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Civil Procedure and Evidence

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MONTANA SUPREME COURT SURVEY

EDITOR'S NOTE

With this issue, we complete the 1979 Montana Supreme Court Survey by offering the remaining segments on Civil Procedure, Evidence, and Criminal Procedure. Because of the thorough analysis of these survey articles, our hope is that topics dealt with exhaustively here need not be reviewed in future surveys for at least two years. In that way, future surveys may consider specific topics within the area of Civil Procedure, Evidence, and Criminal Procedure with the care which would not be possible were the entire field to be covered each year.

PART II

CIVIL PROCEDURE AND EVIDENCE

Daniel N. McLean and Jeannie Young

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INTRODUCTION

Montana decisions from October 1, 1978, to December 31, 1979, reflect the supreme court's tendency to interpret the Montana Rules of Civil Procedure and Rules of Evidence in accordance with federal authority under the corresponding federal rules. Although most decisions follow well-settled principles, there were a few major developments. The authors have selected those cases which indicate new trends or which otherwise are of practical importance to Montana attorneys.* Some of the topics discussed in this survey are in a state of flux. Therefore, Montana attorneys should be alert for changes that may have occurred since December 31, 1979.

I. CIVIL PROCEDURE

A. *Relation Back of Amendments: Rule 15(c)*

In two recent decisions, the Montana Supreme Court clarified the doctrine of relation back of amendments under Montana Rule of Civil Procedure 15(c)¹ where a party seeks to amend a complaint to bring a defendant into a lawsuit after the statute of limitations has run. In both *LaForest v. Texaco, Inc.*² and *Vincent v. Ed-*

* The authors gratefully acknowledge the assistance of Professor William F. Crowley of the University of Montana School of Law faculty. While Professor Crowley provided valuable background comments and suggestions, the authors are responsible for the opinions and analyses expressed in this survey.

1. Montana Rule 15(c), which is identical to the federal rule, states in part:

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

2. — Mont. —, 585 P.2d 1318 (1978).

wards³ the court held that Rule 15(c) will not save a claim from the statute of limitations unless the party sought to be added had notice of the original lawsuit.

In *LaForest*, the plaintiff instituted his action against the wrong parties. After the statute of limitations had run, he filed an amended complaint to substitute the correct party as defendant.⁴ The court considered the language of Rule 15(c), which states that a party sought to be added must have had notice "of [the] institution of the action" before the amendment will relate back to the date of filing of the original complaint. Relying upon a ninth circuit case,⁵ the court decided that "action" means "lawsuit." Therefore, it was not sufficient that the party sought to be made defendant had notice of the incident giving rise to the suit, unless he also had notice of the lawsuit itself.⁶

In *Vincent*, the plaintiff did not know the names of some of the defendants when she filed the lawsuit.⁷ She designated them by fictitious names pursuant to Montana Code Annotated [hereinafter cited as MCA] § 25-5-103 (1979).⁸ The court found that Rule 15(c) governed amendment of complaints under the fictitious name statute.⁹ Since the persons sought to be joined did not have notice of the action as required by Rule 15(c), they could not be joined as defendants after the statute of limitations had run.¹⁰

LaForest and *Vincent* are consistent with the language and purpose of Rule 15(c), which is designed to prevent an unjust result where the "newly named defendant received notice of the action and knew or should have known that he was the intended defendant."¹¹ A party unaware of the filing of a lawsuit should be

3. — Mont. —, 601 P.2d 1184 (1979).

4. *La Forest*, — Mont. —, 585 P.2d at 1319.

5. The court cited *Craig v. United States*, 413 F.2d 854 (9th Cir. 1969). *Id.* at —, 585 P.2d at 1321.

6. In *Craig v. United States*, 413 F.2d 854, 858 (9th Cir. 1969), it was stated: "[A]ction," as used in Rule 15(c), means a lawsuit, and not the incident giving rise to a lawsuit. The relevant words are "notice of the institution of the action." A lawsuit is instituted; an incident is not.

Federal cases addressing the issue are collected at Annot., 11 A.L.R. Fed. 269, 279 § 4 (1972).

7. *Vincent*, — Mont. —, 601 P.2d at 1186.

8. The fictitious name statute provides:

When the plaintiff is ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name is discovered, the pleadings or proceedings may be amended accordingly.

9. *Vincent*, — Mont. —, 601 P.2d at 1187.

10. *Id.* at —, 601 P.2d at 1188, 1190.

11. Advisory Committee's Note to September 29, 1967, Amendment of MONT. R. Civ. P. 15(c).

accorded the protection of the statute of limitations.

B. Joinder of Indispensable Parties: Rule 19

Montana's rule on joinder of indispensable parties¹² is being brought into line with federal authority. In *Prete v. Mountain Ranches, Inc.*, the Montana court held that where an agent and principal engage in a wrongful act, both are not necessarily indispensable parties to an action arising out of the act.¹³ In *Prete*, the alleged principal sued the defendant for breach of contract.¹⁴ The court followed federal case law in holding that the alleged agent was not necessarily an indispensable party.¹⁵ This holding furthers the purpose of Montana Rule of Civil Procedure 19, which abolishes reliance on abstract categorizations of interest.¹⁶ Under the rule, pragmatic considerations dictate which parties are so essential as to preclude continuing the action in their absence.¹⁷

12. MONT. R. CIV. P. 19 provides in part:

Rule 19. Joinder of persons needed for just adjudication. (a) Persons to Be Joined If Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court of Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

13. — Mont. —, 590 P.2d 1132, 1136 (1979).

14. *Id.* at —, 590 P.2d at 1134.

15. *Id.* at —, 590 P.2d at 1136.

16. Montana Rule 19 is based on the federal rule. The Advisory Committee's Notes to FED. R. CIV. P. 19, 28 U.S.C.A. Rules 17 to 23.2 at 106 explains, "The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests—'joint,' 'united,' 'separable,' or the like."

17. The Advisory Committee's Note to the September 29, 1967, Amendment of MONT. R. CIV. P. 19, states:

The changes are intended to make clear that whenever feasible the persons mate-

Preste recognized that the mere categorization of the parties as principal and agent is not conclusive, but did not discuss the pragmatic aspects of the case to see whether Rule 19 required joinder. As a result, the case is of little value in determining how the court will apply Rule 19 standards.¹⁸ The decision does indicate, however, that counsel seeking to rely on the rule must be prepared to prove more than some abstract legal relationship between a party to the suit and the person sought to be joined.

C. Jury Selection

1. Inquiry into Insurance on Voir Dire

The strict taboo against mention of insurance in personal injury actions may be giving way in Montana. In *Borkoski v. Yost*,¹⁹ the court reversed a stance it has maintained for fifty years by adopting the majority American view that certain insurance matters can be inquired into on voir dire.

In *Borkoski*, the plaintiff unsuccessfully sought to inquire into prospective jurors' exposure to insurance company advertisements stating that large jury awards increase insurance premiums.²⁰ The Montana Supreme Court held that such questioning should be allowed, but only after a strict foundation requirement is met.²¹ The court also held that counsel can ask prospective jurors whether they are stockholders or employees of insurance companies.²² If the

rially interested in the subject of an action should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

18. In *Preste*, the court relied on *Wheat v. Safeway Stores, Inc.*, 146 Mont. 105, 404 P.2d 317 (1965), which was decided before Rule 19 was materially altered in 1967. *Preste*, ___ Mont. ___, 590 P.2d at 1136. A more useful analysis of Rule 19 appears in *State ex rel. Drum v. District Court*, 169 Mont. 494, 548 P.2d 1377 (1976).

19. ___ Mont. ___, 594 P.2d 688 (1979).

20. *Id.* at ___, 594 P.2d at 689-90.

21. *Id.* at ___, 594 P.2d at 694-95. The attorney should first present to the court evidence of recent mass advertising designed to bias jurors against large damage awards. Next, the attorney must ask whether the prospective juror (1) has heard or read any matter which might affect his impartiality or (2) regularly reads any of the publications in which it has been demonstrated the insurance advertisements or articles have appeared. Questioning can continue only if a positive response is received to one of these inquiries. Counsel may then inquire whether the prospective juror has heard or read anything indicating that jury verdicts increase insurance premiums; if so, whether he believes the materials, and whether such belief will interfere with the juror's impartiality. Inquiries into any insurance matter during voir dire are subject to a showing that counsel is acting in good faith and is not merely attempting to inform the jury that the defendant has insurance coverage.

22. *Id.* at ___, 594 P.2d at 692, 694.

insurance company involved is a named party or is a mutual company in which policyholders' premiums are determined directly by the amount of damages paid, counsel can ascertain whether the prospective jurors are policyholders in the company.²³

Despite its holding, the Montana court did not reverse because it found that Borkoski had not been prejudiced by his inability to inquire into the advertisements. The court assumed that the advertising discussed only damages, and not liability. The court reasoned that Borkoski could not have been prejudiced because the jury found the defendants not liable and consequently did not reach the question of damages. The court stated, "At no point is it suggested, either by Borkoski or in the advertisements themselves, that juries should not find a party negligent in the first place."²⁴

In making this declaration, the court overlooked an advertisement described at length in the opinion²⁵ and reprinted in an article cited by the court.²⁶ The advertisement, sponsored by Aetna Life and Casualty, states: "We can stop assessing 'liability' where there really was no fault—and express our sympathy for the victims through other means." In addition, it could be argued that a juror who has decided to reduce his insurance premiums by reducing damages can do so most effectively by finding no liability.

Borkoski is the culmination of a puzzling series of cases that began in 1910 with *Beeler v. Butte & London Copper Development Co.*²⁷ In *Beeler*, the court stated that an inquiry as to whether prospective jurors had a business relationship with the defendant's insurer was a proper aid to the plaintiff in making his peremptory challenges.²⁸ However, seventeen years later the court held that *Beeler* would apply only when the opposing party failed to object to the first inquiry into insurance.²⁹ As late as 1967 the

23. *Id.*

24. *Id.* at ___, 594 P.2d at 695.

25. *Id.* at ___, 594 P.2d at 689.

26. The advertisement is reprinted in *Insurance Company Ads Draw Fire*, 64 A.B.A.J. 531 (1978), cited in *Borkoski*, ___ Mont. ___, 594 P.2d at 690.

27. 41 Mont. 465, 110 P. 528 (1910).

28. Apparently respondents deemed this information necessary as an aid to the intelligent exercise of their peremptory challenges. It does not appear that either the purpose or tendency of these questions was to inform the jury that the burden of a judgment, if obtained, would fall on an insurance company instead of the defendant, and the company was not afterwards mentioned in the case. The first time the question was asked, no objection whatever was made, and we are unable to see how the appellant could have been prejudiced by the examination.

Id. at 473, 110 P. at 530.

29. *Robinson v. F.W. Woolworth Co.*, 80 Mont. 431, 443, 261 P. 253, 257 (1927), *rev'd on other grounds*, *Hayward v. Richardson Construction Co.*, 136 Mont. 241, 347 P.2d 475 (1959); *Thomas v. Whiteside*, 148 Mont. 394, 421 P.2d 449 (1966). The court in *Robinson*

court adhered firmly to the rule prohibiting inquiry into insurance. In *Avery v. City of Anaconda*, the court stated: "The law is well-settled in this state that the action of the lower court in permitting this type of questioning on voir dire was prejudicial and reversible error."³⁰

The court backed away from this rule in 1973 in *Haynes v. County of Missoula*.³¹ In *Haynes*, the court noted that the majority rule in the United States allowed the questioning of prospective jurors about their connection with liability insurance companies.³² The court did not adopt the majority rule, however, choosing instead to distinguish the case from prior decisions on the ground that the insurance company was a named party in *Haynes*.³³

But in *Borkoski*, the court decided that *Haynes* had "in effect reversed" former case law.³⁴ Although *Borkoski* raised only the issue of prejudicial advertising, the court also discussed permissible inquiries into jurors' business connections with insurance companies, and jurors' memberships in mutual insurance companies that are involved in the case or named as parties.³⁵ The court's discussion of these principles appears to be dictum; nevertheless, the court stated that the rules were included in the holding of the case.³⁶

It is unclear whether *Borkoski* has any significance aside from voir dire. Montana has long held that the mention of insurance during a personal injury trial requires the severe sanction of granting a mistrial.³⁷ Although some exceptions exist to the automatic

stated that if an objection were properly raised on the first inquiry into insurance, the trial court would commit reversible error by allowing a party to ask about prospective jurors' business connections with insurance companies.

30. 149 Mont. 495, 497, 428 P.2d 465, 466 (1967).

31. 163 Mont. 270, 517 P.2d 370 (1973).

32. *Id.* at 287-88, 517 P.2d at 380.

33. [The majority rule becomes] compelling in a case where an insurance company is a named party to the litigation. Montana, inferentially at least, observes the distinction with respect to voir dire examination of prospective jurors in cases involving an insurance company as a party and those cases in which it is not. [Prior case law is] distinguishable on this basis and accordingly inapplicable to the instant case.

Id. at 288, 517 P.2d at 380.

34. *Borkoski*, ___ Mont. ___, 594 P.2d at 691-92.

35. *Id.* at ___, 594 P.2d at 692.

36. Therefore, we hold that in appropriate cases an attorney upon voir dire may inquire of prospective jurors whether they have any business relationship with insurance companies and whether they are policyholders of an insurance company named as a defendant or of a mutual insurance company involved in the case.

Id. at ___, 594 P.2d at 694.

37. "Ordinarily injection of the fact that defendant is protected by liability insurance into such a case, directly or indirectly, by evidence, arguments, or remarks constitutes re-

mistrial rule,³⁸ the court's adherence to the sanction generally has been firm.³⁹ It remains to be seen whether *Borkoski* signals a weakening of the automatic mistrial rule or is merely a warning to insurance companies to abstain from prejudicial advertising.

2. *Peremptory Challenges: Rule 47(b)*

A common question faced by district courts is how many peremptory challenges should be allowed to multiple defendants during jury selection in civil cases. Montana's jury selection statute states that "each party is entitled to four peremptory challenges. . . ."⁴⁰ Recognizing the potential unfairness of uneven peremptory challenges, the Montana Supreme Court has construed "each party" to mean "each side" when multiple defendants are involved, unless the interests of the multiple defendants are hostile to each other.⁴¹ The Montana Rules of Civil Procedure likewise refer to "each side" in discussing peremptories, and allow for additional peremptories when circumstances warrant it.⁴² Determining whether hostility exists is crucial to answering the question of how many peremptory challenges should be allowed to multiple defendants.

The Montana Supreme Court recently addressed this problem in *Hunsaker v. Bozeman Deaconess Foundation*.⁴³ In *Hunsaker*, the district court consolidated three related cases over the objection of the plaintiff.⁴⁴ The district court also allowed, without an

versible error." *D'Hooge v. McCann*, 151 Mont. 353, 359-60, 443 P.2d 747, 750 (1968).

38. MONT. R. EVID. 411 states that evidence of liability insurance is inadmissible to prove liability, but admissible to show agency, ownership, control, bias, or prejudice of a witness. *See also* *Meinecke v. Intermountain Transp. Co.*, 101 Mont. 315, 323-24, 55 P.2d 680, 682 (1936), where the court held reversal was not warranted when a witness unexpectedly disclosed that the defendant carried liability insurance; the court emphasized that damages were not excessive.

39. *D'Hooge v. McCann*, 151 Mont. 353, 359-60, 443 P.2d 747, 750 (1968).

40. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 25-7-224 (1979) (emphasis added).

41. *See, e.g.,* *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 416-17, 148 P. 323, 325-26 (1915). Montana is apparently among the majority of jurisdictions that have considered the question. *See* *Annot.*, 32 A.L.R.3d 747, 752 (1970).

42. MONT. R. CIV. P. 47(b) provides: "[e]ach side shall have four peremptory challenges In the event there is more than one party defendant, and should it appear that each defendant is entitled to peremptory challenges, then the original panel shall be increased to provide four additional jurors for each defendant. . . .entitled to exercise peremptory challenges." (emphasis added).

43. — Mont. —, 588 P.2d 493 (1978).

44. The three actions were the deceased Hunsaker's estate against the hospital for negligent care, the deceased's estate against his doctors for failure to diagnose his condition, and Hunsaker's widow's derivative action against the hospital for negligence. — Mont. —, 588 P.2d at 497. The general rule that peremptory challenges are to be exercised collectively

express finding of hostility, four peremptory challenges to each defendant.⁴⁵ On appeal, the supreme court discussed at great length the inherent difficulty of reviewing the district court's ruling, since the record did not set out its reasons for granting the motion.⁴⁶ Concluding that "discretion exercised under these circumstances is no discretion at all," the court imposed an obligation on trial counsel and district courts to make proper records and offered the following suggestions:

1. Existing procedural rules, particularly pretrial conferences, are ideally suited for resolution of the number of peremptories to be allowed.⁴⁷
2. If there is no pretrial conference, the issue should be raised by motion, setting forth facts and law.
3. The district court should set forth its reasons and the facts on which it relies in making its ruling.⁴⁸

Hunsaker also raises two related questions that the court does not completely resolve. The first is what constitutes "hostility" of interest, warranting peremptory challenges by each defendant. The court stated in *Hunsaker* that no rules had previously been set forth on this question, other than to say it can be shown by pleadings, representations, or evidence.⁴⁹ This statement ignores *Kudrna v. Comet Corp.*, where the hostility requirement was discussed in some detail.⁵⁰ In *Kudrna*, hostility was found by examining the plaintiff's theory of recovery from each defendant, the defendant's separate defenses, and the fact that the defendants tried to place responsibility on one another.⁵¹ In *Hunsaker* the court examined the same factors and found no hostility since the defendant's theories reinforced one another and the defendants synchronized their jury instructions.⁵² A more precise definition of hostility awaits further development, as cases with adequate find-

applies when several parties are united by consolidation as well as when they are joined on one complaint, at least if the formally united parties are not regarded as having diverse interests. Annot., 32 A.L.R.3d 747, 772 (1970). The rule in federal courts is different. See note 18 & accompanying text *infra*.

45. — Mont. —, 588 P.2d at 500.

46. *Id.* at —, 588 P.2d at 499-501.

47. MONT. R. CIV. P. 16 gives district courts broad discretion to hold a pretrial conference to resolve a wide variety of questions in an effort to streamline the trial process.

48. *Id.* at —, 588 P.2d at 501.

49. *Hunsaker*, — Mont. —, 588 P.2d at 499, citing *Mullery*, 50 Mont. at 416-17, 148 P. at 325-26 and *Leary v. Kelly Pipe Co.*, 169 Mont. 511, 515, 549 P.2d 813, 816 (1976).

50. — Mont. —, 572 P.2d 183, 186-87 (1977).

51. *Id.*

52. *Hunsaker*, — Mont. —, 588 P.2d at 500. The court noted that the defendants' theories "meshed like the finest gearshift mechanism."

ings of fact and law are presented to the supreme court for review.

The second problem raised by *Hunsaker* is whether a plaintiff must demonstrate on appeal that he was prejudiced by the allowance of excessive peremptory challenges to the defendants. Although the court has wavered on this question, the rule in Montana is that prejudice must be shown.⁵³ The court in *Hunsaker* noted that proving prejudice is virtually impossible, since the plaintiff would have to show that a biased juror sat on the case.⁵⁴ The court seemed dissatisfied with imposing such a heavy burden on the plaintiff.⁵⁵ It remains to be seen whether the court's uneasiness will result in reversal when review of an adequate record indicates an incorrect allowance of excessive peremptories.

The federal rules relating to peremptory challenges are similar to Montana rules. The federal statute dealing with peremptory challenges provides:

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges. Or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.⁵⁶

The statute allows flexibility in the matter of challenges but does not apply to *consolidated* actions. In consolidated cases each defendant is allowed three peremptories, and a single defendant against multiple plaintiffs gets the same number of peremptories as all of the plaintiffs combined.⁵⁷ With respect to consolidated cases, federal practice differs from the rules followed in state courts.⁵⁸

Hunsaker should warn Montana lawyers to establish an ade-

53. *Leary v. Kelly Pipe Co.*, 169 Mont. 511, 516, 549 P.2d 813, 816 (1976). The court stated in dictum in *Ferron v. Intermountain Trans. Co.*, 115 Mont. 388, 392, 143 P.2d 893, 895 (1943) that to allow excessive peremptories is reversible error as a matter of law (prejudice is presumed). *Leary* expressly overruled *Ferron* on this point, however. 169 Mont. at 516, 549 P.2d at 816.

54. *See Leary*, 169 Mont. at 516, 549 P.2d at 816-17; *Ashley v. Safeway Stores*, 100 Mont. 312, 322-23, 47 P.2d 53, 58 (1935).

55. *See Hunsaker*, — Mont. —, 588 P.2d at 501 where the court said that it can't really guess as to actual prejudice, but cannot blind itself to the advantage to one side of having additional peremptories. This is precisely why review of the correctness of the trial court's decision must be part of the review on appeal.

56. 28 U.S.C. § 1870 (1976).

57. 5A MOORE'S FEDERAL PRACTICE ¶ 47.07, at 2029 (2d ed. 1979) *citing* *Mutual Life Ins. Co. v. Hillman*, 145 U.S. 285 (1892) and *Signal Mountain and Portland Cement Co. v. Brown*, 141 F.2d 471 (6th Cir. 1944).

58. *See* note 44 *supra*.

quate factual and legal record in the trial court to justify additional peremptory challenges, or risk reversal on appeal. As more complete records are presented for review, the supreme court will develop a more precise definition of hostility. Until then, counsel should be prepared to separate theories of recovery and defense from those of other litigants to establish their adverse interests. *Hunsaker* may also signal the court's willingness to abandon the rule requiring a party to prove he was prejudiced by the allowance of excess peremptories.

D. Summary Judgment: Rule 56

Rule 56 of the Montana Rules of Civil Procedure provides a method for prompt disposal of cases presenting no genuine issue of material fact. The purpose of summary judgment is to eliminate unnecessary trials, delay, and expense.⁵⁹ The rule requires a court to grant summary judgment if the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record show that no material factual issue exists, and that the *moving party* is entitled to judgment as a matter of law.⁶⁰ The Montana Supreme Court has discussed this situation frequently, but only recently has the court considered whether summary judgment may be granted in favor of a *non-moving party*.⁶¹

In *Hereford v. Hereford* the supreme court ruled that summary judgment may properly be granted to a non-moving party where the moving party has been afforded a fair opportunity to meet the proposition that there is no genuine factual issue.⁶² Before granting summary judgment to a non-moving party, the moving party must be given notice and reasonable opportunity to be heard on issues not raised by his own motion.⁶³ In so holding, the Montana court follows the federal rule and the great weight of

59. *Silloway v. Jorgensen*, 146 Mont. 307, 310, 406 P.2d 167, 169 (1965).

60. MONT. R. CIV. P. 56(c) (emphasis added).

61. *Hereford v. Hereford*, ___ Mont. ___, 598 P.2d 600 (1979).

62. *Id.* at ___, 598 P.2d at 602.

63. *Id.* In *Hereford*, ex-husband Charles filed for an accounting to recover excess child support payments, alleging that he overpaid his child support obligation because he did not receive full credit for Social Security payments made for his child's benefit. Ex-wife Margaret admitted receiving payments from both Charles and the Social Security Administration, but no amounts were alleged in her answer. Charles moved for summary judgment, which motion Margaret resisted, but she made no countermotion. The district court entered summary judgment for Margaret. *Id.* at ___, 598 P.2d at 601. Charles was never given notice of the district court's intent to grant summary judgment in favor of Margaret, or of the grounds upon which the judgment was to be based. The only issue addressed by Charles's motion was the excess payments. *Id.* at ___, 598 P.2d at 602.

authority on this question.⁶⁴

Rule 56 does not expressly state whether summary judgment may be entered in favor of a non-moving party. Rule 54(c), however, empowers the court to grant relief beyond that demanded in the pleadings.⁶⁵ While Rule 54(c) does not directly apply to summary judgment, where one party moves for summary judgment, it is reasonable for the court to enter summary judgment for the non-moving party if the case warrants that result.⁶⁶ A trial court should not be precluded from entering summary judgment for a non-movant even if the non-movant vigorously contends that triable issues exist.⁶⁷

Hereford's holding that a moving party must have notice and opportunity to be heard before summary judgment can be entered for a non-movant is consistent with prior Montana decisions. Although the court faced the precise issue for the first time in *Hereford*,⁶⁸ it had considered similar situations in *Gravelly v. MacLeod*⁶⁹ and *State ex rel. Department of Health and Environmental Sciences v. City of Livingston*.⁷⁰ In both cases a Rule 12(b)(6) motion to dismiss was changed to a motion for summary judgment.⁷¹ Providing the movant an opportunity to present evidence on issues not raised in his own motion comports with the function of summary judgment, which is not to try the facts of a case, but to determine whether there is a genuine issue of fact to be tried.⁷²

64. 6 MOORE'S FEDERAL PRACTICE ¶ 56.12, at 56-331 through -334 (2d ed. 1976).

65. MONT. R. CIV. P. 54(c) provides:

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

66. See 6 MOORE'S FEDERAL PRACTICE ¶ 56.12, at 56-331 (2d ed. 1976).

67. *Id.* at 56-334.

68. *Hereford*, ___ Mont. ___, 598 P.2d at 602.

69. ___ Mont. ___, 573 P.2d 1166, 1169 (1978).

70. 169 Mont. 431, 435-36, 548 P.2d 155, 157-58 (1976).

71. MONT. R. CIV. P. 12(b) provides in part:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

72. *Johnson v. Johnson*, 172 Mont. 150, 154, 561 P.2d 917, 919 (1977) (summary judgment is not a substitute for trial; it can only be granted where the record shows no genuine issue of material fact). See also 6 MOORE'S FEDERAL PRACTICE ¶ 56.04[1], at 56-67 (2d ed. 1976).

II. EVIDENCE

A. *Dead Man's Statute*

On July 10, 1979, the Montana Supreme Court issued an order⁷³ declaring certain statutes superseded by the Montana Rules of Evidence. Among the statutes declared superseded was the Montana dead man's statute.⁷⁴ The court had previously invalidated the dead man's statute by implication when it adopted the Rules of Evidence,⁷⁵ and the Montana Legislative Council acknowledged this fact by excluding the statute from the Montana Code Annotated. In addition, two decisions prior to the supreme court's July 10 order, *Cremer v. Cremer Rodeo Land and Livestock Co.*⁷⁶ and *McNulty v. Bewley Corp.*,⁷⁷ expressly recognized that the Rules of Evidence superseded the dead man's statute.⁷⁸

Commentators have been virtually unanimous in condemning dead man's statutes on the grounds that they breed litigation, and while preventing enforcement of honest claims, they are ineffective to prevent perjury by witnesses who do not fall within the limited scope of the statutes.⁷⁹ Notwithstanding this widespread criticism, most jurisdictions have retained their dead man's acts.⁸⁰ Montana's adoption of the minority position is in accord with the policy of the Federal Rules of Evidence, which rejects the disqualification of

73. In the Matter of the Montana Supreme Court Commission on Rules of Evidence, No. 12729, 36 St. Rptr. 1647 (Montana Supreme Court, July 10, 1979) (per curiam).

74. REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947] § 93-701-3(3),(4). In essence the statute disqualified a witness from testifying about transactions and oral conversations between the witness and a person or agent now dead, in actions against the deceased's estate or principal, respectively. There were two statutory exceptions to the rule which allowed testimony: (1) when the court feels that injustice would result from excluding the testimony, and (2) if the executor or principal first introduces the testimony.

75. MONT. R. EVID. 601(a) states that every person is qualified to be a witness, unless disqualified under Rule 601(b). The dead man's statute is impliedly superseded by Rule 601(a) since its provisions do not appear in 601(b). See also the Commission Comment to Rule 601(a), which contains an extensive discussion of the dead man's rule, and Table B, appended to the rules. The court's authority to invalidate the statute derives from MONT. CONST. art. VII, § 2, cl. 3, which provides: "The supreme court may make rules governing . . . practice and procedure for all other courts . . . Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation." Also, MCA § 3-2-706 (1979) provides that upon adoption of any rules of procedure and practice, "such laws and rules insofar as they are in conflict therewith shall thereafter be of no further force and effect." The Rules of Evidence were adopted December 29, 1976. The legislature did not disapprove of the rules in either 1977 or 1979.

76. — Mont. —, 592 P.2d 485 (1978).

77. — Mont. —, 596 P.2d 474 (1979).

78. *Cremer*, — Mont. —, 592 P.2d at 489; *McNulty*, — Mont. —, 596 P.2d at 476.

79. WEINSTEIN'S EVIDENCE ¶ 601[03], at 601-18 (1978). See also the Commission Comment to MONT. R. EVID. 601.

80. WEINSTEIN'S EVIDENCE ¶ 601[03], at 601-18 (1978).

witnesses on account of interest.⁸¹

B. *Subsequent Repairs: Rule 407*

As early as 1901 Montana recognized the general rule that evidence of a defendant's repair of a dangerous condition following an accident is inadmissible to show his negligence in failing to make earlier repair.⁸² For many years, however, it seemed that the rule prohibiting admission of evidence of subsequent repairs had been swallowed by its exceptions. Case law established exceptions allowing evidence of subsequent repairs to show that the defendant controlled the defective condition and had a duty to repair it,⁸³ to rebut testimony by the defendant that repair was impracticable,⁸⁴ and to show conditions as they existed at the time of the accident.⁸⁵ This last exception was established in *Pullen v. City of Butte*⁸⁶ in 1912. The *Pullen* exception is so broad that it virtually destroys the rule of inadmissibility, since in every case there will be a need to show what conditions existed at the time of the injury.

Montana Rule of Evidence 407, which became effective July 1, 1977, now governs admission of evidence of subsequent repairs. It neither condones nor rejects the *Pullen* exception, although the commission comment indicates the exception still exists.⁸⁷ A recent Montana Supreme Court case, however, raises the possibility that application of the *Pullen* exception will be restricted under Rule 407.

Cech v. State, the first case to apply Rule 407 after its adop-

81. JONES ON EVIDENCE § 20:20 (6th ed. 1972). FED. R. EVID. 601 contains no provisions similar to the dead man's statutes. The federal courts, however, defer to states having a dead man's statute in effect when state law supplies the rule of decision in a case. See the Report of the House Committee on the Judiciary, Federal Rules of Evidence, Rule 601.

82. *May v. City of Anaconda*, 26 Mont. 140, 144, 66 P. 759, 761 (1901).

83. *Id.*

84. *Lawlor v. County of Flathead*, ___ Mont. ___, 582 P.2d 751, 755 (1978).

85. *Teesdale v. Anschutz Drilling Co.*, 138 Mont. 427, 439-40, 357 P.2d 4, 10-11 (1960); *Titus v. Anaconda Copper Mining Co.*, 47 Mont. 583, 589, 133 P. 677, 678-79 (1913); *Pullen v. City of Butte*, 45 Mont. 46, 53, 121 P. 878, 879 (1912).

86. 45 Mont. 46, 53, 121 P. 878, 879 (1912).

87. Rule 407 states the general rule and provides an open-ended list of exceptions:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The Commission Comment to Rule 407 cites the Montana cases that have applied the *Pullen* exception.

tion,⁸⁸ was decided initially in August 1979.⁸⁹ After rehearing, the court reversed its decision.⁹⁰ In the initial decision, two justices held that where there is ample evidence of the conditions at the scene of the accident, it is reversible error to admit evidence of subsequent repairs to show what those conditions were.⁹¹ Justice Shea specially concurred with the decision to reverse, but on different grounds.⁹² Two dissenting justices contended that the evidence was admissible as an exception to the general rule to show feasibility of repair and as impeachment testimony.⁹³

On rehearing, a unanimous court adopted the rationale of the dissent, finding admission of the evidence to show feasibility of repair and for impeachment to be supported both by prior case law and Rule 407.⁹⁴ The court did not discuss whether the evidence would have been admissible had it been offered solely to show conditions at the time of the accident. The court did rely, however, on *Lawlor v. County of Flathead*,⁹⁵ which recognized the *Pullen* exception.⁹⁶ The initial *Cech* decision indicates that although at least two justices are prepared to recognize the *Pullen* exception as allowable under Rule 407, the exception would apply only where evidence is not otherwise available to show conditions at the time of the accident.⁹⁷

88. The court considered the admission of evidence of remedial measures, but did not discuss Rule 407, in *Lawlor v. County of Flathead*, ___ Mont. ___, 582 P.2d 751 (1978). *Lawlor* was tried before the rule was adopted, but appealed after the rule took effect. In *Hill v. Squibb & Sons, E.R.*, ___ Mont. ___, 592 P.2d 1383, 1388 (1979), the court rejected a claim that Rule 407 applied to a medical pamphlet which had not been published by the defendant.

89. ___ Mont. ___, 598 P.2d 584 (1979).

90. ___ Mont. ___, 604 P.2d 97 (1979).

91. *Cech*, ___ Mont. ___, 598 P.2d at 588. This is more restrictive than the approach taken in prior cases. In *Pullen*, the court found the evidence admissible because it "tended to throw some light upon the physical conditions existing at the time of the accident." *Pullen*, 45 Mont. at 53, 121 P. at 879. None of the cases decided before adoption of Rule 407 limited the *Pullen* exception to situations where other evidence was unavailable to show conditions at the time of the accident.

92. *Id.* at ___, 598 P.2d at 592-93.

93. *Id.* at ___, 598 P.2d at 590, 592. Justice Sheehy wrote the dissent, with Justice Daly concurring.

94. *Cech*, ___ Mont. ___, 604 P.2d at 101-02.

95. ___ Mont. ___, 582 P.2d 751 (1978).

96. *Id.* at ___, 582 P.2d at 755. In *Lawlor* the court cited the *Pullen* exception with approval, but did not apply it in that case.

97. This approach is consistent with MONT. R. EVID. 403, which allows the exclusion of evidence where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . or needless presentation of cumulative evidence." The Commission Comment to Rule 407 states that "admission of evidence of subsequent repairs for another purpose should be made under the considerations of Rule 403, particularly its prejudicial effects."

C. *Opinion Testimony: Rules 701, 703, and 705*

In four recent cases, the Montana court liberally interpreted the rules governing opinion testimony⁹⁸ so as to give trial courts wide latitude in the admission of expert and lay opinion evidence.

The court has made it clear that Montana Rule of Evidence 703⁹⁹ allows expert testimony to be based on hearsay.¹⁰⁰ In *Hunsaker v. Bozeman Deaconess Foundation*, the court held that a doctor may rely on medical records, other documents, and his conversations with other doctors in reaching an opinion on the standard of medical care in a geographic area.¹⁰¹ The court extended that rule in *Azure v. City of Billings*, deciding that medical opinion can be based in part on a police report.¹⁰² Further, it is permissible for a general practitioner to testify against a medical specialist.¹⁰³ The training of the expert and the basis of his testimony goes to the weight of the evidence and not its admissibility.¹⁰⁴

Under Rule 705,¹⁰⁵ the expert need not reveal the source of his testimony on direct examination. In *Stewart v. Casey*, the court noted: "[I]f opposing counsel believe the opinion is not founded on sufficient data, cross-examination is the shield to guard against unwarranted opinions."¹⁰⁶

The rules also have expanded the number of circumstances in which lay testimony is permissible. In *State v. Bier*,¹⁰⁷ a defendant charged with negligent homicide sought to testify on the angle of a gun shot. This evidence was excluded at trial on the ground that the complexity of the subject required expert testimony. The su-

98. The admission of expert and lay opinion testimony is governed by MONT. R. EVID. 701-705.

99. Rule 703 states:

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

100. Even before adoption of the Montana Rules of Evidence, the court held that medical testimony must of necessity in some cases be based on hearsay. See *Klaus v. Hillberry*, 157 Mont. 277, 296, 485 P.2d 54, 59 (1971).

101. ___ Mont. ___, 588 P.2d 493, 504-05 (1978).

102. ___ Mont. ___, 596 P.2d 460, 471-72 (1979).

103. *Hunsaker*, ___ Mont. ___, 588 P.2d at 503.

104. *Id.* at ___, 588 P.2d at 505; *Azure*, ___ Mont. ___, 596 P.2d at 472.

105. Rule 705 provides:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

106. ___ Mont. ___, 595 P.2d 1176, 1180 (1979).

107. ___ Mont. ___, 591 P.2d 1115, 1119 (1979).

preme court disagreed:¹⁰⁸ "Rule 701 permits lay opinion so long as rationally based on perceived facts and helpful to an understanding of testimony or facts. Cross-examination in the normal case is considered to sufficiently safeguard the testimony from infirmities." While previous Montana case law has allowed lay opinion,¹⁰⁹ *Bier* indicates that under the rules such testimony will be allowable in a broader range of circumstances.¹¹⁰

D. Polygraph Evidence

Virtually all jurisdictions reject the results of lie detector tests as evidence to prove the guilt or innocence of one accused of crime, whether offered by the prosecution or the accused.¹¹¹ The most common reason given for prohibiting polygraph evidence is that polygraphs have not been proven reliable.¹¹² Montana adheres to this rationale.¹¹³

*State v. McClean*¹¹⁴ raises a secondary question with respect to polygraph evidence—whether the mere mention of a polygraph test taken by a prosecution witness is grounds for a mistrial. In *McClean*, defense counsel attempted to impeach a policeman by asking him whether he smoked marijuana. The policeman replied, "No, Sir, as a matter of fact, I took a polygraph." The district judge denied defense counsel's motion for a mistrial.¹¹⁵

On appeal the Montana Supreme Court upheld the denial,

108. *Id.* at ___, 591 P.2d at 1119. However, the court found exclusion of the evidence to be harmless error.

109. See *Wilson v. Wilson*, 128 Mont. 511, 517, 278 P.2d 219, 222 (1954), *rev'd on other grounds*, *Trudgen v. Trudgen*, 134 Mont. 174, 187, 329 P.2d 225, 232 (1958), in which the court relied on 32 C.J.S. *Evidence* § 455 in stating that the "'ordinary observer'" is qualified to give opinion evidence "if it appears to the presiding judge that he has had sufficient opportunities for drawing the inference which he proposes to state, and possesses the capacity necessary to make and state it."

110. In *Bier*, the court indicated that it would have reached a different conclusion but for adoption of the Montana Rules of Evidence. ___ Mont. ___, 591 P.2d at 1119.

111. 29 AM. JR. 2d *Evidence* § 831 (1967). New Mexico allows polygraph evidence if offered by a defendant in a criminal case on the grounds that to prohibit the evidence would amount to a denial of due process. *State v. Dorsey*, 88 N.M. 184, 185, 539 P.2d 204, 205 (1975).

112. Note, *Truth by Ordeal: The Growing Acceptance of Polygraphy*, 6 FLA. ST. U. L. REV. 1373, 1380 (1978). The note criticizes this rationale, advanced in the seminal case in the field of polygraph evidence, *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). "The thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.*

113. In *State v. Hollywood*, 138 Mont. 561, 575, 358 P.2d 437, 444 (1960), the court stated, "Until it is established that reasonable certainty follows from such tests, it would be error to admit in evidence the results thereof."

114. ___ Mont. ___, 587 P.2d 20 (1978).

115. *Id.* at ___, 587 P.2d at 22.

stating "[D]espite general policy against the use of polygraph evidence, the issue must be framed in terms of its prejudicial effect on the defendant."¹¹⁶ The court found that any actual prejudice to the defendant was minimal, since the policeman's response referred only to his own use of marijuana and dealt only indirectly with charges against the defendant.¹¹⁷

Although not cited in *McClellan*, the supreme court had reached a similar conclusion in *State v. Cor*.¹¹⁸ There the court refused to rule that the very mention of "polygraph" or "lie detector" is per se reversible error.¹¹⁹ Instead, the court held that a prosecution witness' mention of polygraph tests given to defendant's alibi witnesses was not so prejudicial as to warrant reversal.¹²⁰ *Cor* arguably presented more potential prejudice than *McClellan*, since in *Cor* the polygraph tests involved were those given to the defendant's witnesses. In light of the court's holding in *Cor*, the result in *McClellan* is not surprising.

The Montana Supreme Court has considered polygraph evidence in only four other cases.¹²¹ In *Gropp v. Lotton*,¹²² a civil action to quiet title to real estate, the court rejected plaintiff's offer of polygraph evidence, stating that few jurisdictions allow polygraph tests in criminal actions and even fewer consider such evidence in civil actions.¹²³

In *State v. Campbell*,¹²⁴ the court reaffirmed *State v. Hollywood*,¹²⁵ which held that the results of polygraph tests are not

116. *Id.* at ___, 587 P.2d at 23. The court relied on *Gafford v. State*, 440 P.2d 405, 411 (Alas. 1968). See also *Hutchins v. State*, 334 So.2d 112, 113-14 (Fla. App. 1976); *State v. Marquez*, 113 Ariz. 540, 544, 558 P.2d 692, 696 (1977). Cf. *State v. Davis*, 351 So.2d 771, 772-73 (La. 1977) (reference to polygraph not always reversible error, but there was reversible error where the witness' credibility was of vital importance to the state's case); *Kaminski v. State*, 63 So.2d 339, 341 (Fla. 1953) (reversible error to mention polygraph taken by victim, the only prosecution witness who could identify the defendant); *Robinson v. State*, 550 S.W.2d 54, 61 (Tex. Crim. App. 1977) (prejudicial error when prosecutor mentioned polygraph test taken by accomplice, upon whose testimony the state's case depended).

117. ___ Mont. ___, 587 P.2d at 23. The court further stated that the mention of the polygraph may have bolstered the witness' credibility, but it did not appear to have done so "except perhaps to rehabilitate him from a potentially highly prejudicial attempt at impeachment." *Id.*

118. 144 Mont. 323, 396 P.2d 86 (1964).

119. The court stated that a "per se reversible error" rule was urged by the defendant. *Id.* at 348, 396 P.2d at 99.

120. *Id.* at 350, 396 P.2d at 100.

121. *State v. Hollywood*, 138 Mont. 561, 358 P.2d 437 (1960); *Gropp v. Lotton*, 160 Mont. 415, 503 P.2d 661 (1972); *State v. Campbell*, ___ Mont. ___, 579 P.2d 1231 (1978); *In re T.Y.K. and D.A.W.R.*, ___ Mont. ___, 598 P.2d 593 (1979).

122. 160 Mont. 415, 503 P.2d 661 (1972).

123. *Id.* at 424-25, 503 P.2d at 666.

124. ___ Mont. ___, 579 P.2d 1231 (1978).

125. 138 Mont. 561, 575, 358 P.2d 437, 444 (1960).

admissible as evidence in a criminal trial.¹²⁶ In *Campbell* the court specifically reserved the issue whether Montana should follow Wisconsin's lead to allow polygraph evidence under the conditions set forth in *State v. Stanislawski*.¹²⁷ (1) the use of polygraphs are within the prosecutor's discretion; (2) the prosecution and defense stipulate in writing to the admission of the polygraph; and (3) notwithstanding the stipulation, admissibility is within the sound discretion of the trial court.¹²⁸

*In re T.Y.K. and D.A.W.R.*¹²⁹ is the most recent Montana decision that mentions polygraph evidence. There the court again declined to decide whether polygraphs are admissible by stipulation because the appellants raised the issue for the first time on appeal.¹³⁰

One-third of the states admit polygraph evidence by stipulation of both parties.¹³¹ Admission by stipulation is theoretically inconsistent with the "unreliability" rationale excluding polygraphs, since stipulation cannot be said to overcome such a defect.¹³² Because the Montana Court adheres to the unreliability rationale,¹³³ it is unclear whether it will follow the trend in favor of stipulated admission of polygraph evidence.

126. *Campbell*, ___ Mont. ___, 579 P.2d at 1234.

127. 62 Wis.2d 730, 216 N.W.2d 8 (1974).

128. See *Campbell*, ___ Mont. ___, 579 P.2d at 1234 for a discussion of the *Stanislawski* criteria.

129. ___ Mont. ___, 598 P.2d 593 (1979).

130. *Id.* at ___, 598 P.2d at 596.

131. Note, *Truth by Ordeal: The Growing Acceptance of Polygraphy*, 6 FLA. ST. U. L. REV. 1373, 1382 (1978).

132. *Id.* The note's author concludes that admission by stipulation points to a trend in favor of admissibility, since stipulation does not improve the reliability, accuracy, weight, or prejudicial value of polygraph evidence.

133. See notes 113 & 125 *supra*. The unreliability rationale persists in most jurisdictions despite significant technological advances in polygraphy since *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). A commonly cited reference containing a good discussion of the development is T. REID & F. INDAU, *TRUTH AND DECEPTION* (2d ed. 1977). An explanation for the reluctance of courts to accept polygraph results may lie in a judicial belief that a trier of fact will give inordinate weight to such evidence. MCCORMICK ON EVIDENCE § 207 (2d ed. 1972). Reluctance to entrust key participation in the legal factfinding process to polygraphers who are not under effective judicial control is also a factor. *Id.* n. 12. See, e.g., *Kaminski v. State*, 63 So.2d 339, 341 (Fla. 1953) (admitting the evidence resulted in the "substitution of a mechanical device, without fair opportunity for cross-examination, for the time-tested, time-tried, and time-honored discretion of the . . . jury as to matters of credibility"). A few recent federal cases may signal a trend away from the unreliability standard, but their import is not clear. See generally Note, *State v. Souel: Ohio Turns the Corner on Polygraph Evidence*, 8 CAPITAL U.L. REV. 287 (1978); Note, *Truth by Ordeal: The Growing Acceptance of Polygraphy*, 6 FLA. ST. U. L. REV. 1373 (1978).

E. Corroboration of Accomplice Testimony

1. Introduction

Montana has long required corroboration of accomplice testimony in order to uphold a criminal conviction.¹³⁴ The statute embodying the rule has remained virtually unchanged since the Bannack Statutes.¹³⁵ Despite its long existence, the rule is still a frequent source of litigation.¹³⁶

The Montana Supreme Court has not consistently applied the corroboration statute, which may account for some of the litigation on this issue. Five relevant decisions were handed down during the survey period.¹³⁷ Of these five, three offer useful guidance as to how the rule operates. *State v. Owens*¹³⁸ and *State v. Williams*¹³⁹ illustrate the nature and quantum of independent evidence sufficient to corroborate accomplice testimony. *State v. Kemp*¹⁴⁰ is a well-analyzed case where the court found the independent evidence insufficient to implicate the defendant. The remaining two cases do little to clarify the rule. *State v. Standley*¹⁴¹ only confuses the rule, and *State v. Holliday*¹⁴² finds the rule satisfied without

134. At common law it is well settled that the testimony of an accomplice, although entirely without corroboration, will support a verdict unless the testimony appears on its face to be preposterous or self-contradictory. 30 AM. JUR. 2d *Evidence* § 1151 (1967). The common law rule has been changed in many jurisdictions by statutes expressly declaring that uncorroborated testimony of an accomplice cannot sustain a conviction. *Id.*, citing *State v. Yegen*, 86 Mont. 251, 283 P. 210 (1929).

135. MCA § 46-16-213 (1979) provides:

A conviction cannot be had on the testimony of one responsible or legally accountable for the same offense, as defined in 45-2-301, unless the testimony is corroborated by other evidence which in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

The only amendment made since the statute's adoption is the substitution of "one responsible or legally accountable for the same offense" for "accomplice," to be consistent with the language of the Montana Criminal Code of 1973 (MCA Title 45). The statute was previously codified at R.C.M. 1947, § 95-3012 (Supp. 1977); R.C.M. 1947, § 94-7220; R.C.M. 1921, § 11388; R.C.M. 1907, § 9290; MONT. PENAL CODE 1895, § 2089 (Bannack).

136. See, e.g., the extensive list of annotations to the relevant sections in the R.C.M. 1947. The Pacific Digest contains over forty Montana cases on the subject, the earliest being *Territory v. Corbett*, 3 Mont. 50 (1877).

137. In a sixth case, *State v. Harvey*, ___ Mont. ___, 603 P.2d 661 (1979), defendant raised the corroboration issue, but the supreme court did not examine the evidence for corroboration because it found that the witness in question was not an accomplice. *Id.* at ___, 603 P.2d at 666.

138. ___ Mont. ___, 597 P.2d 72 (1979).

139. ___ Mont. ___, 604 P.2d 1224 (1979).

140. ___ Mont. ___, 597 P.2d 96 (1979).

141. ___ Mont. ___, 586 P.2d 1075 (1978).

142. ___ Mont. ___, 598 P.2d 1132 (1979).

explaining what specific independent evidence corroborated the accomplice testimony. A brief review of Montana case law interpreting the corroboration statute will help place these five cases in context.

2. *Historical Development*

a. *Early 1900's*

*State v. Cobb*¹⁴³ is frequently cited for a complete statement of the Montana corroboration rule:

- (a) The corroborative evidence may be supplied by the defendant or his witnesses.
- (b) It need not be direct evidence—it may be circumstantial.
- (c) It need not extend to every fact to which the accomplice testifies.
- (d) It need not be sufficient to justify a conviction or to establish a *prima facie* case of guilt.
- (e) It need not be sufficient to connect the defendant with the commission of the crime; it is sufficient if it *tends* to do so.
- (f) Whether the corroborative evidence tends to connect defendant with the commission of the offense is a question of law, but the weight of the evidence—its efficacy to fortify the testimony of the accomplice and render his story trustworthy—is a matter for the consideration of the jury.¹⁴⁴

Earlier cases generally provide little guidance as to how these rules apply to specific fact situations. Typically they discuss the rule to be applied, then merely state, without pointing to specific items of evidence, that the rule is either satisfied or not satisfied.¹⁴⁵

A notable exception is *State v. Spotted Hawk*.¹⁴⁶ That case involved the murder of a shepherd in unsettled cattle country. The court found that most of the corroborative evidence did not satisfy the statute (then § 2089 of the Penal Code) because it relied on the accomplice testimony for meaning and was therefore not

143. 76 Mont. 89, 245 P. 265 (1926).

144. *Id.* at 92, 245 P. at 266. It must be noted that *Cobb* is not the original source of the rules listed. Rather, the case collects the principles that emerged from prior cases. For similar summaries of the rules, *See also* *State v. Ritz*, 65 Mont. 180, 186-87, 211 P. 298, 300 (1922); *State v. Bolton*, 65 Mont. 74, 87-88, 212 P. 504, 508 (1922).

145. *See, e.g.*, *State v. Ritz*, 65 Mont. 180, 187, 211 P. 298, 300 (1922); *State v. Lawson*, 44 Mont. 488, 491, 120 P. 808, 808 (1912); *State v. Biggs*, 45 Mont. 400, 406, 123 P. 410, 412 (1912); *State v. Stevenson*, 26 Mont. 332, 334, 67 P. 1001, 1002 (1902); *State v. Welch*, 22 Mont. 92, 98, 55 P. 927, 930 (1899). *But see* *State v. Bolton*, 65 Mont. 74, 212 P. 504 (1922); *State v. Spotted Hawk*, 22 Mont. 33, 55 P. 1026 (1899); and *State v. Geddes*, 22 Mont. 68, 55 P. 919 (1899) (all of which contain analysis of specific evidence in applying the rules of law).

146. 22 Mont. 33, 55 P. 1026 (1899).

independent.¹⁴⁷ There was independent evidence, however, that placed the defendant in the general area of the crime, and arguably established a motive for the killing.¹⁴⁸ The court apparently did not consider this evidence substantial enough to warrant submission to the jury, which indicates to some extent the quantum of evidence required to satisfy the statute.

b. 1926 to Present

Cases decided after *Cobb* often contain adequate examination of specific independent evidence and offer useful guidance to determine the quantity and quality of evidence required to satisfy the statute. Initially the standard to measure the sufficiency of evidence was whether there is "substantial testimony, aside from the uncorroborated evidence of an accomplice, to justify a judgment of conviction."¹⁴⁹ This standard is consistent with *Spotted Hawk*.

Subsequent cases interpreted the "tend to connect" requirement. *State v. Jones*¹⁵⁰ adopted a negative approach: "The mere showing of opportunity . . . is not enough, and where the facts and circumstances relied upon for corroboration are as consistent with innocence as with guilt, a conviction must be set aside."¹⁵¹ The court applied a similar negative standard in *State v. Keckonen*¹⁵² and *State v. Gangner*,¹⁵³ both of which involved prosecutions for sodomy committed by adults with young boys, who were held to be accomplices.¹⁵⁴ The court in *Keckonen*, however, did not cite *Jones* as precedent for the "equally-as-consistent-with-innocence" standard.¹⁵⁵ Instead, it arrived at a similar statement by analogy to a case involving circumstantial evidence.¹⁵⁶ Although substantial in-

147. *Id.* at 62, 55 P. at 1035.

148. An independent witness saw defendant and his accomplice shoot a cow, and he also saw a white man discover them skinning the animal. The accomplice testified that the group followed this white man and killed him to avoid being punished for killing the cow. *Id.* at 60, 55 P. at 1034. The court in *State v. Bolton*, 65 Mont. 74, 87, 212 P. 504, 508 (1922) held that it was proper to consider, on the corroboration issue, evidence that the defendant was seen with the accomplice near in time and place to the crime, and that a motive existed. See also *State v. Jones*, 95 Mont. 317, 325, 26 P.2d 341, 343 (1933).

149. *State v. Yegen*, 86 Mont. 251, 254, 283 P. 210, 211 (1929); *State v. Keithley*, 83 Mont. 177, 184, 271 P. 449, 452 (1928).

150. 95 Mont. 317, 26 P.2d 341 (1933).

151. *Id.* at 325, 26 P.2d at 343.

152. 107 Mont. 253, 84 P.2d 341 (1938).

153. 130 Mont. 533, 305 P.2d 338 (1957).

154. *Keckonen*, 107 Mont. at 255, 84 P.2d at 341-42; *Gangner*, 130 Mont. at 534, 305 P.2d at 339.

155. Ignoring *Jones*, the court purported to define "tend" for the first time in connection with the corroboration rule. *Keckonen*, 107 Mont. at 260, 84 P.2d at 344.

156. *Id.* at 261, 84 P.2d at 344. The court adapted for purposes of the corroboration

dependent evidence was introduced in *Keckonen*, the court held that it showed only an opportunity to commit the offense and was therefore insufficient.¹⁵⁷

*State v. Gangner*¹⁵⁸ also included substantial independent evidence, including discovery of the defendant and the boy accomplice unclothed in bed together, but the court again found that the evidence showed no more than opportunity to commit the offense.¹⁵⁹ *Gangner* stretched the *Jones-Keckonen* "equally-as-consistent-with-innocence" rule to its limit, demonstrating the near impossibility of meeting the standard if it is strictly applied. Later cases retreated from such a burdensome requirement.¹⁶⁰

*State v. Barick*¹⁶¹ did not mention the *Jones-Keckonen* rule, referring instead to the 1899 construction: "Evidence which 'tends to connect' is that evidence which taken by itself leads to the inference, not only that a crime has been committed, but the prisoner is implicated in it."¹⁶² The court in *Barick* nonetheless applied a high standard to test the sufficiency of the corroboration, which included the defendant's admission to a third party of his involvement in the crime. Without the admission, other substantial corroborative evidence was considered insufficient.¹⁶³

Two recent cases illustrate the supreme court's vacillation in applying the corroboration rules, both as to the quantity and character of evidence required. *State v. Briner*¹⁶⁴ applied a much less demanding standard than *Barick* to find adequate corroboration.¹⁶⁵ In *State v. Coleman*¹⁶⁶ the court returned to the *Jones-Keckonen* rule. The court applied the rule less restrictively than it had in *Gangner*,¹⁶⁷ finding adequate corroboration to send the case to the jury.¹⁶⁸ Some language in *Coleman* is misleading, however. The court's statement that "the evidence does not *establish* any reasonable explanation pointing toward innocent conduct"¹⁶⁹ certainly is

rule a definition of "tend" from *Moffett v. Bozeman Canning Co.*, 95 Mont. 347, 362, 26 P.2d 973, 979 (1933) (Anderson, J., dissenting).

157. 107 Mont. at 263-64, 84 P.2d at 345.

158. 130 Mont. 533, 305 P.2d 338 (1957).

159. *Id.* at 535, 305 P.2d at 339.

160. *See, e.g., State v. Coleman*, ___ Mont. ___, 579 P.2d 732, 748 (1978).

161. 143 Mont. 273, 389 P.2d 170 (1964).

162. *Id.* at 283, 389 P.2d at 175, *citing State v. Geddes*, 22 Mont. 68, 83, 55 P. 919, 924 (1899).

163. *Barick*, 143 Mont. at 283, 389 P.2d at 175.

164. 173 Mont. 185, 567 P.2d 35 (1977).

165. *Id.* at 191-92, 567 P.2d at 38-39.

166. ___ Mont. ___, 579 P.2d 732 (1978).

167. *See text accompanying note 158 supra.*

168. *Coleman*, ___ Mont. ___, 579 P.2d at 748.

169. *Id.* (emphasis added). Use of "establish" merely may be a bad choice of words,

a turnaround from whether evidence is "equally consonant" with innocence as with guilt.¹⁷⁰ An appropriate standard is whether the independent evidence points more likely to guilt than to innocence.

The foregoing discussion suggests a two-step analysis of corroboration evidence. The first step focuses on the "tend to connect" requirement: Does the independent evidence point to the defendant? The *Jones-Keckonen* rule can be applied in this first step. The second step focuses on the quantity of evidence that passes the first test: Is the independent evidence that tends to connect the defendant "substantial?" The court has never expressly recognized these two branches of the corroboration rule, relying sometimes on one or the other, sometimes on both. The court's most recent discussions of the corroboration statute do not alleviate this confusion.

3. Survey cases

*State v. Standley*¹⁷¹ involved the theft of 106 televisions from a Ramada Inn. The thieves transported the stolen sets in a van, which was parked temporarily on one Dosdall's property. Dosedall in turn stole eight of the sets for himself from the thieves.¹⁷² The court treated Dosedall as an accomplice, so his testimony required corroboration.¹⁷³

The court cited *Cobb*, *Keckonen*, and *Coleman* for the rules to be applied, but did not apply the rules in examining specific evidence. The court held the following evidence sufficient to corroborate the accomplice testimony:¹⁷⁴ (1) Dosedall's employee testified that he put the van on Dosedall's property, and helped Dosedall steal the eight sets from the original thieves. The court did not consider that the employee was also an accomplice,¹⁷⁵ nor did it explain how this evidence implicated the defendant Standley. (2) Tires brought in by the defendant for repair were comparable in size to tracks found near the warehouse from which the televisions were stolen.

not intended to change the rule. If so, such imprecision adds to uncertainty in what is already a cloudy area.

170. *Keckonen*, 107 Mont. 253, 261, 84 P.2d 341, 344 (1938).

171. ___ Mont. ___, 586 P.2d 1075 (1978).

172. *Id.* at ___, 586 P.2d at 1075-76.

173. *Id.* at ___, 586 P.2d at 1077. The trial court instructed the jury that Dosedall was an accomplice, and the defendant did not object to this instruction. The supreme court apparently treated Dosedall and the defendant Standley as accomplices in the same crime.

174. *Id.* at ___, 586 P.2d at 1077. Again the court said that the independent corroborative evidence did not "establish any reasonable explanation pointing toward innocent conduct." *Id.* (emphasis added). See notes 169 & 170 and accompanying text *supra*.

175. One accomplice can't corroborate another. *State v. Bolton*, 65 Mont. 74, 88, 212 P. 504, 509 (1922).

The tires were not described as unusual in size, and the court did not explain how they implicated the defendant more than any other motorist with flat tires of that size. (3) The tires were brought in for repairs one day after Dosedall said the defendant removed them from the van. Since the significance of the timing depended on Dosedall's testimony, this evidence was not independent. (4) The defendant drove a Toyota truck, just as Dosedall described. Again, this depended on Dosedall's testimony for its significance. (5) The eight sets found in Dosedall's house were identified as stolen from the Ramada Inn. This evidence alone cannot be said to implicate Standley as the thief.

The evidence relied on by the court in *Standley* substantially corroborated the accomplice testimony, but the court did not ask two important preliminary questions: First, "Is the evidence independent?" and second, "Does it point to the defendant?" The only evidence that fits within the corroboration rule is the second item listed above, that the tires brought in for repair were similar in size to the tracks left at the scene of the crime. Taken alone, this would not satisfy even the *Spotted Hawk* standard, let alone the *Jones-Keckonen* rule.

*State v. Owens*¹⁷⁶ offers a better discussion and application of the corroboration rule. There an innocent companion of the defendant and an accomplice testified to several facts which clearly implicated the defendant in a bizarre murder. The court again cited *Cobb*, *Keckonen*, and *Coleman*, but this time applied the principles of those cases. The court listed the corroborative evidence it considered to test its sufficiency to support the conviction, and each of the items not only was independent but also pointed toward the defendant.¹⁷⁷

*State v. Kemp*¹⁷⁸ involved the illegal sale of drugs in an elaborate scheme described by an accomplice.¹⁷⁹ The court first dis-

176. — Mont. —, 597 P.2d 72 (1979).

177. *Id.* at —, 597 P.2d at 76. The independent evidence included the defendant's purchase of shotgun shells on the day of the murder, and the fact that he had no license to hunt. The same type of ammunition was used to kill the victim. The defendant also made incriminating statements to the arresting officer. The two killers' female companion, who was not involved in the killing, testified that the two brothers left together with the victim, after threatening him if he wouldn't cooperate. Also, she testified that the two brothers returned to their motel together after the murder and later dictated to her a list of items stolen from the victim's car.

178. — Mont. —, 597 P.2d 96 (1979).

179. *Id.* at —, 597 P.2d at 97-98. The accomplice testified that she made a deal with the defendant to buy \$12,000 of methamphetamines. She then contacted others to participate, and they all met in a Livingston motel to close the deal. The following day, the defendant brought back one ounce of the drugs, and the accomplice stored her share with a friend

cussed the policy behind the corroboration statute:

[The accomplice] turned state's evidence in exchange for immunity from prosecution. Since her consent to cooperate stemmed from her desire to avoid prosecution, she cannot be said to be without motive to fabricate. This factor, coupled with her status as an admitted accomplice to the charge, renders the information she provided particularly suspect.¹⁸⁰

Then the court analyzed each item of evidence in light of the principles stated in *Keckonon*, *Gangner*, and other cases.¹⁸¹ First, motel records and the testimony of a friend who stored the accomplice's drugs did not meet the requirements of the corroboration statute. Although they corroborated the accomplice on other matters, they did not point to the defendant.¹⁸² Second, testimony of the banker who wired money for the drug purchase and the accomplice's ledger and address book were also discarded, since they depended on the accomplice testimony for their significance.¹⁸³ The only independent evidence that fit within the statute was the nearness in time of the money wire and the drug deal. The court acknowledged that this fact cast suspicion over the defendant, but noted that suspicion and opportunity are not enough to corroborate accomplice testimony.¹⁸⁴

The court in *State v. Holliday*¹⁸⁵ merely recited the rules set out in *Cobb* and *Coleman* and with minimal examination found the requirements of those rules met.¹⁸⁶ The court may have omitted discussion because the same issue was dealt with in a related case, but even that case is questionable in its analysis of the corroborative testimony.¹⁸⁷

The latest Montana case dealing with corroboration of accom-

in Three Forks while she went to Bozeman. Money for the deal was wired from a North Dakota bank.

180. *Id.* at ___, 597 P.2d at 98.

181. *Id.* at ___, 597 P.2d at 99.

182. *Id.*

183. *Id.*

184. *Id.*

185. ___ Mont. ___, 598 P.2d 1132 (1979).

186. *Id.* at ___, 598 P.2d at 1136.

187. See *State v. Fitzpatrick*, ___ Mont. ___, 569 P.2d 383 (1977). Fitzpatrick and Holliday were two of five codefendants who conspired to rob a supermarket in Hardin, Montana. The corroborative evidence in *Fitzpatrick* showed that the five defendants went in two cars to Hardin at about the time the crime was committed, and customers in the store noticed a car similar in color to one of the defendants' cars. Evidence of a bullet hole in the windshield of one of the cars depended on an accomplice for its significance, and testimony from a conspirator who did not go to Hardin was also considered. *Fitzpatrick*, ___ Mont. ___, 569 P.2d at 394.

plice testimony is *State v. Williams*,¹⁸⁸ which involved a conspiracy to commit burglary and theft. After reciting a number of now familiar corroboration cases, the court focused on the "tend to connect" requirement.¹⁸⁹ The court then listed specific independent evidence that corroborated the accomplice, and each item pointed to the defendant.¹⁹⁰ *Williams* illustrates well the type of evidence required to satisfy the corroboration statute.

4. Summary and Conclusion

Recent Montana cases have done little to clarify the law relating to corroboration of accomplice testimony. Given the court's treatment of this statutory requirement over its long history, clarification is needed. The court has vacillated between strict and liberal applications of judicial rules interpreting Montana's corroboration statute. This inconsistency invites further litigation on the issue.

The court should establish a unified standard to apply to corroboration cases. *Kemp*, *Owen*, and *Williams* are a good beginning. The corroboration statute and prior case law suggest a three-step analysis: First, determine whether the corroborative evidence is independent; that is, whether it depends on the accomplice testimony for its meaning. Second, determine whether the independent evidence points to the defendant. The *Jones-Keckonen* test is appropriate here, if not applied too strictly.¹⁹¹ A proper standard for applying the *Jones-Keckonen* rule is whether the evidence points more likely to guilt than to innocence.¹⁹² Finally, determine whether the evidence which passes the first two steps is "substantial." It should cast more than suspicion, but need not itself be sufficient to support a verdict, or even establish probable cause.

188. — Mont. —, 604 P.2d 1224 (1979).

189. *Id.* at —, 604 P.2d at 1230.

190. *Id.* As to the burglary: (1) defendant had constructive possession of the stolen stereo; (2) defendant admitted giving a gun to a woman, and the gun was identified as the one stolen in the burglary; (3) defendant knew the victim and had had an opportunity to see the stereo in the victim's home. As to the robbery: (1) defendant admitted being with the perpetrators immediately before the robbery and for much of the preceding evening; (2) defendant admitted going to the gas station that was robbed, and also that he loaned his car to the robbers during the time they committed the crime; (3) half of a rope from an exercise device (matching the rope used in the crime) was found under defendant's kitchen sink.

191. See text accompanying note 158 *supra*.

192. See text accompanying note 170 *supra*. This standard would not violate the proof-beyond-reasonable-doubt requirement in criminal cases. The question of whether accomplice testimony is corroborated is only a preliminary question of law for the court. *State v. Kemp*, — Mont. —, 597 P.2d at 99; *State v. Jones*, 95 Mont. at 324, 26 P.2d at 342. The jury then considers the evidence with the accomplice testimony to decide whether guilt has been proved beyond a reasonable doubt.

F. *Other Crimes Evidence: Rule 404(b)*

Three recent Montana Supreme Court cases have created some uncertainty about the circumstances in which the state may introduce evidence that the defendant previously committed other crimes or wrongful acts. The first opinion, *State v. Just*,¹⁹³ grafts strict procedural and foundation requirements onto Montana Rule of Evidence 404(b).¹⁹⁴ However, *State v. Patton*¹⁹⁵ and *State v. Brubaker*,¹⁹⁶ decided within a month and a half of *Just*, indicate that the court may be adopting a less restrictive analysis of Rule 404(b).

1. *Procedural Requirements*

In *Just*, the court adopted a minority position followed by the Minnesota courts¹⁹⁷ and established the following procedural safeguards: (1) the party seeking to introduce evidence that the defendant committed other crimes or wrongful acts must notify the defendant that the evidence will be offered and the purposes for which it is to be admitted; (2) at the time of introduction of the evidence, the trial court must explain to the jury the purpose of the evidence and admonish it to weigh the evidence for only that purpose; (3) in its final charge the court must instruct the jury that the evidence was received for only the limited purpose earlier stated, that the defendant is not being tried and cannot be convicted for any offense except that charged, and that the conviction for other offenses may result in unjust double punishment. The majority decided to impose these requirements prospectively only.¹⁹⁸ Justice Shea dissented from this portion of the opinion.¹⁹⁹

193. — Mont. —, 602 P.2d 957 (1979). The opinion decided on September 17, 1979, was written by District Judge W.W. Lessley, sitting in place of Justice Sheehy. Justice Shea dissented.

194. Rule 404(b), which became effective in 1977, provides:

(b) Other crimes, wrongs, acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

195. — Mont. —, 600 P.2d 194 (1979). *Patton* was decided September 25, 1979. Justice Daly, who concurred in *Just*, wrote the opinion for a unanimous court.

196. — Mont. —, 602 P.2d 974 (1979).

197. *Just*, — Mont. —, 602 P.2d at 962-64. The Minnesota rule set forth in *State v. Billstrom*, 276 Minn. 174, 178-79, 149 N.W.2d 281, 284-85 (1967) also has been adopted by Louisiana and Oklahoma. *State v. Prieur*, 277 So.2d 126, 130 (La. 1973); *Burks v. State*, 594 P.2d 771, 774 (Okla. Crim. App. 1979).

198. *Just*, — Mont. —, 602 P.2d at 963.

199. *Id.* at —, 602 P.2d at 966.

In *Brubaker*, the court reiterated its intention to apply the procedural rules prospectively²⁰⁰ and imposed yet another requirement: "[T]he jury should be instructed that such prior [crimes] . . . are circumstantial evidence of the defendant's guilt with respect to the crime charged and the usual cautionary instructions [should be] given with respect to the application and consideration by a jury of circumstantial evidence."²⁰¹ The court did not state whether this instruction would be required only on retrial of *Brubaker* or whether the court was establishing a rule for all future cases.

Brubaker also clarified the foundation that must be laid before introducing other crime evidence. The court criticized the record because it did not show clearly how many prior crimes were being ascribed to the defendant: "The evidence is most confusing. One could conclude that the evidence shows at least five prior assaults, or it might be concluded that [the witnesses] . . . are all describing one assault . . ."²⁰² The court held that as "a matter of proper foundation" the state must prove "with reasonable particularity and certainty the number of other assaults being testified to . . ."²⁰³

2. Requirements for Admissibility

In *Just* the court found that there is a "four element test to determine the admissibility of evidence of other crimes."²⁰⁴ (1) the other crimes or acts must be similar to the one charge; (2) they must be near in time to the crime charged; (3) they must tend to establish a common scheme, plan or system; and (4) the prejudice to the defendant must not substantially outweigh the probative value of the evidence.

The fourth requirement simply restates Montana Rule of Evidence 403.²⁰⁵ The other three elements are taken from *State v.*

200. *Brubaker*, ___ Mont. ___, 602 P.2d at 981.

201. *Id.* at ___, 602 P.2d at 982.

202. *Id.*

203. *Id.*

204. *Just*, ___ Mont. ___, 602 P.2d at 961. *Just* deals with the admissibility of prior sex offenses committed by the defendant against the prosecutrix. But the court does not expressly limit the case's applicability to this narrow factual setting. Further, the court cites as support cases that involve varying types of offenses. *See, e.g.*, *State v. Taylor*, 63 Mont. 106, 515 P.2d 695 (1973) (second-degree murder); *State v. Frates*, 160 Mont. 431, 503 P.2d 47 (1972) (sale of dangerous drugs). Both cases were cited in *Just*, ___ Mont. ___, 602 P.2d at 960.

205. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or mislead-

Jensen,²⁰⁶ a pre-rules case, and unduly restrict application of Rule 404(b). To illustrate, *Just* and *Jensen* mandate that other crime evidence establish a common scheme, plan, or system. However, Rule 404(b) provides that such evidence is admissible for many purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Patton does not apply the restrictions set forth in *Just*. In *Patton*, the court decided that the other crime evidence was admissible to show intent²⁰⁷ and stated, without reference to *Just*, that the *Jensen* requirements did not apply.²⁰⁸ The court retained the Rule 403 mandate that the prejudicial value of the evidence cannot substantially outweigh its probative value, which is consistent with federal authority.²⁰⁹

While the result in *Patton* is sound, the court's reasoning is unclear. The court stated that *Jensen* was inapplicable because:

This testimony was not offered to establish that defendant had committed other crimes; it was offered to prove that before he forceably assaulted her, defendant had verbally attempted to seduce the complaining witness. This being so, it was not crucial that the State demonstrate "similarity of crimes or acts, nearness in time, and tendency to establish a common scheme, plan or system. . . ."²¹⁰

However, the court failed to state how *Patton* differs from other cases in which the *Jensen* test was applied. For instance, in *Just*, as in *Patton*, the evidence was not admitted "to establish that defendant had committed other crimes," and still the *Jensen* requirements were imposed.

Brubaker adds to the confusion. The court, relying on a 1960 decision, repeated the requirements of *Jensen* that for "evidence

ing the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

206. 153 Mont. 233, 239, 455 P.2d 631, 634 (1969).

207. *Patton*, ___ Mont. ___, 600 P.2d at 198.

208. *Id.* at ___, 600 P.2d at 199. The discussion in *Patton* arguably is dictum since the court found that the defendant's failure to properly object to the other crime evidence at trial impaired his right to raise the issue on appeal.

209. *Id.* 10 MOORE'S FEDERAL PRACTICE § 404.21[2], at IV-114, -15 (2d ed. 1979) states: Although the legislative history of subsection (b) favors admissibility, both the legislative history and the Advisory Committee's Note leave considerable discretion to the trial judge in admitting or excluding such evidence. The danger of undue prejudice must be balanced against the probative value of the evidence in making this determination. An accounting as to the availability of other means of proof and factors discussed in Rule 403 is also helpful in ruling on the admission of other crimes evidence.

210. *Patton*, ___ Mont. ___, 600 P.2d at 199.

of unrelated crimes to be admissible . . . it must appear that the evidence of the other crimes tends to establish a common scheme, plan, system, design or course of conduct similar to or closely connected with the one charged” and not be too remote in time.²¹¹ The court stated that “[i]t appears that these earlier statements of this Court have now been incorporated into rule 404(b)”²¹² Nevertheless, the court approved an instruction that would allow other crime evidence to prove “defendant’s possible motives, opportunities, intent, preparation, plan, knowledge, identity,” or absence of mistake or accident.²¹³

The court’s failure to recognize and resolve the conflict between the *Jensen* rule and Rule 404(b) raises uncertainty about the purposes for which other crime evidence may be admitted. While the court continues to cite the *Jensen* requirement that other crime evidence is allowed to show only a common scheme, plan, or design, *Brubaker* indicates that the court approves the many other purposes listed in Rule 404(b).²¹⁴

The problems raised in determining what other crimes are similar and how recently they must have occurred make it desirable to discard the *Jensen* test.²¹⁵ In some cases, remoteness in time

211. *Brubaker*, ___ Mont. ___, 602 P.2d at 981. The court cites *State v. Merritt*, 138 Mont. 546, 549, 357 P.2d 683, 684 (1960).

212. *Brubaker*, ___ Mont. ___, 602 P.2d at 981.

213. *Id.* at ___, 602 P.2d at 982.

214. Two cases decided less than a year before *Just* support the conclusion that the court has in fact abandoned the *Jensen* rule. In *State v. Leighty*, ___ Mont. ___, 588 P.2d 526, 530 (1978), the court held that Rule 404(b) permitted the use of other crime evidence to show that the defendant acted with knowledge of the illegality of his conduct and not out of mistake or accident. In *State v. Gone*, the court allowed other crime evidence to show “consciousness of guilt” and criminal intent, stating, “The Commission Comment to this rule notes that Montana law is consistent with the concept that purposes other than those listed may be used to admit evidence of other crimes.” ___ Mont. ___, 587 P.2d 1291, 1295 (1978). Further, neither *Leighty* nor *Gone* required that the other crime be similar to the one charged; it is arguable that in both cases the previous acts that were held admissible were dissimilar to the charges facing the defendants. In *Leighty*, the defendant was charged with outfitting without a license. The “other crime” evidence concerned admission of written documentation of the initial revocation of his license. *Id.* at ___, 588 P.2d at 529-30. In *Gone*, the defendant was tried for aggravated assault for firing a gun into a bar; the other crime was resisting arrest and assaulting a highway patrolman. *Id.* at ___, 587 P.2d at 1293-95.

215. The similarity and time standards have been applied mechanically at times, leading to overly restrictive results. For instance, in a pre-rules case the court decided that another assault by the defendants in the same city within a day of the crime charged was not similar to that crime: “[T]o show defendants’ . . . participation in other assaults on dissimilar men at dissimilar places and for dissimilar purposes does not satisfy” the element of similarity. *State v. Crowl*, 135 Mont. 98, 337 P.2d 367, 369 (1959). *Crowl* appears to require the crimes be identical rather than similar. The court in *Just*, in considering how near in time the prior act must be, stated: “[T]hree years before is close to the limit as being too remote for probative value.” *Just*, ___ Mont. ___, 602 P.2d at 961. This approach is too

and dissimilarity of crime may not destroy the probative value of the evidence under Rule 404(b). In those cases in which the probative value is low, the evidence can be properly excluded under Rule 403.

Because of inconsistencies in prior Montana case law, it is ironic that *Just* and *Brubaker* look to pre-rule authority for support. The Montana court changed its position on other crime evidence at least three times before the rules became effective. The court first adopted the general rule now embodied in Rule 404(b).²¹⁶ Then, in 1952 it abolished altogether the admission of evidence of other crimes.²¹⁷ In 1969 *Jensen* firmly established the restrictive three-pronged test that was relied upon in *Just*. This test had been applied before *Jensen*, but not consistently.²¹⁸

Adoption of the Montana Rules of Evidence gave the court a chance to rid itself of Montana's restrictive position. *Just* appears to reassert the *Jensen* test. However, *Patton* and *Brubaker*, decided soon after *Just*, indicate that the court may give Rule 404(b) a proper reading.

G. Hearsay: Rules 803 and 804

In *State v. Brubaker*,²¹⁹ the Montana Supreme Court adopted a narrow reading of three exceptions to the hearsay rule—the exceptions for statements made to a doctor for purposes of diagnosis or treatment,²²⁰ the excited utterance exception,²²¹ and the opened exception of 804(b)(5) for hearsay evidence having a sufficient guarantee of trustworthiness.²²²

Montana Rule of Evidence 803(4) allows admission of hearsay statements "made for purposes of medical diagnosis or treatment and describing . . . the inception or general character of the cause or external source [of past or present symptoms] insofar as reasonably pertinent to diagnosis or treatment." In *Brubaker*, the defendant was convicted of aggravated assault.²²³ The state sought to

inflexible; under the circumstances of particular cases, the probative value of a prior act may decrease appreciably before or after three years.

216. See *State v. Cassill*, 70 Mont. 433, 439-40, 227 P. 49, 52 (1924).

217. *State v. Searle*, 125 Mont. 467, 471, 239 P.2d 995, 997 (1952).

218. The requirements of similarity and proximity in time had been applied sporadically by the court before *Jensen*. For example, these requirements were applied in *State v. Merritt*, 138 Mont. 546, 549-50, 357 P.2d 683, 684 (1960), but were omitted from the court's discussion in *State v. Tully*, 148 Mont. 166, 168-69, 418 P.2d 549, 550 (1966).

219. — Mont. —, 602 P.2d 974 (1979).

220. *Id.* at —, 602 P.2d at 978-79.

221. *Id.* at —, 602 P.2d at 979-80.

222. *Id.*

223. *Id.* at —, 602 P.2d at 975.

show that the victim had told her doctor that injuries she had suffered prior to the beating at issue had been inflicted by the defendant.²²⁴ Even though the doctor in *Brubaker* testified that his inquiries as to the cause of the victim's injuries were important in determining the method of treatment,²²⁵ the court found the foundation inadequate.²²⁶ The court indicated that the foundation might have been sufficient had the doctor been asked how he used the information for diagnosis or treatment.²²⁷ The fact that sufficient grounds for admitting the evidence were stated in an in-chambers conference did not remedy the lack of foundation in the presentation before the jury.²²⁸

Testimony by the victim's mother also was found inadmissible. The neighbor testified that "one night Sharon [the victim] had come pounding on her door to be let in. [The neighbor] testified that Sharon looked a mess and 'had her jaw out as big as a football,' and that Sharon said Jim had beaten her. [The neighbor] also testified to a subsequent occasion . . . when Sharon had come to her bar and . . . told her that 'Jim [the defendant] was after her.'"²²⁹

The court stated that even if Sharon were considered an unavailable witness because of her poor physical condition at the time of trial,²³⁰ the evidence still would not be admissible under Rule 804(b)(5). That rule allows admission of hearsay evidence where the person who made the statement cannot testify²³¹ and the statement, although not covered specifically by any of the exceptions in 804(b), has "circumstantial guarantees of trustworthiness" that are comparable to those of the stated exceptions. The court

224. *Id.* at ___, 602 P.2d at 979.

225. *Id.* The doctor testified as follows:

"Q. Did you inquire as to what happened to her? A. Yes, I asked the statement, what had happened to her. Q. Now was it important for you to know in determination as to what to do next and how to treat her? A. Only insofar as pertaining to my field. Q. And that is to the mouth? A. To the mouth and jaws. Q. And there was injury to the mouth? A. Slight."

226. *Id.*

227. *Id.*

228. *Id.* Chief Justice Haswell, dissenting, stated that repetition of the foundation before the jury was not essential because the foundation had been laid and the evidence ruled admissible in chambers. "A repetition of the foundation testimony before the jury, while preferable, was not essential to any function of the jury at trial." *Id.* at ___, 602 P.2d at 983.

229. *Id.* at ___, 602 P.2d at 979.

230. *Id.* at ___, 602 P.2d at 976, 980. Sharon, who suffered a severe head injury, testified at trial from a wheelchair even though it appeared that her speech was quite impaired.

231. MONT. R. EVID. 804(a) lists those situations in which the declarant is considered unavailable as a witness.

found that the victim's hearsay statement did not have "comparable circumstantial guarantees of trustworthiness, because in this case the testimony of her statements comes from [the neighbor], who admittedly does not like [the defendant]."²³²

This rationale misconstrues Rule 804(b)(5); what is at issue is the trustworthiness of the *declarant's* statement—not the trustworthiness of the witness who is testifying as to the content of the declarant's statement.²³³ Judge Weinstein notes in his commentary on the Federal Rules of Evidence:²³⁴ "In order to determine reliability, 'a trier must be able to determine the credibility of the extrajudicial *declarant* when he made the statement attributed to him. . . .'"²³⁵ This determination is important because under Rule 804(b)(5) the declarant will be unavailable for cross-examination to expose inaccuracies in his perception and memory.²³⁶ However, the witness who is repeating the declarant's hearsay statement is available for cross-examination. The credibility of the witness is a question for the trier of fact, and the witness' possible bias should not disqualify him altogether.²³⁷

Without reference to Rule 803(2), the court in *Brubaker* also found the neighbor's testimony to be inadmissible as an "excited

232. *Id.* at ___, 602 P.2d at 980.

233. The Commission Comments to the Montana Rules of Evidence support this analysis. The Commission Comment to Rule 804(b)(5) states that the comment to Rule 803(24) applies. The comment to Rule 803(24) notes that the criteria for determining trustworthiness are those factors set out in the comments to the other Rule 803 hearsay exceptions. Those comments focus on the trustworthiness of the declarant's statements. For example, the comments to the first three exceptions in Rule 803 emphasize that the spontaneity of the declarant's statement reduces the chance that he is making a deliberate misrepresentation.

234. FED. R. EVID. 803(24) is more stringent than the Montana rule. The federal rule requires that the statement be offered as evidence of a material fact, that it be more probative on the point for which it is offered than any other evidence, that the general purposes of the rules and interests of justice be served, and that notice be given to the adversary. The Commission Comment to Montana Rule 803(24) states that the federal requirements were not adopted because they were "too restrictive."

235. WEINSTEIN'S EVIDENCE ¶ 803(24)[01], at 803-292 (1979) (emphasis added).

236. *Cf.* WEINSTEIN'S EVIDENCE ¶ 803(24)[01], at 803-291 (1979) where it is noted that the judge may want to disallow evidence under Rule 803(24) if he believes that cross-examination "is needed to expose inaccuracies in the perception, memory and narration of the declarant."

237. MONT. R. EVID. 607 allows impeachment of a witness by any party. The Commission Comment notes that traditional methods of impeachment include evidence of bias for or against any party involved in the case. Rule 601, which provides for disqualification of witnesses, does not provide for disqualification simply upon a showing of bias. 10 MOORE'S FEDERAL PRACTICE § 601.07, at VI-25, -27 (2d ed. 1979) states that credibility is largely a jury question although the judge could exclude the evidence if he determines "no one" could believe a witness. Nothing in *Brubaker* suggests, however, that the neighbor's bias against the defendant was so great that her testimony was completely unbelievable.

utterance."²³⁸ Rule 803(2) provides that an excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Even though the declarant in this case arguably was speaking under the stress of a startling event—a beating or threat of violence by the defendant—the court found the evidence inadmissible. Relying on *State v. Newman*,²³⁹ a pre-rules case, the court held that excited utterances are admissible only if they are a part of the *res gestae* of the crime charged.²⁴⁰ However, Rule 803(2) does not require that the excited utterance arise out of the crime at issue—it requires only "an event which causes excitement" and that the declarant speak under the stress of excitement.²⁴¹ Further, the statements in *Newman* were found not to be excited utterances because they were made twelve to thirteen hours after the alleged beating.²⁴² *Brubaker's* application of *Newman* unduly limits the scope of the exception provided in Rule 803(2).

Brubaker indicates that in criminal cases the court may take an especially hard look at hearsay evidence.²⁴³ An extensive foundation should be laid in the presence of the jury for admission of statements made for purposes of diagnosis or treatment. Under Rule 804(b)(5), counsel should be prepared to discuss the trustworthiness of both the witness and the declarant. Further, if the court retains its restrictive approach to the admission of excited utterances, the state will be hard-pressed to make a sufficient showing to justify their admission.

238. *Brubaker*, — Mont. —, 602 P.2d at 980.

239. 162 Mont. 450, 513 P.2d 258 (1973).

240. *Brubaker*, — Mont. —, 602 P.2d at 980.

241. See Commission Comment to Rule 803(2).

242. *Newman*, 162 Mont. at 457, 513 P.2d at 262.

243. Cf. WEINSTEIN'S EVIDENCE ¶ 803(24)[01], at 803-292 (1979), which states:

In interpreting Rule 803(24), it should also be remembered that need and reliability may vary with the type of case being tried. The same courts, which are rather free in admitting hearsay in non-jury cases, are often reluctant to admit hearsay against criminal defendants, in part because of constitutional pressures.

