lutey, 207 Mont. 1, 11, 674 P.2d 485, 490 (1983).

70. *Derenberger*, 207 Mont. at 11, 674 P.2d at 490.

71. *Id.* at 11-13, 674 P.2d at 490-91. *See also Bielski*, 16 Wis. 2d 1, 114 N.W.2d 105

negligence, the rationale for disallowing the comparison of a plaintiff's ordinary negligence and a defendant's gross negligence no longer existed.[72] The *Bielski* court was the first court in the nation to eliminate kinds of conduct in a comparative-negligence jurisdiction.[73]

Comparative negligence brought a fault-based balance to a system that, over time, had shifted from one extreme to another with doctrines such as contributory negligence and kinds of conduct. As the court stated in *Bielski*, excepting kinds of conduct from the comparative-negligence statute was contrary to the intent of the doctrine itself, resulting in a system no longer based on fault.[74] For example, prior to *Bielski*, if a court deemed a plaintiff negligent and a defendant grossly negligent, the court would not consider the plaintiff's negligence, and the plaintiff would recover 100 percent. *Bielski* affords a more equitable solution by allowing consideration of a plaintiff's negligence and a reduction in the plaintiff's recovery based on his or her fault.[75] As a result, the court will hold the plaintiff accountable for his or her negligent conduct. No arbitrary ruling as to the kind of conduct the defendant exhibited would allow a plaintiff full recovery when the jury should be allowed to reduce a plaintiff's recovery according to his or her percentage of negligence.

The problems associated with defining and applying different kinds of conduct to comparative negligence necessitated abandoning kinds of conduct in *Martel*. Not only were the different kinds of conduct ambiguous and unworkable, but the use of different kinds of conduct under a comparative-negligence statute conflicted with the intent of comparative negligence, which is to allow recovery based on the fault of both parties. The Montana Supreme Court, by eliminating kinds of conduct, correctly expunged a remnant from the days of contributory negligence. Therefore, *Martel* liberates the Montana jury from judicial findings categorizing the parties' conduct and allows the jury to compare all conduct.

C. *Informing the Jury of the Effect of Comparative Negligence*

Having reaffirmed its commitment to follow Wisconsin case law by eliminating kinds of conduct, the Montana Supreme Court

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(1962).

72. *Bielski*, 16 Wis. 2d 1, 17, 114 N.W.2d 105, 113. In Wisconsin, gross negligence includes reckless conduct and wanton conduct.

73. H. WOODS, COMPARATIVE FAULT § 7:2 (2d ed 1987).

74. *Id.*

75. *Id.*

in *Martel* then decided to venture into an area not explored by the Wisconsin Supreme Court. Specifically, the court ruled that the trial court should have informed the jury of the effect that comparative negligence would have on the jury's verdict.[76] By reaching this conclusion, the court abandoned Wisconsin case law that ruled against informing the jury[77] and cast a strong vote of confidence in favor of Montana juries.

In arriving at the decision to inform juries, the Montana Supreme Court relied upon its decision in *Owens v. Parker Drilling Co.*[78] The court concluded in *Owens* that Montana juries were able to remain objective when deciding emotional cases.[79] Emotional cases involve facts that generate sympathy for the plaintiff. The facts in *Martel* illustrate an emotional case in which a young man experienced extreme emotional and physical pain that could have elicited sympathy from a jury. Nonetheless, the jury in *Martel* remained objective and denied the plaintiff recovery. This case demonstrates that the Montana Supreme Court's confidence, as posited in *Owens*, was well placed.

The Montana Supreme Court further solidified the *Owens* principle by refusing to overturn a holding in which the defendant, on appeal, contended that opposing counsel was allowed to tell the jury too much.[80] In light of these decisions indicating the Montana Supreme Court's increasing confidence in Montana juries, the ruling in *Martel* is a natural extension of jury autonomy. Thus, the *Martel* decision follows a developing trend toward informing a jury of the effect of comparative negligence on a verdict.[81]

The Wisconsin Supreme Court, however, initiated and still leads the majority of jurisdictions opposed to informing a jury of the effect of comparative negligence.[82] Despite criticism of blindfolding the jury, the Wisconsin Supreme Court recently upheld its long-standing rule against informing the jury in *McGowan v. Story*.[83] Relying heavily on the assumption that juries are easily influenced by sympathy for an injured plaintiff, the *McGowan* court reasoned that a jury—knowing the effect of comparative negligence—would manipulate its verdict to compensate an injured

76. *Martel*, 231 Mont. 96, 106, 752 P.2d 140, 145-46 (1988).
77. DeGroot v. Van Akkeren, 225 Wis. 105, 115, 273 N.W. 725, 729-30 (1937); Blahnik v. Dax, 22 Wis. 2d 67, 76-77, 125 N.W.2d 364, 369 (1963).
78. Owens v. Parker Drilling Co., 207 Mont. 446, 676 P.2d 162 (1984).
79. *Id.* at 454, 676 P.2d at 166.
80. North v. Bunday, 226 Mont. 247, 258, 735 P.2d 270, 277 (1987).
81. H. WOODS, COMPARATIVE FAULT, § 18:2 (2d ed. 1987).
82. *Id.*
83. McGowan v. Story, 70 Wis. 2d 189, 234 N.W. 2d 325 (1975).

plaintiff.[84] However, assuming that jurors are more susceptible than judges or lawyers to "sympathy, bias or prejudice, [contradicts] our theory of government," which entrusts the people with the power of self-governance.[85] Not only is this assumption repugnant to principles of democracy, but little or no authority exists for the frequently posited view that jurors are more emotional than judges.[86] Before the proper role of the jury can be defined in the justice system, unsupported recitation of assumptions about jury sympathies and biases must give way to more critical analysis.

Arguments against informing juries also rest on the proposition that the average juror is unaware of comparative-negligence law.[87] One commentator, attempting to justify blindfolding juries, has gone as far as to suggest that a court select unsophisticated jurors.[88] Logic and precedent contradict the suggestion that the justice system would function better if decisions were left to uninformed juries.[89]

The same commentator urges that a stern cautionary instruction against speculation will prevent the unsophisticated jury from speculating.[90] The commentator concludes, "The response that juries would ignore such cautionary instructions and continue to speculate represents an unjustified distrust of jurors."[91] Apparently, the commentator trusts an unsophisticated jury, but mistrusts jurors who may be able to think for themselves. The arguments against informing juries of the effect of comparative negligence generally are predicated on a mistrust of jury objectivity and a belief that the informed jury will manipulate its verdict.[92] Recognizing that these arguments were without substantiation, the Montana Supreme Court in *Owens* stated:

> There are those who distrust the lay person's capacity for reasoned and dispassionate judgment. There are those who tolerate the juries but feel compelled to hold tight rein lest the wretched twelve break the bank. This judicial chauvinism will, if not checked, inevitably erode the jury process.

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84. *Id.* at 197, 234 N.W.2d at 329.

85. Ryan, *Are Instructions Which Inform the Jury of the Effect of Their Answers Inimical to Justice?*, 1940 WIS. L. REV. 400, 401 (1940) [hereinafter Ryan].

86. *Id.* at 400.

87. Comment, INFORMING THE JURY OF THE LEGAL EFFECT OF SPECIAL VERDICT ANSWERS IN COMPARATIVE NEGLIGENCE ACTIONS, 1981 DUKE L.J. 824, 841 (1981) [hereinafter *Informing the Jury*].

88. *Id.* at 843.

89. *See* Smith v. Rorvik, 231 Mont. 85, 94-95, 751 P.2d 1053, 1058 (1988).

90. *Informing the Jury*, *supra* note 87, at 843.

91. *Id.*

92. Roman v. Mitchell, 82 N.J. 336, 341, 413 A.2d 322, 327 (1980).

> We feel that the *parties' peers are best able to define and measure justice.*[93]

Average jurors probably are capable of understanding the effect of their verdict.[94] Even if the jurors do not know the effect of apportionment of negligence on a verdict, keeping them in the dark will not prevent speculation about the results of a decision.[95] Even though uninformed that the plaintiff's percentage of negligence would reduce his award, the *Martel* jury, nonetheless, sent questions to the judge inquiring as to the effect the plaintiff's negligence would have on his award.[96] Moreover, one need not view such speculation with suspicion as the work of a result-oriented jury.[97] Rather, jury speculation ensures that a jury's collective sense of justice—not just the judge's sense of justice—is applied to cases.

Uninformed juries, however, will deliberate blindly or with an incorrect understanding of the law. Under a jury system, no valid reason exists for denying jurors the information necessary to render a just verdict.[98] The possibility of error inherent in blindfolding juries outweighs any perceived benefit.[99] Thus, the Montana Supreme Court in *Martel* rightfully decided that a jury instructed on the effect of comparative negligence is best suited to render a just verdict.

V. The Role of Punitive Damages After *Martel*

Punitive damages, by their nature, depend on the kind of conduct the defendant exhibited. A jurisdiction that has abolished this dependence either must design a new mechanism to trigger the award of punitive damages or abolish punitive damages in comparative-negligence cases. The Wisconsin Supreme Court stated that abolition of kinds of conduct eliminates "the basis for punitive damages in negligence cases. But punitive damages are given, not to compensate the plaintiff for his injury, but to punish and deter the tortfeasor . . . ."[100] By eliminating kinds of conduct, the Wisconsin court abolished the mechanism for determining whether pu-

93. *Owens*, 207 Mont. at 454, 676 P.2d at 166 (emphasis added).
94. Ryan, *supra* note 85, at 404.
95. Thomas v. Board of Township Trustees, 224 Kan. 539, 551, 582 P.2d 271, 280 (1978).
96. *Martel*, 231 Mont. at 105, 752 P.2d at 146.
97. *Informing the Jury*, *supra* note 87, at 842.
98. Simpson v. Anderson, 33 Colo. App. 134, 136, 517 P.2d 416, 418-19 (1973).
99. *See generally* Ryan, *supra* note 85.
100. *Bielski*, 16 Wis. 2d 1, 18, 114 N.W.2d at 113.

nitive damages are appropriate. The court, however, indicated that because punitive damages differed in kind from compensatory damages, *Bielski* did not abolish punitive damages altogether.

In 1980, the Wisconsin Supreme Court refined the *Bielski* holding when it held that a jury could award punitive damages under comparative negligence if the defendant's conduct were deemed "outrageous."[101] The court reiterated that the main holding of *Bielski* abolished kinds of conduct in comparative-negligence cases, but did not abolish punitive damages.[102] Unfortunately, the court was forced to revive a classification of conduct, specifically outrageous conduct, to enable a plaintiff to recover punitive damages.[103] The Wisconsin Supreme Court indicated that "outrageous" conduct is a high standard, but—as with all artificial classifications—the standard will need to be fleshed out in case law before its inherent ambiguity can be defined.

Creating a precise standard for evaluating the defendant's conduct, however, probably will prove futile, like the previous effort to define kinds of conduct. The Wisconsin Supreme Court in 1928 recognized that "[a]ny exact and precise definition of the technical term in law of the 'malice' that must be shown in order that there may be a basis for punitory damages . . . is hard to find, and still harder to frame."[104] Despite this recognition, the Wisconsin court appears unwilling to abandon classification of the conduct needed to justify an award of punitive damages.

Though the Wisconsin Supreme Court attempts to define levels of conduct, the Montana Supreme Court should reject this approach. In line with the *Martel* decision, the jury should be allowed to determine the appropriateness of punitive damages. The court's role would entail only modifying clearly erroneous awards of punitive damages, or those awards which are not supported by the facts or circumstances and are likely a result of passion or prejudice. Under this test, the primary role of determining punitive damages would shift to the jury. Such a shift would be consistent with the Montana Supreme Court's demonstration of confidence in juries, as evidenced in *Martel*, and would allow the court to oversee this process.

VI. CONCLUSION

In deciding *Martel*, the Montana Supreme Court demon-

101. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 271, 294 N.W.2d 437, 446 (1980).
102. *Id.* at 272-77, 294 N.W.2d at 444-47.
103. *Id.* at 271, 294 N.W.2d at 446.
104. Meshane v. Second St. Co., 197 Wis. 382, 387, 222 N.W. 320, 322 (1928).

strated its confidence in Montana juries. By eliminating the application of kinds of conduct to Montana's comparative-negligence statute, the court realigned itself with Wisconsin precedent. Additionally, the abolition of arbitrary classifications of conduct removed a remnant of contributory negligence and clarified the application of the doctrine of comparative-negligence to all negligence cases. The Montana Supreme Court's decision to inform juries of the effect of comparative negligence rightfully granted further autonomy to the jury in its deliberations and signaled the court's faith in the jury system. Finally, the Montana Supreme Court must now decide the role of punitive damages under comparative negligence. Punitive damages should not be abolished, but in determining standards for applying punitive damages, the court should avoid reviving ambiguous classifications of negligent conduct. The Montana Supreme Court should allow juries to decide when punitive damages are appropriate, thereby reducing the court's intervention into the comparative-negligence sphere and further investing its trust in Montana juries.