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# The Slip and Fall Case in Montana and the Doctrine of Constructive Notice as Applied in Accidents in the Supermarket

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# THE SLIP AND FALL CASE IN MONTANA AND THE DOCTRINE OF CONSTRUCTIVE NOTICE AS APPLIED IN ACCIDENTS IN THE SUPERMARKET

## *THE SCOPE OF SLIP AND FALL LIABILITY IN THE SUPERMARKET*

The character of modern supermarkets, their method of self-service selection, the nature of the products they sell, and the manner in which those products are displayed has created a unique dilemma in the law circumscribing landowner liability. For example, to merely show that the plaintiff has suffered a slip and fall does not prove that the defendant was negligent. To prevail, the plaintiff must demonstrate that the defendant failed in his duty to keep the store premises in a reasonably safe condition.

In some cases, the plaintiff can prove by direct evidence that the defendant supermarket was actively negligent or had actual notice of the hazard causing the accident. Often, however, the conduct of another patron is an intervening cause of the hazard, and the defendant supermarket is liable only if it is chargeable with constructive notice of the hazard.[1]

To provide evidence sufficient for a court or jury to charge the defendant with constructive notice, the plaintiff must rely primarily on circumstantial evidence.[2] But the greatest difficulty for the plaintiff, especially in a jurisdiction like Montana,[3] is a specific requirement by the courts that he show how long the hazard was present.

To avoid the difficulty of coming forward with sufficient circumstantial evidence to construct a prima facie case, plaintiff's counsel have attempted to interject into the liability formula doctrines of *res ipsa loquitur* and strict liability. These overtures have been rejected by the courts.[4] Nonetheless, in this orbit of supermarket slip and fall cases, traditional tort principles have been challenged and changed in a few

[1]This is the majority rule and is applied in all jurisdictions. *See* Annot., *Liability of Proprietor of Store, Office, or Similar Business for Injury from Fall Due to Presence of Litter or Debris on Floor,* 61 A.L.R. 2d 6 (1958) [hereinafter cited as 61 A.L.R.2d].

[2]2 HARPER & JAMES, THE LAW OF TORTS, § 19.4, at 1072 (1956) [hereinafter cited as HARPER & JAMES], which reads:

> While circumstantial proof may afford an inference of negligence, though equivocal in the sense described in the last paragraph [equivocal to the specific acts of negligence], yet it must cover *all* of the necessary elements of negligence to make out a prima facie case on that issue. Failure at this point is a common shortcoming, which often springs from a lack of careful attention to the substantive requirements of negligence. In a great many types of cases there is a two-fold aspect of these requirements which is sometimes lost sight of in proof.

[3]Rossberg v. Montgomery Ward & Co., 110 Mont. 154, 162, 99 P.2d 979, 981 (1940).

[4]*See, e.g.,* Jones v. Jarvis, 437 S.W.2d 189, 190 (Ky. 1969).

jurisdictions. Plaintiff's attorneys have convinced the courts that certain areas of the supermarket, primarily the vegetable stand, are more hazardous, and the proprietor of the supermarket should be held to higher standards of care.[5]

The purpose of this comment is to discuss the traditional concepts of landowner liability as they have been applied in Montana, to illustrate current changes in the law created by the supermarket slip and fall decisions recently handed down by other jurisdictions,[6] and to discuss their validity.

## *THE PRINCIPLES OF LAW APPLICABLE TO ALL OWNERS AND OCCUPIERS OF LAND*

Slip and fall cases are governed by the rules of law which define the duties and liabilities of landowners to those persons who are business invitees.[7] Landowner duties and liabilities are expressed separately. The landowner owes a duty to invitees to "exercise ordinary care to see that the portions of the premises which the invitee may be expected to use are reasonably safe."[8] If the hazards are obvious to the invitee or if the landowner gives warnings to the invitee of the presence of the danger, the landowner has discharged his duty and he is absolved from liability.[9]

On the other hand, the landowner is liable for a dangerous condition on the premises if—but only if—it is established that: 1) the condition was one created by or under the authority of the proprietor, or one in connection with which the proprietor is shown to have participated; 2) the proprietor had actual notice of the conditions; 3) the condition existed for such a period of time that in the exercise of ordinary care the proprietor should have known of it and taken reasonable steps to correct it.[10]

Terminology is material to understanding the analysis of the legal principles of landowner liability as they are applied specifically to slip and fall accidents in the supermarket. The proprietor of a supermarket

[5]Wollerman v. Grand Union Stores, Inc., 47 N.J. 426, 221 A.2d 513 (1966). Other cases are discussed under the subheading *STRICTER VIGILANCE IN THE SUPERMARKET AND THE DOCTRINE OF WOLLERMAN v. GRAND UNION STORES, INC., infra.*

[6]Rain water in the supermarket is one sphere of new development which is beyond the scope of this comment. However, it should be pointed out that this is an area of tort law which is moving toward strict liability for slip and fall accidents. *See* 5 WILLAMETTE L. J. 353 (1969); 18 DRAKE L. REV. 136 (1968).

[7]*See* 61 A.L.R. 2d §§ 1-3 at 11-18.

[8]*Id.* § 2 at 13.

[9]RESTATEMENT (SECOND) OF TORTS § 343 (b) at 215 (1965). *See also Id.* § 343, comment *a* at 216. Montana expressly recognized the proposition that the landowner discharges his duty if he warns the invitee of the danger in Regedahl v. Safeway Stores, Inc., 149 Mont. 229, 233, 425 P.2d 335, 337 (1967). *See, e.g.,* O'Dell v. Cook's Market, Inc., 432 S.W.2d 382, 385 (Mo. 1968).

[10]Paraphrased from 61 A.L.R. 2d at 13. *See* 9 WIGMORE ON EVIDENCE § 2487 (3d ed. 1940).

is *actively* negligent when he or someone under his control has participated in the creation of the dangerous condition. If the dangerous condition was created by someone other than the proprietor, the proprietor will be negligent if he has *actual notice* of the hazard and has failed to correct the condition promptly; a failure to render his business premises safe is *passive negligence*. If the hazard has remained uncorrected for a sufficiently long period of time, even though the proprietor neither created the hazard nor had actual notice of the hazard, he is deemed to have *constructive notice* of the hazard. His negligence in this instance is predicated upon his failure to discover the hazard within a reasonable period of time; it is a second form of *passive negligence*.

## *THE LAW IN MONTANA— A DICHOTOMY IN THE CHAIN OF PRECEDENT*

The Montana Supreme Court has decided few cases in which the liability of the landowner for slip and fall accidents has been discussed. There are no Montana cases in which the Court has been confronted with a slip and fall accident inside a supermarket.[11] Several decisions have analyzed slip and fall accidents which have occurred in circumstances sufficiently analogous to conditions inuring to accidents in supermarkets and from which applicable legal rules may be distilled.[12]

The case law of Montana acknowledges two discernible chains of precedent applicable to landowner liability: in one chain of precedent, the Court's conclusions turn on the presence or absence of active negligence or actual notice;[13] in the other chain of precedent,[14] the Court's

[11]The Court has considered several cases arising out of slip and fall accidents in parking lots made hazardous from accumulations of snow and ice. These cases are easily distinguishable on their facts and do not illuminate landowner liability for slip and falls occurring within the store. *See* Luebeck v. Safeway Stores, Inc., 152 Mont. 88, 446 P.2d 921 (1968); Tigh v. College Park Reality Co., 149 Mont. 358, 427 P.2d 57 (1967).

[12]As previously limned, slip and fall cases are within the purview of the landowner's liability generally. Any analysis of Montana law must reflect the general principles of law applicable to landowner liability and specific rules deduced from the firm application of these general rules.

[13]Wells v. Stanley J. Thill & Ass'n, Inc., 26 St. Rptr. 152, 452 P.2d 1015 (1969); Dean v. First Nat'l Bank of Great Falls, 152 Mont. 474, 452 P.2d 402 (1969); Suhr v. Sears Roebuck & Co., 152 Mont. 344, 450 P.2d 89 (1969); Luebeck v. Safeway Stores, Inc., 152 Mont. 88, 446 P.2d 921 (1969); Pushard v. J. C. Penney Co., 151 Mont. 82, 438 P.2d 928 (1968); Tigh v. College Park Reality Co., 149 Mont. 358, 427 P.2d 57 (1967); Clark v. Worrall, 146 Mont. 374, 406 P.2d 822 (1965); Vogel v. Fetter Livestock Co., 144 Mont. 127, 394 P.2d 766 (1964); McIntosh v. Linder-Kind Lumber Co., 144 Mont. 1, 393 P.2d 782 (1964); Kerns v. F. W. Woolworth Co., 138 Mont. 249, 356 P.2d 127 (1960); Zimmer v. California Co., 174 F. Supp. 757 (D. Mont. 1959); Cassady v. City of Billings, 135 Mont. 390, 340 P.2d 509 (1959); Milasevich v. Fox W. Mont. Theatre Corp., 118 Mont. 265, 165 P.2d 195 (1946); Chichas v. Foley Bros. Grocery Store, 73 Mont. 575, 236 P. 361 (1925); Montague v. Hanson, 38 Mont. 376, 99 P. 1063 (1908).

[14]Matson v. Northern Hotel, Inc., 152 Mont. 103, 446 P.2d 913 (1969); Clark v. Worrall, *supra* note 13; Rossberg v. Montgomery Ward & Co., *supra* note 3; McEnaney v. City of Butte, 43 Mont. 526, 117 P. 893 (1911). *See also* MONTANA JURY INSTRUCTION GUIDE No. 120.04 [hereinafter cited as M.J.I.G.].

judgment rests almost exclusively on facts which denote the presence or absence of constructive notice.[15]

## *CASSADY v. CITY OF BILLINGS AND ROSSBERG v. MONTGOMERY WARD & CO.*

*Cassady v. City of Billings*[16] and *Rossberg v. Montgomery Ward & Co.*[17] are the two leading cases in Montana. *Cassady* is generally utilized by the Court when the facts of the principal case require discussion of active negligence or actual notice. The case phrases the law in terms of the duty owed by the landowner to the business invitee.[18] The following language is most often cited by the Court as stating the rule in Montana:

> It is well-established in Montana that a landowner is obligated toward an invitee to either use ordinary care to have the premises reasonably safe, or to warn the invitee "of any hidden or lurking danger therein." Milasevich v. Fox Western Montana Theatre Corp., 118 Mont. 265, 270, 165 P.2d 195, 197 see Restatement, Torts, Negligence, § 343. He is not an insurer against all accidents and injuries to such persons while there. Milasevich v. Fox Western Montana Theatre Corp., *supra*.[19]

A number of recent cases have appropriated this language from the *Cassady* case, and it may now be said to be the majority rule in Montana.[20] Several recent decisions have not specifically cited *Cassady*, although these cases do employ language which is similar to the language found in *Cassady*.[21] This discrepancy is insignificant and does not distract from the apparent willingness of the Montana court to follow *Cassady* as the leading decision.

When it discusses the doctrine of constructive notice, the Montana court relies on the precedent first established in *McEnaney v. City of Butte*[22] and later affirmed in *Rossberg*. In the *Rossberg* decision the Court explained:

> From the evidence heretofore outlined and well-settled law, it is clear that the plaintiff, in order to prove negligence on the part of the defendants, must show that the defendants placed the oil

[15]Regedahl v. Safeway Stores, Inc., *supra* note 13 and Clark v. Worrall, *supra* note 13 are two exceptions to this statement. M.J.I.G. No. 120.04, *supra* note 14, also expresses both concepts, duty and liability, of the basic principle of law. Failure to cite accepted Montana authority made McIntosh v. Linder-Kind Lumber Co., *supra* note 13, an anomalous decision and one which is difficult to classify.

[16]135 Mont. 390, 340 P.2d 509 (1959).

[17]*Supra* note 3.

[18]When the duty concept is cited alone, the requirements for establishing liability may be obscured and overlooked as part of the law.

[19]Cassady, *supra* at 393, 340 P.2d at 510.

[20]Wells v. Staney J. Thill & Ass'n, Dean v. First Nat'l Bank of Great Falls and Suhr v. Sears Roebuck & Co., *supra* note 13. Regedahl v. Safeway Stores, Inc., *supra* at 223, 425 P.2d at 337, cites *Cassady* but relies on that decision solely for the principle that the landowner's duty of keeping the premises reasonably safe is discharged by giving notice of the hazard to the invitee.

[21]Pushard v. J. C. Penney Co., Tigh v. College Park Reality Co., and Kerns v. F. W. Woolworth Co., *supra* note 13; Matson v. Northern Hotel, Inc., *supra* note 14.

[22]*Supra* note 14, 43 Mont. at 531, 117 P. at 894.

> or foreign substance on the floor, or had knowledge of it being there, or that it was on the floor such a length of time that the defendants should have known of its presence.[23]

In decisions which have resorted to the *Rossberg* precedent, the Court has strictly required the plaintiff to demonstrate the length of time the hazard has existed.[24]

Because of the recency of both *Matson v. Northern Hotel, Inc.* and *Clark v. Worral,* it may be concluded that *Rossberg* is viable precedent and not disturbed by the *Cassady* group of decisions. The *Rossberg* decision should be controlling precedent for future slip and fall accidents occurring in the supermarket.[25]

## *FROM McENANEY ON—THE DOCTRINE OF CONSTRUCTIVE NOTICE AS APPLIED IN MONTANA*

The cases following the precedent of constructive notice in *McEnaney* are not unique and coincide with judgments from other jurisdictions decided upon similar factual questions. However, the Montana court has demonstrated a greater readiness to demand rigid compliance with the requirements for proving constructive notice. This places on the plaintiff a severe burden, a conclusion which may be substantiated by the failure of any plaintiff to prove sufficiently a prima facie case for constructive notice. The plaintiff's difficulty is finding enough circumstantial evidence to prove a definite period of time.

For example, in the *McEnaney* case the Montana court reversed a district court decision holding for the plaintiff.[26] The plaintiff had alleged that the City of Butte was negligent in allowing an accumulation of snow and ice to form on a public sidewalk and that the defendant had full knowledge of the hazard at all times.[27] The Court answered:

> The notice may be actual or constructive. The celerity of action is necessarily dependent upon the attendant circumstances in each case. . . . but mere knowledge, without any reasonable opportunity to act does not determine liability. In this class of cases, therefore, liability depending, as it does, upon notice of the alleged unsafe condition and the failure to exercise ordinary care to remedy it, it is necessary to allege facts showing notice at a sufficient interval before the injury, to give the defendant reasonable opportunity to act.[28]

The Court tested the pleadings of the plaintiff by the rule and found them insufficient because the time period was not proved: "Was this period of time an hour, or a day or a month?"[29]

[23]Rossberg, *supra* at 169, 99 P.2d at 985.
[24]*See* discussion of McEnaney and Clark v. Worrall *infra.*
[25]The validity of this statement rests on the plethora of slip and fall cases reported in which constructive notice must be proven. *See generally* 61 A.L.R. 2d at 6.
[26]*Supra* at 526, 117 P. at 893.
[27]*Id.* at 532, 117 P. at 894.
[28]*Id.*
[29]*Id.*

The *Rossberg* decision reviewed one of the few slip and fall accidents which occurred within a store and which was caused by a negligent act of someone other than an employee. It affirmed *McEnaney*.[30] Together these are the only decisions in Montana in which the Court discusses the relationship between the proof and the requirement that it establish a definite time lapse.[31]

In the *Rossberg* case, the plaintiff was walking through the basement of the defendant store when she slipped and fell on what appeared to be a pool of oil.[32] There was no evidence other than the testimony of an employee of the defendant as to statements made by him twenty days after the accident to the effect that the oil spill had been there long enough to have been cleaned up.[33]

The Court refused admission of the employee's statements on the basis that they were hearsay and not part of the *res gestae* exception to the hearsay rule.[34] However, the Court in dictum considered the statements as though they were admissible and determined that they had no probative value.[35] The Court dismissed the statements made by the employee because "absolutely no time is fixed as to when the oil was spilled, or how long it was on the floor prior to the accident."[36]

The fundamental stress which the Court places upon the requirement that a time lapse be established is not without merit. Unless and until a time lapse is proven, the jury has no function. The Court explained in *Rossberg*:

> The function of the jury in such cases is to determine, once the length of time the oil had been on the floor is ascertained, whether or not the defendants had sufficient notice as to its existence to have removed it.[37]

[30]Rossberg, *supra* at 169, 99 P.2d at 985.
[31]In *Clark v. Worrall supra* at 382, 406 P.2d at 826, the Court considered an instruction given by the lower court structured on the language in *Rossberg* and upheld the instruction as stating exactly the legal requirements for demonstrating constructive notice.
[32]Rossberg, *supra* at 160, 99 P.2d at 981.
[33]*Id.* at 161, 99 P.2d at 981.
[34]*Id.* at 162, 99 P.2d 981.
[35]*Id.* The Court said:

> The statement it had been there long enough to be cleaned up is not the equivalent to an admission that it was there long enough to impute negligence because it had not been cleaned up. If it was there for one minute, it was there long enough to have been cleaned up; but the question was whether it was there long enough so that not discovering it and cleaning it up constituted negligence.

[36]*Id.*
[37]*Id.*
[38]*Id.* at 163, 99 P.2d at 982. The Court related this example:

> . . . Suppose a traveler on a highway were to collide with an obstacle thereon, and later reported his collision to another person who had never before seen the obstacle, knew not how it had gotten on the highway and did not see the collision, and he were to exclaim, "That obstacle has been there long enough to have been removed." By what process of reasoning or even guessing could a jury ascertain how long the obstacle had been on the highway? It is evident that such a statement, if actually made would be without meaning as having no foundation to support it, and as not tending to show negligence.

If the time lapse is not ascertained, the jury can only speculate on the question of constructive notice.[38]

The Court settled the rule of law in Montana to mean that the plaintiff must show the "defendants placed the oil or foreign substance on the floor or had knowledge of it being there, or that it was on the floor such a length of time that the defendants should have known of its presence."[39]

The *Rossberg* decision states the complete doctrine of landowner liability. It is the only case to do so in absolute terms.[40]

In the case of *Clark v. Worrall,*[41] the Montana Supreme Court rendered an exceedingly narrow decision, considering only what constitutes sufficient evidence to satisfy the plaintiff's burden of proving constructive notice.[42]

The setting of the accident was a bowling alley during a tournament. The plaintiff brought forward evidence to prove that the floors had not been cleaned since 4:00 P.M. and that there were large crowds in the alley the night of the accident. The person designated to clean the alley testified that he did not know of any spillage and debris on the floor, but that such spillage and debris was " 'to be expected'."[43]

The Court rebuked the plaintiff's contention that the defendant was negligent by failing to warn her of the dangerous conditions created by the wet slippery floors. The Court held that in Montana the duty to warn the invitee goes only to hidden or lurking dangers; the invitor is not an insurer against all accidents.[44] The Court believed that it was common knowledge that floors are slippery when wet and that debris such as cellophane makes the floor slippery.[45] The Montana Court, recognized as correctly stating the law an instruction which reiterated the language of *Rossberg.*[46]

[38] *Id.* at 169, 99 P.2d at 985.

[40] *Rossberg* cites *Montague v. Hanson,* 38 Mont. 376, 99 P. 1063 (1908) for precedent that the landowner is not an insurer of the safety of his patrons. He only has the duty to exercise ordinary care to keep his premises reasonably safe. Rossberg, *supra* at 170, 99 P.2d at 985.

[41] 146 Mont. 374, 406 P.2d 822 (1965).

[42] The facts of this case are noteworthy because other jurisdictions have considered analogous situations and have found active negligence on the part of the defendant. Wells v. Palm Beach Kennel Club, 160 Fla. 502, 35 So. 2d 720 (1948); Bern v. Greyhound Parks of Arizona, Inc., 5 Ariz. App. 483, 428 P.2d 147 (1967); Bozza v. Voranado, Inc., 42 N.J. 355, 200 A.2d 777 (1964).

[43] Clark v. Worrall, *supra* at 378, 406 P.2d at 824.

[44] *Id.* at 380, 406 P.2d at 825.

[45] *Id.*

[46] *Id.* at 382, 406 P.2d at 826. The instruction read:

> If you believe from the evidence that the plaintiff fell by reason of debris or some foreign substance on the floor, you are instructed that the plaintiff, in order to prove negligence on the part of the defendant must show that the defendant placed the debris or foreign substance on the floor or had knowledge of it being there, or that it was on the floor such a length of time that the defendant should have known of its presence.

The lower court had denied the plaintiff's motion for a new trial, and the Supreme Court affirmed. This is particularly significant in light of the ascertainable time which the hazard may have existed. However, evidence was introduced to the effect that the large crowds made clean up impossible, and the Court may have found this to be exoneration from the duty to clean up the spillage and debris within a reasonable time.[48]

A more recent decision in which the Court applied *Rossberg* is *Matson v. Northern Hotel, Inc.*[48] The case did not involve a slip and fall, but the Court found the facts sufficiently analogous to require a showing of proof that the defendant had constructive notice of the hazard.[49] The facts of the *Matson* case are unusual. The plaintiff was an entertainer and had just finished his show before a large banquet audience. He was hot and tired; carrying several heavy instruments, he asked to use the service elevator in order to avoid the crowd leaving by the main elevators. When he pulled together the service elevator inner cage doors, his hand slipped and was crushed between the closing doors. There was evidence produced at the trial which indicated that there was usually a strap attached to the upper door of the cage which was missing at the time of the accident.

The Supreme Court analyzed the facts of the case and reached the conclusion that no proof was produced which demonstrated that the defendant Hotel had knowledge of the absence of the strap. This deficiency of proof was fatal to the plaintiff's case. The Court held:

> The general rule is that a proprietor of premises may not be held liable for injuries resulting from a defect in the premises, if such defect was not caused by the proprietor, but was of such character as to come about without his knowledge. See Clark v. Worral, 146 Mont. 374, 406 P.2d 822, Rossberg v. Montgomery Ward & Co., 110 Mont. 154, 99 P.2d 979.[50]

The *Matson* case also contained the following statement of dictum by the Court: Speaking for the Court, Castles, J., opined, "[c]ertainly the missing strap would likely come about without the proprietor's knowledge, and there is simply no evidence of a failure to inspect."[51]

[47]In the case of *Food Town Stores, Inc. v. Patterson* 282 Ala. 477, 213 So.2d 211 (1968) the Alabama Supreme Court held a defendant supermarket liable for its failure to keep the premises reasonably safe. In this case, the supermarket produced evidence that a stockboy had swept the floor near the vegetable stand 10 minutes prior to the accident alleged. However, there was evidence that six or seven customers had stopped to pick out fruit and vegetables. The court believed that this was sufficient evidence to have put the supermarket on notice that a hazard could have been created.

[48]152 Mont. 103, 446 P.2d at 913 (1969).

[49]*Id.* at 109, 446 P.2d at 916.

[50]*Id.*

[51]*Id.* at 110, 446 P.2d at 916.

This comment is the first indication in any decision in Montana in which the Montana Court has intimated that the failure to inspect could constitute an independent ground for finding the defendant negligent.[52]

## *McINTOSH V. LINDER-KIND LUMBER CO.— AN ELIPTICAL DECISION*

In 1964 the Montana Supreme Court handed down a very abstruse decision in *McIntosh v. Linder-Kind Lumber Co.*[53] An analysis of the facts does not resolve the question on what legal theory the case was decided.

The facts of the case are simple. The plaintiff was visiting a lumber yard to purchase roofing material. In an effort to avoid being struck by a truck driving through the lumber yard, she took several steps backwards. Backing into a sharp edge on a roll of tin lying on the ground, she lost her balance and fell. There is no evidence in the case which suggests how the roll of tin was left where it was.

In the *McIntosh* decision the Court did not cite familiar language from prior Montana case law, and in fact it looked to foreign case law for support of propositions for which there was ample Montana authority.[54]

The Court offered the following comment:

> The true ground of liability is his superior knowledge over that of business invitees of the dangerous condition and his failure to give warning of the risk, however, he is not an insurer against all accidents which may befall them upon his premises.[55]

The Court holds the following facts to be operative and determinative in the case:

> Here, the proof showed that the plaintiff entered upon the defendant's premises to purchase roofing, that while there, and in an effort to not be hit by a vehicle using the passageway, she was cut by a piece of tin causing her to fall and suffer the injuries testified to at the trial. . . .[56]

From the discussion reported in the case, the Court appears to apply a doctrine of *res ipsa loquitur* in the decision without acknowledging that it is in fact doing so.[57]

[52]Failure to inspect is passive negligence, but if a defendant's failure to inspect is demonstrated, this may be sufficient evidence for a jury to find either (1) constructive notice or (2) active negligence in the store's operating methods. *See* Food Town Stores, Inc. v. Patterson, *supra* note 48.

[53]144 Mont. 1, 393 P.2d 782 (1964).

[54]*Id.* at 6, 7, 393 P.2d at 785.

[55]*Id.* at 6, 393 P.2d at 785.

[56]*Id.* at 7, 393 P.2d at 785.

[57]An analysis of the case points up the inconsistencies in the reasoning of the Court. The fact that the plaintiff is able to prevail on a showing which is essentially no more than that a slip and fall occurred, indicates an adoption of *res ipsa loquitur* by the Court. However, this construction is opposed to other language in the case.

However, *McIntosh* was reviewed by the Court in *Regedahl v. Safeway Stores, Inc.*[58] The Court concluded: "While this is indeed the underlying reason or policy for the liability it is not intended to be the fully articulated rule or final test."[59] The Court in this case affirmed as correctly stating the law, M.J.I.G. No. 120.04.[60] Based on the Court's recognition of the limits of *McIntosh*, it is reasonable to conclude that the *McIntosh* decision did not disturb prior precedent in Montana.[61]

To date, the law in Montana remains unaltered and unamended. The principles of law, although expressed by two separate lines of precedent follow an unbroken chain of application, and there is little indication that the Montana Supreme Court will alter the relevant precedent in the future.

## *STRICTER VIGILANCE IN THE SUPERMARKET AND THE DOCTRINE OF WOLLERMAN v. GRAND UNION STORES, INC.*

In 1952 the Superior Court of New Jersey decided the case of *Simpson v. Duffy*.[62] At that time the New Jersey courts considered the possibility of embodying in the law of landowner liability the principle that the proprietor of a supermarket owed a more vigilant duty to exercise ordinary care because of the greater risks of injury in and around the vegetable stand.[63]

By 1966 the Supreme Court of New Jersey sought to reevaluate its prior position that the proprietor of the supermarket owed no greater duty than to exercise due care. In the case of *Wollerman v. Grand Union Stores, Inc.*[64] the court recognized:

> That someone was negligent seems clear enough. Vegetable debris carries an obvious risk of injury to a pedestrian. A prudent man would not place it in an aisle or permit it to remain there.[65]

The Court in *Wollerman* ascertained three sources which could have created the hazard: 1) carelessness in the manner in which the supermarket displayed its produce; 2) carelessness in the handling of the produce by an employee; 3) carelessness of another patron.[66] The Court recognized that the plaintiff is not in a position to know precisely what the cause of the hazard was and concluded:[67]

[58] 149 Mont. 229, 425 P.2d 335 (1967).
[59] *Id.* at 234, 425 P.2d at 338.
[60] *Id.* at 229, 425 P.2d at 337.
[61] This conclusion is further supported by all subsequent decisions in which the Court has not declared *McIntosh* as precedent or as significantly altering the law.
[62] 19 N.J. Super. 339, 88 A.2d 520 (1952).
[63] *Id.* at 348, 88 A.2d 525. The Court concluded that such a policy would create strict liability for slip and fall accidents and for that reason rejected the theory of higher duty of care. *See also* 61 A.L.R. 2d at 15.
[64] 47 N.J. 426, 221 A.2d 513 (1966). The facts of the case are simple. The plaintiff slipped and fell on a string bean. No other significant evidence was introduced by the plaintiff.
[65] *Id.* at 428, 221 A.2d at 514.
[66] *Id.* at 429, 221 A.2d at 515.
[67] *Id.*

> [I]t is appropriate to require the defendants to come forward with proof of the measures they took to deal with the probability that litter would fall and accumulate.[68]

Upon first inspection, the New Jersey court's decision in *Wollerman* speaks in terminology much like that found in the doctrine of *res ipsa loquitur*,[69] although the Court does not state expressly that it is adopting that doctrine.[70]

The effect of the decision in *Wollerman* is to create a "presumption of active negligence."[71] In application, the presumption creates, in the absence of proof by the defendant of his due care, an inference for the jury that he was probably negligent.[72] The presumption obviates the evidentiary requirement that the defendant prove actual or constructive notice to avoid dismissal after presenting his case in chief.[73]

The presumption of active notice differs from the doctrine of *res ipsa loquitur* not so much in form as in its application. The doctrine of *res ipsa loquitur* requires that both the inspection and control of the cause of the injury be excusively in the hands of the defendant.[74] Of course, exclusive control is not possible in a self-service supermarket where

[68] *Id.* at 430, 221 A.2d at 515. The New Jersey Court stated:

> We appreciate that these views do not square completely with the standard approach to the problem [citing Annot., 61 A.L.R.2d 6 (1958)], but we are satisfied that where a substantial risk of injury is implicit in the manner in which a business is conducted, and on the total scene it is fairly probable that the operator is responsible either in creating the hazard or permitting it to arise or to continue, it would be unjust to saddle the plaintiff with the burden of isolating the precise failure. The situation being peculiarly in the defendant's hands, it is fair to call upon the defendant to explain if he wishes to avoid an inference by the trier of facts that the fault probably was his.

*See* Kahalili v. Rosecliff Reality, Inc., 26 N.J. 595, 141 A.2d 301 (1958).

[69] Several law review recent decisions have classified the *Wollerman* decision as announcing the doctrine of *res ipsa loquitur*. *See* 20 ARK. L. REV. 404 (1967); 18 W. RES. L. REV. 1015 (1967); 35 FORDHAM L. REV. 375 (1966); 12 VILL. L. REV. 396 (1967). Although the Court in *Wollerman* does not expressly state that they are approaching a concept of *res ipsa loquitur* several of the cases cited as authority in that decision are *res ipsa loquitur* decisions. *See* Kahalili v. Rosecliff Reality, Inc., *supra* note 68; Francois v. American Stores Co., 46 N. J. Super. 394, 131 A.2d 799 (1957); Bornstein v. Metropolitan Bottling Co., 26 N.J. 262, 139 A.2d 404 (1958).

[70] If the New Jersey Court were to have adopted the concept of *res ipsa loquitur*, they would be required to overturn *Simpson v. Duffy*, *supra*, as valid precedent. The fact that *Wollerman* looked to the *Simpson v. Duffy* case for authority is indicative of an intention not to fully accept the substantive provisions of *res ipsa loquitur*.

[71] For lack of a better description, the legal consequences of the *Wollerman* decision are termed a presumption of active negligence.

[72] Wollerman, *supra* at 429, 221 A.2d at 515.

[73] In its operation, the presumption requires the defendant to put on proof of his satisfactory methods of conducting his business. The presumption technically raises an issue of fact, as any other presumption does, for the trier of the facts. If the defendant fails to come forward with evidence, he risks an adverse verdict grounded upon the presumption of negligence. This prevents the defendant from aborting the lawsuit at the end of the plaintiff's case in chief upon a motion for directed verdict.

[74] *See* 9 WIGMORE ON EVIDENCE § 2509 (3d ed. 1940); 2 HARPER & JAMES § 19.5 at 1051; PROSSER, HANDBOOK ON THE LAW OF TORTS at 218 (3d ed. 1964). *See also* Wold, *Application of Res Ipsa Loquitur Doctrine in Montana*, 29 MONT. L. REV. 199 (1968); RESTATEMENT (SECOND) OF TORTS § 328 D, at 156, 157 (1968).

there may occur intervening negligence by a patron.[75] The presumption of active negligence places the burden of going forward with evidence on the defendant to demonstrate that he was exercising the proper degree of due care to keep his premises reasonably safe. It does not shift the burden of proof.

If the defendant comes forward with evidence and disputes the presumption, the plaintiff to prevail must then prove all the elements of his cause of action, including the presence of either actual or constructive notice.[76]

Only three other jurisdiction have cited the *Wollerman* decision,[77] and solely as precedent for the concept that the vegetable stand area of the supermarket demands a greater vigilance to meet the standards of ordinary care.[78] None of these jurisdictions has adopted either the *Wollerman* presumption of active negligence or *res ipsa loquitur*.[79]

Many jurisdictions have recently required the supermarket to exercise greater care to keep the area around the vegetables reasonably

[75]Courts have continually refused to apply *res ipsa loquitur* on the theory that in the supermarket no one person may be said to have exclusive control.

[76]This analysis is substantiated by Panko v. Food Fair Stores, Inc., 403 F.2d 62, 64 (3d Cir. 1968). In this case the Circuit Court affirmed the decision of the Federal District Court for the District of New Jersey. The lower court properly applied the *Wollerman* decision when it said:

> In our matter, the Defendant did come forward and present proof; so that I conclude that Wollerman is inapposite to the instant case.

*See also* HARPER & JAMES § 19.11, at 1100-1102.

[77]Morton v. Lee, 450 P.2d 957 (Wash. 1969); Stract v. Great Atl. & Pac. Tea Co., 35 Wis. 2d 51, 150 N.W.2d 361 (1967); Rhodes v. El Rancho Markets, 4 Ariz. App. 183, 418 P.2d 613 (1966).

[78]Morton v. Lee, *supra* at 960; Stract, *supra* at 57, 150 N.W.2d at 364; Rhodes, *supra* at 185, 418 P.2d at 615. *Rhodes* appeared to adopt the *Wollerman* presumption of active negligence; the case was reversed and remanded for a new trial. The case again appeared before the Arizona Appellate Court in 1969, *Rhodes v. El Rancho Markets*, 9 Ariz. App. 576, 454 P.2d 1016 (1969) on appeal from a verdict for the defendant. On appeal, the Arizona Appellate Court had the opportunity to reaffirm *Wollerman*, but it failed to do so, and cited as authority RESTATEMENT (SECOND) OF TORTS § 343. 9 Ariz. App. at 583, 454 P.2d at 1021. Furthermore, the court expressly refused an instruction structured on the principles of *res ipsa loquitur*. *Id.* It appears that the Arizona Court has moved away from its initial courtship of the concepts in *Wollerman*.

[79]Morton v. Lee, *supra* at 960; Stract, *supra* at 56, 150 N.W.2d at 364; Rhodes v. El Rancho Markets, *supra* at 583, 454 P.2d at 1021. No state has adopted either *res ipsa loquitur* or strict liability. *See generally* 61 A.L.R.2d at 6. It is of some interest to ascertain that the case of Carl's Market, Inc. v. De Feo, 55 So.2d 82 (Fla. 1951) has been rolled back and the specially concurring opinion by Terrill, J. in that case, disapproved of in Food Fair Stores, Inc. v. Trussell, 131 So.2d 730 (Fla. 1961). *See Super Market liaibity: Problems of Proving the Slip and Fall Case in Florida*, 18 U. FLA. L. REV. 440 (1965). *See also* 61 A.L.R.2d., *supra* at 15.

safe. Thus, when there is evidence on the part of the defendant supermarket of active negligence in the manner in which they conducted their business, a question of fact is raised and must be submitted to the jury.[80]

The question is moot as to whether those jurisdictions recognizing a higher degree of duty (without accepting a doctrine of *res ipsa loquitur)* have eased the plaintiff's burden of proof. The effects of the courts' decisions may be otiose. Nevertheless, no jurisdiction has made this principle of more vigilant care binding on any area outside of the vegetable stands.[81]

## *CONCLUSIONS*

The jurisdictions which have expressed that the supermarket is subject to a higher degree of care to keep the vegetable stands reasonably safe are in the minority. In these jurisdictions, the facts of the cases have peculiarly indicated the presence of active negligence by the supermarket in the methods of maintenance or merchandizing.[82]

These cases should be criticized for two very basic reasons. First, the law of landowner liability has always been that he owes the duty of ordinary care to keep the premises reasonably safe. Ordinary care is ordinary care under the circumstances. Recognizing that there are greater risks created by the method of self-service marketing of produce, the care required is increased. Therefore, these cases previously discussed have accomplished no more than a restatement of the law as it currently reads.

Second, the presence of active negligence is a sufficient issue to be presented to the jury and does not require contortion to ascertain some higher risk and thereby avoid the requirement that the plaintiff prove notice. There is a distinct and absolute difference between proving active negligence and proving a notice requirement. To prove the former does not require disproof of the latter.

The *Wollerman* case should also be criticized, but for different reasons. Undoubtedly, the *Wollerman* decision shifts the burden of going forward

[80]Colonial Stores, Inc. v. Turner, 117 Ga. App. 331, 160 S.E.2d 672 (1968); Food Town Stores, Inc., v. Patterson, *supra* note 53; Safeway Stores, Inc., v. Keef, 416 P.2d 892 (Okla. 1966); Bush v. Great Atl. & Pac. Tea Co., 416 S.W.2d 247 (Mo. 1967); *Contra,* Safeway Stores, Inc. v. Morgan, 53 A.2d 452 (D.C. Cir. 1969); Joye v. Great Atl. & Pac. Tea Co., 405 F.2d 464 (4th Cir. 1968); Rumsey v. Great Atl. & Pac. Tea Co., 276 F.Supp. 314 (E.D. Pa. 1967); Bogart v. F. W. Woolworth Co., 31 A.D.2d 685, 295 N.Y.S.2d 785 (1968); Lofton v. Travelers Ins. Co., 208 So.2d 189 (La. 1968); Jones v. Jarvis, 437 S.W.2d 189 (Ky. 1969); German v. Kienow's Food Stores, 246 Ore. 334, 425 P.2d 523 (1967). *See also* 17 Defense L. J. at 119-122, 323-325, 581-584 (1968); Serinto v. Borman Food Stores, 380 Mich. 637, 158 N.W.2d 485 (1968); Romeo v. Jumbo Market, 56 Cal. Rptr. 26 (1967).

[81]Several jurisdictions have upheld verdicts on a demonstration of active negligence on the part of the defendant in the conduct of his business. Colonial Stores v. Donovan, 115 Ga. App. 330, 154 S.E.2d 659 (1967); Francois v. American Stores Co., *supra* note 70; Swartz v. Warick-Philadelphia Corp., 424 Pa. 185, 226 A.2d 484 (1967).

[82]*See* cases cited *supra* note 81.

with evidence from the plaintiff to the defendant. This presumption creates an issue of fact by its very operation unless the Court deems that it has been disputed and the presumption disappears.[83] If the case is given to the jury to decide, the defendant stands the greater probability of suffering an adverse judgment.[84]

The Court in *Wollerman* expressed that the plaintiff was not in position to know what exactly caused the hazard and this was the rationale for shifting the burden of going forward with the evidence to the defendant.[85] This shift in the evidentiary procedure merely required the defendant to illustrate his operating methods.[86] It did not require the defendant to prove the cause of the hazard, but only that he probably was not negligent.

Realistically, in the absence of active negligence, the defendant supermarket is in no better position than the plaintiff to explain to the jury the cause of the accident. With the Rules of Civil Procedure[87] now generally in effect, the plaintiff through the rules granting discovery may ascertain for himself whether the supermarket was exercising proper due care.[88] The Rules of Civil Procedure can accomplish the same results as the presumption of active negligence does in the *Wollerman* decision, but without risking the adverse verdict to the defendant by a sympathetic jury.

The Montana Court has on several prior occasions demonstrated that it will decide slip and fall cases conservatively.[89] Before the Court will allow a jury to determine the issue of negligence when the plaintiff is alleging constructive notice, the plaintiff is required to establish the

[83]Panko v. Food Fair Stores, Inc. *supra* note 77. *See* HARPER & JAMES § 19.11 at 1100-1102.

[84]HARPER & JAMES § 19.5 at 1801, which reads:

> . . . Since juries incline heavily toward plaintiffs the net practical effect of the doctrine [*res ipsa loquitur*] is to shift the burden of loss from unexplained accidents of these types from plaintiffs to defendants.

[85]*Supra* at 429, 221 A.2d at 514.

[86]*Id.* at 430, 221 A.2d at 515. If a question of fact is raised, courts hesitate to remove the case from the jury. *See* RESTATEMENT (SECOND) OF TORTS § 328 D, comment *f*, at 160 (1965). For Montana law, *see* McIntosh, *supra*, at 8, 393 P.2d at 786.

[87]*See* REVISED CODES OF MONTANA 1947 § 93-2701 and Rule Nos. 26, 31, 33, 34 contained therein.

[88]Supermarkets now keep accurate time sheets of when the store was swept and by whom. The plaintiff may have access to these sweeping sheets, lists of employees on duty at the time of the accident, reports of the adjusters and a list of witnesses by proper use of the Rules of Procedure for discovery. This is probably all the evidence available to the defendant also.

[89]Matson, *supra* note 49; Clark v. Worrall, *supra* note 13; Rossberg, *supra* note 3; McEnaney, *supra* note 23. For example, in *Clark v. Worrall*, *supra* at 378, 406 P.2d at 824, the Court held that it is common knowledge that (1) tile floors are slippery when wet, and (2) a piece of paper such as cellophane would cause the floor to be slippery also. If this logic is extended to supermarkets, the plaintiff would be charged with knowing that the area around the vegetable stand is hazardous and slippery. The effect of *Clark v. Worrall* is to place upon the plaintiff notice of the hazard and the duty to exercise reasonable care or otherwise face an inference that he was contributorily negligent.

specific time lapse.[90] Consequently, the Montana Court cannot adopt a theory of *res ipsa loquitur* without creating a significant break with established rules and without completely altering the direction signaled in its prior precedent.

On the other hand, the Montana Court is not limited by current precedent from requiring greater vigilance of a supermarket proprietor when the operative facts of the case require a greater degree of care. As presently stated, the law of Montana is fully adequate to meet the institutional requirements of future factual situations in slip and fall accidents.

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[90] *Id.* Clark v. Worrall, Rossberg and McEnaney. In *Matson, supra* note 52, the Court noted that failure to inspect was not alleged. This is an indication that the failure to inspect by a supermarket may be negligence *per se* in some certain circumstances. However, this is essentially an issue of active negligence and should not be confused as disturbing the evidentiary burden resting with the plaintiff which requires him to prove all the elements of his cause of action.