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NOTES

WHEN CONSUMER PROTECTION BECOMES PREORDAINED: *MALCOLM v. EVENFLO* AND MONTANA'S PRODUCTS LIABILITY STANDARD

Justin Harkins*

I. INTRODUCTION

According to the Montana Supreme Court, Montana's products liability law was enacted in order to provide "maximum protection for consumers against dangerous defects in manufactured products."[1] That goal is a worthy and welcome one: consumers demand and deserve protection from manufacturers that market dangerous products, and the State is uniquely positioned to provide that protection. The application of the maximum protection goal is complicated, however, by the obstacle of determining what, exactly, renders a product dangerously defective. Especially when products are designed to protect consumers from foreseeable dangers, it can be extremely difficult to differentiate actual defects from unavoidable limitations. In many instances, government regulations exist to provide a minimum safety standard that manufacturers must meet before marketing their products.[2]

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1. *Sternhagen v. Dow Co.*, 935 P.2d 1139, 1144 (Mont. 1997).

2. *See e.g.* 49 C.F.R. § 571.213 (2009) (stating the purpose of the regulation for child restraint systems is "to reduce the number of children killed or injured in motor vehicle crashes and in aircraft").

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Unfortunately, the responsible use of an acceptably safe product is not tantamount to invincibility; accidents still happen and people still get hurt. In Montana, injured parties may file suit against the manufacturer or seller of any product whose defective design may have caused or compounded an injury.[3] Montana statutes cannot provide an exhaustive list of products that may be at issue in a given case, replete with any unacceptable defects those products may suffer, so it is incumbent upon individual juries to determine whether each challenged product is indeed defective. According to the *Restatement (Third) of Torts*, a product's performance in safety regulation tests is appropriate information to provide to a jury that may be insufficiently familiar with the product's reasonable expectations.[4] The Montana Supreme Court disagrees.[5]

Through its refusal to adopt the *Restatement (Third)*'s evidentiary standard, the Court has elevated its goal of maximum protection for consumers above its responsibility to fairly and efficiently decide the cases that come before it. This decision begets three especially pernicious and avoidable consequences: first, manufacturers are saddled with the unreasonable burden of justifying their safety-conscious decisions without the ability to present the metric that guides those decisions; second, the impartiality of the jury is compromised because the same test results that are forbidden in determining defectiveness are allowed to help determine punitive damages; and third, manufacturers have a clear incentive to restrict their product lines to only those products that boast the safest designs even to the unreasonable exclusion of products with designs that may be less safe but feature characteristics that are otherwise attractive to discerning consumers. Each of these consequences is on display in the 2009 products liability case *Malcolm v. Evenflo*. Section II of this note presents a brief history of products liability in Montana. Section III provides the facts of *Malcolm*, and Section IV details the Montana Supreme Court's holding and the justices' commentary. Section V analyzes the holding and discusses its effects. Section VI summarizes the implications of *Malcolm* for Montana practitioners.

II. Historical Approach to Products Liability

The Court in *Malcolm*, in both the majority opinion and two of the dissents, discussed the "well-settled, decades-old principles of strict liability" to which the Court adhered.[6] According to *Kuiper v. Goodyear Tire and Rubber Company*, Montana first heard a products liability case in

3. Mont. Code Ann. § 27–1–719 (2011).

4. *Restatement (Third) of Torts: Products Liability* § 4(b) (1998).

5. *Malcolm v. Evenflo*, 217 P.3d 514, 522 (Mont. 2009).

6. *Id.* at 522; *see also id.* at 535 (Nelson, J., concurring and dissenting) and *id.* at 544 (Rice, J., concurring and dissenting).

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1973.[7] At least as far back as *Kuiper* in 1983, the Court distinguished strict products liability from standard negligence. *Kuiper* held that strict liability "imposes on the seller a duty to prevent the release of 'any product' in the defective condition unreasonably dangerous to the user or the consumer, 'into the stream of commerce.'"[8] In 1987, this strict liability approach was codified as Montana Code Annotated § 27–1–719, providing that a seller, whether manufacturer, wholesaler, or retailer, is liable for any physical harm caused by a defective, unreasonably dangerous product. The seller is liable even if it "exercised all possible care in the preparation and sale of the product" and did not directly sell the product to the eventual user.[9] Section 27–1–719(5) provides only two affirmative defenses: (a) the user discovered the defect, or the defect was obvious and the user made use of the product anyway; or (b) the user unreasonably misused the product.[10]

In *Sternhagen*, a 1997 case upon which *Malcolm* relied heavily,[11] the Court enumerated eight public policy considerations that led to the adoption of the strict liability standard. These are:

1. The manufacturer can anticipate some hazards and guard against their recurrence, which the consumer cannot do.
2. The cost of injury may be overwhelming to the person injured while the risk of injury can be insured by the manufacturer and be distributed among the public as a cost of doing business.
3. It is in the public interest to discourage the marketing of defective products.
4. It is in the public interest to place responsibility for injury upon the manufacturer who was responsible for [the defective product] reaching the market.
5. That this responsibility should also be placed upon the retailer and wholesaler of the defective product in order that they may act as the conduit through which liability may flow to reach the manufacturer, where ultimate responsibility lies.
6. That because of the complexity of present day manufacturing processes and their secretiveness, the ability to prove negligent conduct by the injured plaintiff is almost impossible.
7. That the consumer does not have the ability to investigate for himself the soundness of the product.
8. That this consumer's vigilance has been lulled by advertising, marketing devices and trademarks.[12]

7. *Kuiper v. Goodyear Tire & Rubber Co.*, 673 P.2d 1208, 1219 (Mont. 1983).

8. *Id.* at 1222 (quoting *Restatement (Second) of Torts* § 401(a)(65) (1965)).

9. Mont. Code Ann. § 27–1–719(1), (3).

10. Mont. Code Ann. § 27–1–719(5).

11. *Malcolm*, 217 P.3d at 520–522 (majority); *id*. at 530 (Nelson, J., concurring in part and dissenting in part).

12. *Sternhagen*, 935 P.2d at 1142–1143 (citing *Brandenburger v. Toyota Motor Sales*, 513 P.2d 268, 273 (Mont. 1973)).

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Sternhagen also specifically rejected the "state-of-the-art defense," which allows manufacturers to present evidence that a design, while not necessarily safe, was as safe as possible given current technology.[13] Because the state-of-the-art defense includes elements of reasonableness and foreseeability, the Court determined that allowing it

> would inject negligence principles into strict liability law and thereby "sever Montana's strict products liability law from the core principles for which it was adopted—maximum protection for consumers against dangerous defects in manufactured products" with the focus on the condition of the product, and not on the manufacturer's conduct or knowledge.[14]

It was for precisely that reason (indeed, with precisely that quote[15]) that the *Malcolm* Court rejected § 4(b) of the *Restatement (Third)*.[16]

The *Restatement (Third) of Torts: Products Liability* § 4 was introduced in 1998.[17] It consists of two subsections and provides guidance for defective design liability where a government regulation is at issue. Subsection (a) provides that a product's noncompliance with applicable regulation "renders [it] defective with respect to the risks sought to be reduced by the statute or regulation."[18] Subsection (b), deemed "controversial" in Justice Nelson's dissent,[19] provides that

> a product's compliance with an applicable [safety regulation] is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.[20]

The subsections' contrasting effects are important. Under subsection (a), noncompliance with a regulation conclusively establishes that the product is defective, thereby completely removing the decision from a jury.[21] Subsection (b), however, provides only that compliance is proper for consideration, and it expressly restricts potential misapplication by noting that compliance does not bar a jury from determining that a product is defective.[22]

It is apparent both that the Court has taken seriously its mission to provide maximum protection to consumers in products liability cases and that the standard applied in such cases is, as the Court intimated in *Malcolm*, well-settled and decades-old.[23] Noteworthy, though, is that the Court

13. *Sternhagen*, 935 P.2d at 1147.
14. *Id.* at 1144.
15. *Malcolm*, 217 P.3d at 521 (quoting *Sternhagen*, 935 P.2d at 1144).
16. *Malcolm*, 217 P.3d at 522.
17. *Restatement (Third) of Torts: Products Liability* § 4.
18. *Id.* at § 4(a).
19. *Malcolm*, 217 P.3d at 535 (Nelson, J., concurring and dissenting).
20. *Restatement (Third) of Torts: Products Liability* § 4(b).
21. *Id.* at § 4(a).
22. *Id.* at § 4(b).
23. *Malcolm*, 217 P.3d at 521–522.

in *Kuiper* recognized that liability issues focus "on whether the product was defective and unreasonably dangerous, not only upon the conduct of the user or the seller."[24] That the Court included the conduct of the user or seller in the equation whatsoever differentiates the standard it applied in *Kuiper* from the policy it has employed in more recent cases. If any ambiguity remained about the Court's willingness to tolerate the application of the negligence standard in products liability, it was doubtless extinguished by *Sternhagen*,[25] but the fact that the Court's standard has evolved in the past is an encouraging sign that it may do so in the future.

Although not a products liability case, the Court relied heavily on its recent decision in *Sunburst School District No. 2 v. Texaco*[26] in the *Malcolm* analysis, and a short description of the facts and holding in that case will be helpful here. *Sunburst* was decided in August 2007, which was after the jury's original verdict in *Malcolm*.[27] The case was brought by the city of Sunburst, Montana, where Texaco had operated a gasoline refinery from 1924 to 1961.[28] Sunburst alleged various harms incidental to contamination from benzene, a chemical used by the refinery.[29] Following a three-week trial, a jury awarded Sunburst $16 million in compensatory damages, $15 million in restoration damages, and $25 million in punitive damages.[30] Texaco appealed the verdict on several grounds, but the one especially germane to the discussion of *Malcolm* is the district court's exclusion of evidence of discussions Texaco had with Montana's Department of Environmental Quality ("DEQ").[31] Regarding this point, the Court ruled that the district court had acted improperly when it excluded the DEQ evidence because that evidence had bearing on Texaco's state of mind at the time the harm occurred, and "[a] good faith effort to comply with all government regulations 'would be evidence of conduct inconsistent with the mental state requisite for punitive damages.'"[32] Despite this particular ruling, the Court reiterated the broad discretion enjoyed by district courts regarding expert testimony, writing that "without a showing of abuse of discretion, the district court's ruling will not be disturbed on appeal."[33]

24. *Kuiper*, 673 P.2d at 1222.

25. *Sternhagen*, 935 P.2d at 1144.

26. *Sunburst Sch. Dist. No. 2 v. Texaco*, 165 P.3d 1079 (Mont. 2007).

27. *Malcolm*, 217 P.3d at 520.

28. *Sunburst*, 165 P.3d at 1083.

29. *Id.* at 1084.

30. *Id.* at 1086–1087.

31. *Id.* at 1084.

32. *Id.* (citing *Silkwood v. Kerr-McGee Corp.*, 484 F. Supp. 566, 582 (W.D. Okla. 1979)).

33. *Sunburst*, 165 P.3d at 1094 (citing *State v. Vernes*, 130 P.3d 169, 173 (Mont. 2006)).

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III. FACTS

A. *The History of the "On My Way"*

The "On My Way" ("OMW") is a series of rear-facing child safety seats manufactured by Evenflo, designed to safely transport infants weighing up to twenty pounds.[34] The OMW includes a detachable base that allows a user to convert the seat into a baby carrier without disturbing the child. Use of the base is not required, however, because the seat is designed to strap into the car either with the base or without it.[35] If the user chooses not to employ the base, she will route the seatbelt through an open hook, around the back of the seat, and through another hook before securing the seatbelt in its buckle.[36]

Pursuant to Federal Motor Vehicle Safety Standard ("FMVSS") 213, each seat design is tested to determine whether it meets minimum safety standards before the seat can be sold to consumers.[37] It is undisputed that the OMW passed a front-impact test at 27 to 30 miles per hour;[38] in dispute was whether or not the OMW was ever tested in rear-impact, side-impact, or rollover tests, which are not required by FMVSS regulation.[39] At any rate, the OMW was found to be in compliance with applicable regulations and was distributed to sellers for consumer purchase.[40]

By February 1995, Evenflo discovered that the open seatbelt hooks were points of weakness on the OMW model 206.[41] Evenflo alerted the National Highway Traffic and Safety Administration ("NHTSA") that the OMW 206 was not in compliance with FMVSS 213, but the company cited a separate problem with the seat and did not inform the NHTSA of the hook weakness.[42] Evenflo created a retrofit kit that it sent to OMW 206 owners and attached to the 206s that remained in its inventory.[43] For the next series of On My Way safety seats, branded OMW 207, Evenflo strengthened the aforementioned points of weakness.[44] However, even after the changes, Evenflo was alerted to instances of consumer hook failure on both the retrofitted 206 and the production 207.[45]

34. *Malcolm*, 217 P.3d at 517.
35. *Id.*
36. *Id.*
37. 49 C.F.R. § 517.213 (2008).
38. *Malcolm*, 217 P.3d at 517.
39. *Id.*; Appellant's Reply Br., 18, *Malcolm*, 217 P.3d 514 (Mont. 2009).
40. *Malcolm*, 217 P.3d at 517.
41. Appellee's Response Br., 3, *Malcolm*, 217 P.3d 514 (Mont. 2009).
42. *Malcolm*, 217 P.3d at 517.
43. *Id.* at 517–518.
44. *Id.* at 518.
45. *Id.*

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B. Tragedy in Emigrant

In 2000, Jessica and Chad Malcolm lived on a ranch near Emigrant, Montana.[46] Jessica received an OMW 207 as a gift while she was pregnant with their son, Tyler.[47] Jessica called Evenflo to inquire about the safety record of the seat she was given, and the company assured her that the model was safe for use and was not subject to any recalls.[48] On January 16th of that year, Jessica drove to Emigrant. Her sister rode in the front passenger seat, and Tyler, by then an infant, was strapped into the OMW in the back.[49] During the ride back to the ranch, an oncoming driver crossed the middle line and forced Jessica off the road.[50] Her vehicle rolled three times, slid down a hill, and came to rest in a ditch.[51] Jessica emerged relatively unscathed, but her sister and Tyler both suffered serious head injuries.[52] Tyler was found secured in the OMW approximately sixty feet from the spot where the vehicle came to rest; his injuries were fatal.[53] Inspection of the OMW revealed that one of the seatbelt hooks had broken off during the accident.[54]

The Malcolms filed suit against Evenflo, alleging that the OMW 207 "constituted a defectively designed product that failed catastrophically even though they had used the seat in a reasonably anticipated manner."[55] The Malcolms also alleged that the OMW's design was defective due to its open seatbelt hooks and inadequate padding to protect the child's head.[56] The Malcolms argued that Evenflo could have made the OMW safer by designing it with a closed seatbelt tunnel (which, in fact, the OMW base unit featured[57]), instead of its open seatbelt hooks.[58] In addition, the family sought punitive damages, alleging Evenflo consciously and deliberately disregarded the danger the OMW posed to the public when it refused to disclose the seat's spotty performance record.[59]

Evenflo maintained that the OMW was not defective and that Tyler's death was caused exclusively by the force of the accident.[60] The company

46. *Id.*
47. *Id.*
48. *Malcolm*, 217 P.3d at 518.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Malcolm*, 217 P.3d at 518.
55. *Id.* at 519.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Malcolm*, 217 P.3d at 519.

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submitted a scenario in which the door closest to Tyler was forced open during the rollover, leaving Tyler unprotected when he impacted the ground as the car rolled.[61] This hypothesized impact caused the seat to detach from the car and travel unrestrained through the open door, Evenflo argued.[62]

Both parties filed pretrial motions.[63] Evenflo moved for partial summary judgment as to the punitive damages, asserting both that no evidence existed showing actual fraud or malice and that its compliance with FMVSS 213 preempted a claim for punitive damages.[64] The district court denied the motion.[65] The Malcolms filed a motion in limine to exclude evidence of the OMW 207's FMVSS compliance.[66] The district court granted this motion, ruling that the test results were not relevant and would be excessively prejudicial even if they were relevant.[67]

At trial, Lou D'Aulerio, the Malcolms' expert witness, testified that the OMW 206 and 207 models "failed" in 27% of the independent tests that he conducted.[68] Evenflo argued that D'Aulerio's characterization violated the court's in limine ruling because Evenflo could not introduce evidence that the 207 actually had passed FMVSS testing.[69] The court rejected Evenflo's argument.[70] After a ten-day trial,[71] the jury returned a verdict in favor of the Malcolms, awarding $6.7 million in compensatory damages and $3.7 million in punitive damages.[72] The award was, according to Evenflo, "many times greater than any previous wrongful death verdict in the State of Montana."[73] Evenflo appealed both damage awards.[74]

IV. The Supreme Court's Reasoning

The Montana Supreme Court focused its review on four aspects of the case.[75] First, it reviewed whether the district court's exclusion of Evenflo's evidence of FMVSS compliance was improper regarding compensatory damages.[76] In affirming the district court's ruling,[77] the Court relied prima-

61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Malcolm*, 217 P.3d at 519.
67. *Id.*
68. *Id.*
69. Appellant's Reply Br., 13, *Malcolm*, 217 P.3d 514 (Mont. 2009).
70. *Malcolm*, 217 P.3d at 520.
71. *Id.* at 519–520.
72. *Id.* at 520.
73. Appellant's Reply Br., 1, *Malcolm*, 217 P.3d 514 (Mont. 2009).
74. *Id.*
75. *Malcolm*, 217 P.3d at 517.
76. *Id.* at 520.

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rily on the distinction it has drawn between cases sounding in strict liability and those sounding in negligence.[78] Quoting *Lutz v. National Crane Corp.*,[79] the Court noted that "[the] issue in products liability cases is not the *conduct* of the 'reasonable person,' but the *condition* of the product."[80] The Court rejected the *Restatement (Third)* § 4 because it believed that allowing negligence principles into products liability cases would detract from the main purpose of Montana's strict liability law:[81] the "maximum protection for consumers against dangerous defects in manufactured products."[82]

Next, the Court reviewed whether the district court improperly admitted evidence regarding the performance of the OMW model 206, even though the seat at issue in the accident was a model 207.[83] The district court's ruling on this point was also affirmed,[84] despite Evenflo's contention that the designs of the 206 and 207 substantially differed.[85] The Court cited *Preston v. Montana Eighteenth Judicial District Court, Gallatin County*, which held that similar incidents involving similar products are admissible in Montana product liability cases.[86] Ultimately, the Court deferred to the judgment of the district court regarding the two models' similarity and relied on *Sunburst* to determine that the district court's ruling was not an abuse of its discretion.[87]

The Court's third point of review focused on whether the district court unfairly excluded evidence of the OMW 207's compliance with FMVSS 213.[88] Again, the Court refused to reverse the district court on the basis that the lower court did not abuse the broad discretion that it was granted in *Sunburst*.[89] Though the Court admitted that the district court's evidentiary rulings left Evenflo with an arduous task, it emphasized the "heavy burden on the manufacturer of products" that Montana's products liability law demands.[90]

77. *Id.* at 523.

78. *Id.* at 521.

79. *Lutz v. Natl. Crane Corp.*, 884 P.2d 455 (Mont. 1994).

80. *Malcolm*, 217 P.3d at 521 (quoting *Lutz*, 884 P.2d at 462) (emphasis in original).

81. *Malcolm*, 217 P.3d at 522.

82. *Sternhagen*, 935 P.2d at 1144.

83. *Malcolm*, 217 P.3d at 523.

84. *Id.* at 525.

85. Appellant's Reply Br., 31, *Malcolm*, 217 P.3d 514 (Mont. 2009).

86. *Malcolm*, 217 P.3d at 524 (citing *Preston v. Mont. Eighteenth Jud. Dist. Ct., Gallatin Co.*, 936 P.2d 814, 819 (Mont. 1997)).

87. *Malcolm*, 217 P.3d at 525.

88. *Id.* at 526.

89. *Id.* at 530 (citing *Sunburst*, 165 P.3d at 1095).

90. *Malcolm*, 217 P.3d at 530.

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Finally, the Court reviewed whether the district court's exclusion of FMVSS compliance was improper for determining punitive damages.[91] In its sole reversal of the district court, the Court overturned the Malcolms' punitive damage award, holding that FMVSS compliance may evince a "good faith effort" by Evenflo that would not be consistent with the actual fraud or actual malice required for punitive damages.[92] The Court again relied heavily on *Sunburst* in ruling that a court abuses its discretion if it awards punitive damages despite excluding evidence that appears to show the motive or state of mind of the defendant.[93]

Justice Morris wrote the Court's opinion, which Justices Leaphart and Warner joined in full.[94] Chief Justice McGrath wrote a concurring opinion that recommended bifurcating jury trials to prevent juries from hearing evidence affecting punitive damages that they cannot consider for compensatory damages.[95] Justice Rice concurred with the Court's reversal of punitive damages but disagreed with the Court's ruling that the FMVSS exclusion was fairly applied. Citing Montana Rule of Evidence 106, he insisted that "[t]here cannot be one set of evidentiary rules for a plaintiff, and a different set of rules for a defendant, even in a products liability case."[96]

Justice Nelson, with Justice Cotter joining in full, concurred with the Court's decision to uphold compensatory damages but "strenuously" dissented with its decision to reverse on the punitive damages.[97] Justice Nelson's argument was threefold. First, like Justice Rice, he criticized the Court for requiring juries to disregard evidence with respect to compensatory damages that they must consider for punitive damages, saying that "this approach forces jurors into needless and infeasible mental gymnastics."[98] Next, he disagreed with the Court that exclusion of the FMVSS evidence was prejudicial because Evenflo was otherwise successful in presenting evidence to suggest that it had acted in good faith and without actual malice or fraud.[99] Finally, he disagreed that the district court abused its discretion by excluding the evidence.[100] Justice Nelson explained that relevance is not sufficient for admission if the evidence might prove unfairly prejudicial or confusing to the jury.[101] Therefore, even if the evidence had been "marginally relevant," the district court acted within its au-

91. *Id.*
92. *Id.* at 532; *see also* Mont. Code Ann. § 27–1–221.
93. *Malcolm*, 217 P.3d at 531 (citing *Sunburst*, 165 P.3d at 1096).
94. *Malcolm*, 217 P.3d at 516, 533.
95. *Id.* at 533 (McGrath, C.J., specially concurring).
96. *Id.* at 534 (Rice, J., concurring and dissenting) (citing Mont. R. Evid. 106).
97. *Malcolm*, 217 P.3d at 544, 545 (Nelson, J., concurring and dissenting).
98. *Id.* at 534.
99. *Id.* at 542.
100. *Id.* at 543.
101. *Id.* (citing Mont. R. Evid. 403).

thority in excluding the FMVSS results.[102] Nelson relied on *Seltzer v. Morton*[103] in his conclusion that the district court did not "[act] arbitrarily without conscientious judgment or [exceed] the bounds of reason when it excluded the evidence of Evenflo's compliance with FMVSS 213."[104]

V. Analysis

Given the Court's stated priority of maximizing protection for consumers and its historical treatment of products liability issues, its ruling in *Malcolm v. Evenflo* is neither surprising nor, strictly speaking, wrong. The decision is well-founded and well-reasoned, and the deference shown to the district court is laudable. However, the problems caused by the Court's fidelity to precedent and priority are plain and unresolved. These include a fundamental unfairness with respect to manufacturers, an unreasonable demand with respect to jurors, and an unnecessary diminution of the market with respect to consumers. When the Court refused to adopt the evidentiary standard endorsed by the *Restatement (Third)*, these problems were implicitly accepted as tolerable consequences in pursuit of the Court's priorities, yet it remains unclear how the introduction of regulation test results would unduly hinder a compelling products liability claim. The current standard's questionable value does not overcome its weaknesses, and the following analysis will demonstrate that Montana's Supreme Court should retire its products liability precedent in favor the superior standard set forth in § 4 of the *Restatement (Third) of Torts*.

A. A Fundamental Unfairness With Respect to Manufacturers

The Montana Supreme Court's refusal to allow manufacturers to present evidence of their compliance with applicable government regulations requires manufacturers to defend against claims of defectiveness and inadequate safety without any functional definitions of "defectiveness" or "safety." The rule in Montana states only that "[a] product is in a defective condition to a user if it is dangerous to an extent beyond that anticipated by the ordinary user,"[105] thereby introducing additional vague terminology into an already murky landscape. In disallowing evidence of regulatory compliance, the Court has effectively deprived both manufacturer and jury of valuable, concrete information regarding a given product's relative safety.

102. *Malcolm*, 217 P.3d at 543 (Nelson, J., concurring and dissenting).

103. *Seltzer v. Morton*, 154 P.3d 561 (Mont. 2006).

104. *Malcolm*, 217 P.3d at 543 (Nelson, J., concurring and dissenting) (citing *Seltzer*, 154 P.3d at 582).

105. Mont. Pattern Jury Instr. Civ. 7.01 (2d ed. 2003).

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As *Malcolm* illustrates, the ambiguity created by the Court's standard is easily exploited by opportunistic plaintiffs. From the trial's opening statement onward, the Malcolms sought to depict the OMW as having "failed."[106] They referred to "failures" during independent testing.[107] They referred to "failures" of individual parts of the seat.[108] They even introduced into evidence a chart entitled "test failures."[109] As Justice Rice put it in his dissent, however, "[w]hile the efficacy of the FMVSS 213 testing can certainly be debated, nonetheless, the truth is, the OMW seat had actually passed that testing."[110] The *Malcolm* Court allowed the plaintiffs to capitalize on the lower court's evidentiary ruling when it dismissed Evenflo's objections as "semantic" arguments about the appropriate level of technicality that should be afforded to the word "failures."[111] According to Justice Rice, "[f]rom Malcolms' one-sided characterization of the testing, the jury took to deliberations a simple, powerful, yet fundamentally untrue proposition: that the OMW seat had 'failed' mandatory testing."[112]

The Court should adopt the evidentiary standard endorsed by the *Restatement (Third)* in order to ensure a fair trial for both plaintiff and defendant. This standard would allow manufacturers to educate juries about the required regulations. It would also allow manufacturers to differentiate empirically between the performance of two products, such as the OMW 206 and 207, that may seem substantially similar but may include certain significant differences, and it would make it harder for plaintiffs to unfairly misrepresent product performance. The public policy considerations at issue would remain viable because the strict liability standard inherently places a heavy burden on the manufacturer, and the *Restatement* specifically notes that regulatory compliance is not sufficient to establish absence of defect.

The district court in *Malcolm* prohibited evidence of FMVSS compliance in part because it thought that the results would confuse the jury,[113] but the Court later expressed confidence in juries' abilities to overcome what Justice Nelson deemed the "mental gymnastics"[114] required to consider the defendant's regulatory compliance for punitive damages but not for compensatory damages.[115] If the Court trusts juries to parse evidence

106. *Malcolm*, 217 P.3d at 526 (majority).

107. *Id.* at 527.

108. *Id.* at 526.

109. *Id.* at 527.

110. *Id.* at 534 (Rice, J., concurring and dissenting).

111. *Id.* at 526 (majority).

112. *Malcolm*, 217 P.3d at 534 (Rice, J., concurring and dissenting).

113. *Id.* at 519 (majority).

114. *Id.* at 534 (Nelson, J., concurring and dissenting).

115. *Id.* at 532 (majority).

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with regard to different types of awards, it should also trust juries to understand that a product can be both compliant and defective.

The Supreme Court of Appeals in West Virginia dealt with this very issue in *Johnson v. General Motors Corporation*.[116] *Johnson* involved a two-car, head-on collision in which both drivers were killed.[117] The plaintiffs in the case were Gregory and Andrew Johnson, brothers riding in the backseat of a car that was being driven by one of their parents.[118] The Johnsons filed suit against General Motors Corporation ("GM"), maintaining that the car's lap-only seatbelts constituted a defective design.[119] Much like in *Malcolm*, the Johnsons' claim asserted that the defectiveness of the seatbelt design was, at least in part, due to the availability of a superior alternative design (in this case, the now-standard lap and shoulder restraint system).[120] The jury agreed that the lap-only belt was defective and awarded $3.1 million to Gregory and $45,000 to Andrew.[121]

On appeal, the West Virginia Court reviewed the jury instruction regarding GM's FMVSS compliance. The instruction read, in pertinent part:

> In the course of the trial of this lawsuit, evidence has been introduced to the effect that the vehicle, manufactured and sold by Defendant, complied with certain Federal Motor Vehicle Safety Standards established by the National Highway Transportation Safety Administration.
>
> With respect to those Federal Motor Vehicle Safety Standards, you are instructed that compliance by a manufacturer with federal standards, existing at the time the product was manufactured and prescribing standards for design, inspection, testing, or manufacture of a product, is a factor which you may take into consideration in determining whether the car was defective. It is not of itself conclusive either way.
>
> I charge you that industry standards are not conclusive as to ordinary care and design or manufacture, but rather are admissible evidence for your consideration, together with all the other evidence in this case.[122]

The West Virginia Court upheld the jury instruction and remarked, notably, that "the jury did not have to find that the manufacturer's conduct was reasonable merely because it followed the federal motor vehicle safety standards."[123] That the jury eventually found for the plaintiff, even with the inclusion of the FMVSS compliance evidence, confirms that the *Restatement (Third)* standard neither expressly nor practically precludes a jury from finding for a plaintiff when appropriate. The West Virginia instruc-

116. *Johnson by Johnson v. Gen. Motors Corp.*, 438 S.E.2d 28, 33 (W. Va. 1993).

117. *Id.* at 31.

118. *Id.*

119. *Id.*

120. *Id.* at 31–32.

121. *Id.* at 32. The trial court reduced the awards by the amount the Johnsons each received from the estate of the driver with whom they collided. The full awards were eventually reinstated on appeal.

122. *Id.* at 39.

123. *Johnson*, 438 S.E.2d at 39.

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tion succinctly and specifically explains both the ability of the jury to consider the compliance information and its freedom to nevertheless deem the product defective. It represents a suitable application of the *Restatement*'s recommendation, and the Montana Supreme Court would do well to evince a similar faith in its jurors.

The purpose of a products liability trial is to determine whether an injury occurred due to a dangerous, defective product;[124] the purpose of such a trial is not to guarantee the redistribution of wealth from an innocent manufacturer to an injured party "as a cost of doing business."[125] By allowing plaintiffs to misrepresent products' performance results to the degree found in *Malcolm* and then by removing the only recourse the manufacturers have for refuting such misrepresentations, the Court is saddling manufacturers with a burden that borders on insurmountable. Given the policy considerations the Court outlined in *Sternhagen*, though, one wonders if an insurmountable burden is precisely the aim. That "the cost of injury may be overwhelming to [a] person"[126] is unfortunate, and the Court's evident sympathy to injured parties is admirable. However, it is irresponsible and unjust to refuse to consider a product's regulatory compliance under the policy justification that a manufacturer can simply defray the cost of the injury among plenty of other people who bear no responsibility for it.[127] While this notion of spreading the loss among each consumer has legitimate appeal,[128] it does not follow that the Court should ensure access to that emergency fund at every opportunity. As Marshall Shapo warned in his book *Products Liability and the Search for Justice*, "we observe that tort law must always be sensitive to the trap of Robin Hood-ism: requiring one person to compensate another just because the first person is richer."[129]

B. An Unreasonable Demand upon Jurors

It is heartening that the Montana Supreme Court has sufficient faith that jurors can hear evidence regarding regulatory compliance and then compartmentalize that evidence when it comes time to decide a case. Not all of the Court's members share the majority's confidence, however. In his dissent, Justice Nelson wrote, "it is precisely because we cannot rely on the jury to parse evidence in this manner that we require evidence of the defen-

124. Mont. Code Ann. § 27–1–719(2).

125. *Sternhagen*, 935 P.2d at 1142.

126. *Id.* at 1143.

127. *Id.*

128. *See e.g.* Marshall S. Shapo, *Products Liability and the Search for Justice*, 103–104 (Carolina Academic Press 1993).

129. *Id.* at 104.

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dant's financial worth to be presented in a separate proceeding."[130] Even if one agrees with the more optimistic position, the idea that the juries can perform the task does not mean they should.

Malcolm follows *Sunburst* as the second case in recent years in which a punitive damage award was overturned by the Supreme Court because of a district court's misapplication of the evidentiary rules.[131] In order to award punitive damages, a jury must conclude that the defendant acted with actual fraud or malice.[132] The Court determined that Evenflo's regulatory compliance was evidence of its state of mind at the time of manufacture and was, therefore, relevant to the punitive damage assessment.[133] However, the Court had already concluded that same evidence was properly excluded by the district court with regard to the compensatory damage assessment.[134] These conflicting standards basically require district courts to hold separate trials to determine each type of award. With commendable forbearance, the district court noted that "dilemmas such as this are unwelcome in jury trials."[135] The Court admits that it recognizes the "difficulties highlighted by the district court," yet it chose to punt on the issue because it "need not" address it under *Malcolm*'s specific facts and instead ordered a new trial to determine the Malcolms' punitive damages with no further instructions for the next district court that encounters the problem.[136] As Justice Nelson stated in his dissent, "this approach forces the Malcolms to retry their entire case to a different jury, with the concomitant waste of time, money, and resources to the civil justice system—a 'dilemma' left unresolved in *Sunburst* and unresolved here."[137]

This is a dilemma that would be wholly resolved by adoption of the *Restatement (Third)* approach because the jury would be allowed, simply and unequivocally, to hear the evidence that is currently at the center of the problem. Chief Justice McGrath and Justice Nelson recommend bifurcating the trial to determine compensatory and punitive damage awards,[138] but Montana law requires that the trier of fact also determine liability for punitive damages.[139] While the bifurcation approach would certainly represent progress, the jury would still be forced to sit through two separate trials. Chief Justice McGrath recommended that the Court "consider innovative

130. *Malcolm*, 217 P.3d at 535 (Nelson, J., concurring and dissenting).
131. *Id.* at 534.
132. Mont. Code Ann. § 27–1–221.
133. *Malcolm*, 217 P.3d at 532 (majority).
134. *Id.* at 529.
135. *Id.* at 532.
136. *Id.*
137. *Id.* at 534 (Nelson, J., concurring and dissenting).
138. *Id.* at 544; *Malcolm*, 217 P.3d at 533 (McGrath, C.J., specially concurring).
139. Mont. Code Ann. § 27–1–221(7).

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solutions . . . to provide a fair trial to all parties."[140] The Court should adopt the innovative *Restatement (Third)* approach: let juries hear evidence of regulatory compliance and settle this self-imposed predicament once and for all.

C. An Unnecessary Diminution of Consumer Choice within the Market

The Malcolms' claim that the OMW 207 was defective was based largely on their opinion that Evenflo could have manufactured the child seat using a superior alternative design; specifically, they claimed that the seatbelt tunnel that the OMW featured on its base should have been used on the primary unit instead of the seatbelt hooks.[141] The Malcolms contended that the seatbelt tunnel had performed flawlessly in both test and real-world situations and effectively rendered the inferior seatbelt hook design defective.[142] The test performance of the tunnel design was introduced at trial during the Malcolms' cross-examination of Evenflo representative Randolph Kiser, who testified that the tunnel design had never failed in testing.[143] Not presented at trial, due to evidentiary prohibition, was the fact that the hook design also passed all of its tests.[144] After the district court barred Evenflo from presenting evidence of the OMW 207's regulatory compliance and accompanying test results, Evenflo's strongest remaining defense was to suggest that the hook design was not inferior. Evenflo, perhaps with great foresight, declined to argue against its own alternative design, and the Malcolms' claim eventually prevailed.

From a public policy standpoint, this led to the most harmful consequence of the Court's refusal to adopt the *Restatement (Third)* standard. The inability of manufacturers to present evidence proving their products' compliance with applicable regulations provides a direct incentive for the manufacturers to produce products that feature only the safest available designs. Though this initially sounds like a positive effect, it implicitly bars from the market products that, while still plenty safe according to applicable regulations, feature designs that may be both attractive to consumers and mutually exclusive of optimal safety. For instance, a person suffering from arthritis may not want or need a child-proof medicine bottle, but Montana's evidentiary standard would discourage a manufacturer from producing bottles without a child-proof lid because that is the safest available design. The needs of the arthritis-sufferer are sacrificed in order to preserve the ideal of optimal safety.

140. *Malcolm*, 217 P.3d at 533.
141. Appellee's Response Br., 9, *Malcolm*, 217 P.3d 514 (Mont. 2009).
142. *Id.*
143. *Malcolm*, 217 P.3d at 527 (majority).
144. *Id.*

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The OMW is a perfect example of this deficiency. At trial, William Van Arsdell, an engineer and design expert, testified that the seatbelt hook featured on the OMW 207 was more convenient than the seatbelt tunnel and, therefore, "promotes easy [and] proper use."[145] Assuming that the tunnel design is safer than the hook design, there is no way that a consumer can have, at once, the most convenient and most safe baby seat. While it may seem absurd that a child safety-seat company would choose to promote easy and proper use over crashworthiness, recent statistics indicate that seven in ten children are improperly restrained in their seats.[146] Given such a high rate of misuse, it is reasonable to suggest that a seat that is both safe and easy to install has a better chance of protecting more children than a seat that is more safe when installed properly but more difficult to install. Therefore, if a discerning consumer counts among her criteria for a baby seat both safety and convenience, the OMW 207 might be precisely what she needs. If, on the other hand, a consumer wants the absolute safest baby seat and is prepared to tolerate the resultant difficulty of installation and loss of convenience, she is free to choose the model that meets that standard.

Shapo touched on this notion of freedom of choice when he recounted an influential Maryland case in which Harold Myers was severely injured by his lawnmower.[147] Myers argued that the lawnmower manufacturer could have made the mower safer by adding an automatic kill switch or by designing the mower without the clearance necessary for an operator to get an appendage caught beneath it.[148] In rejecting the plaintiff's alternative design argument, the Maryland Court of Appeals proclaimed that "in a free market, Myers had the choice of buying a mower equipped with [the safety devices], of buying the mower which he did, or of buying no mower at all."[149] While the *Myers* case is not perfectly apposite when viewed alongside *Malcolm*—Montana law did not grant the Malcolms the choice of using no car seat at all[150]—the larger point stands: the Malcolms were free to choose a baby seat that incorporated the very features they eventually declared the OMW 207 should have included. The fact that they did not choose such a model does not, or at least should not, automatically render the one they chose defective.

145. *Id.* at 528.

146. SeatCheck, *Child Passenger Safety Statistics*, http://www.seatcheck.org/news_fact_sheets_statistics.html (accessed Jan. 26, 2012).

147. Shapo, *supra* n. 128, at 32 (citing *Myers v. Montgomery Ward & Co.*, 252 A.2d 855 (Md. 1965)).

148. *Myers*, 252 A.2d at 858.

149. *Id.* at 864.

150. Mont. Code Ann. § 61–9–420(1).

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The determination that a product is not the safest is insufficient to conclude that the product is not safe; unfortunately, the two are functionally equivalent under the evidentiary standard promoted by the Court. If the manufacturers were allowed to present evidence of their products' regulatory compliance, juries would be able to see where on the safety continuum the specific products fall and determine whether the manufacturers had sacrificed so much safety that the products are defective. As it stands, the jury has no idea how safe the product is compared to any other product; it only knows that the product is or is not the safest. This standard disincentivizes creativity on the part of manufacturers and diminishes the choice of features that consumers might enjoy. The Court should adopt the *Restatement (Third)* § 4(b) and demonstrate that it values not only the protection of consumers but also their right to choose for themselves.

VI. Conclusion

Tyler Malcolm's death was tragic. It is easy to succumb to the temptation to do whatever it takes to ease the pain of his family, especially if the primary sacrifice comes from a faceless corporation. However, justice is not always served when the more sympathetic party prevails. Of course, as indicated by the West Virginia case, the Malcolms very well may have prevailed at the district court level even with the inclusion of Evenflo's regulatory compliance evidence. It is not the purpose of this note to argue that Evenflo should have won; rather, the purpose is simply to show that the jury did not have all the information it needed to decide one way or the other. The result-oriented evidentiary standard employed by the Montana Supreme Court with respect to the regulatory compliance of products generates verdicts that necessarily rely on incomplete knowledge. It is unfair to defendants, unfair to juries, and unfair to consumers whom the standard eventually deprives. The Court should reverse its precedent and adopt the recommendation of § 4(b) of the *Restatement (Third) of Torts: Products Liability*, thereby ensuring that future Montana products liability cases are decided more accurately, more fairly, and with justice as the primary goal.