# Montana Takes a Flexible Approach to the Heeding Presumption

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We previously discussed the Montana Supreme Court case of Riley v. American Honda Motor Co., 856 P.2d 196 (Mont. 1993) and touted it as one of the best rejections of the heeding presumption we've seen – rejecting all of the most often advanced arguments in favor of the heeding presumption. So we were a bit surprised when we learned about that same court's decision in Patch v. Hillerich & Bradsby Co., No. 2011 MT 175, slip op. (Mont. July 21, 2011) (unpublished) – applying the heeding presumption.

While not a drug or medical device case, Patch is definitely a step backward by the Montana Supreme Court and one that may well have implications for our clients. Patch involves the tragic death of an 18 year-old boy who, while pitching a baseball game, was struck in the head by a ball hit using an aluminum bat manufactured by the defendant. Patch, slip op. at 2. A jury returned a verdict for the plaintiff finding that the defendant failed to adequately warn about the enhanced risks associated with its bat which allegedly increased the velocity speed of a batted ball. Id. at 3.

On appeal, the defendant sought review, among other things, of the lower's court's denial of defendant's motion for judgment as a matter of law on the failure to warn claim. Id. at 2 (other aspects of the appeal raised issues related to decedent's status as a bystander, the "workability" of providing a warning, and assumption of the risk, see id. at 5-8, 12-13). The main issue – causation. It is here that the Montana Supreme Court seems to do an about face.

The question in Patch was whether the trial court's adoption of the heeding presumption violated the holding of Riley. Id. at 9. Clearly, it does. In Riley, the court specifically rejected the argument that the heeding presumption – *i.e.* shifting the burden of causation to the defendant – is necessitated by the policy underlying strict products liability. Riley, 856 P.2d at 200 ("[w]e are unwilling to shift the respective parties' burdens in such a fashion. . . . A defendant certainly is in no better position to rebut a presumption which totally excuses a plaintiff from meeting the causation element than a plaintiff is in establishing the causation element as part of the prima facie case.").

So, with the heeding presumption squarely rejected, how did the Patch court get around its holding in Riley? By being flexible. That's right, flexible.

"The policy underlying products liability – protecting the consuming public by requiring manufacturers to bear the burden of injuries caused by defective products – requires courts to apply a **flexible** standard of proof."

Patch, slip op. at 9 (emphasis added) (further, "our decision in Riley was not intended to limit the flexible standard of proof in products liability cases." Id. at 10). What exactly is a flexible standard of proof? Well, that's the rub – how is anyone supposed to know what the standard is if it's flexible? Unhelpfully, the court goes on to state the obvious: "The nature and quality of evidence used in products liability cases to demonstrate causation varies." Id. at 9. Well, sure it does. But does that mean that when the plaintiff is going to have a particularly difficult time proving causation, he no longer has to?

The Montana Supreme Court, clinging now to the dissent in Riley, has answered that question affirmatively – at least where plaintiff is deceased -- "the death or inability of the plaintiff to testify is one of the factors influencing the requisite standard of proof." Id. But, as the majority in Riley reasoned, the burden of establishing causation "is not qualitatively different than other testimony given by a party in support of her or his prima facie case." Riley, 856 P.2d at 200. The facts in Patch are a horrible tragedy; a young man died and we don't make light of the situation. But, by the court's reasoning, it would seem wrongful death plaintiffs should be relieved of all their burdens of proof in products liability actions simply because they are deceased (Does this likewise extend to other plaintiffs who are unable to testify for whatever reason?).

Finally, the Patch court found it would be "unfair and unjust" to require the plaintiff to prove causation because he had died – "it [would] be virtually impossible to prove what the decedent would have done had he been warned." Patch, slip op. at 11. If it would be "virtually impossible" for the plaintiff to prove – what chance does a defendant have? The defendant is left with an even more difficult burden of rebutting the presumption with the same lack of testimony.

Unfortunately, the Montana Supreme Court has flexed enough to allow the heeding presumption in cases where the plaintiff is unable to testify. It remains to be seen just how supple that court is.