BUCZKOWSKI v. McKAY: A PROPER CASE FOR GUN DEALER LIABILITY?

INTRODUCTION

Firearms play an ever-increasing role in violent crimes in this country,[1] with the injuries caused by such gun use placing an enormous drain on the national economy.[2] While the perpetrators of gun violence may be punished effectively through use of the criminal justice system, civil liability is often a different story. Civil suits often bring unsatisfactory results for the victims of gun violence because many criminals lack sufficient financial resources to satisfy a civil judgment rendered against them. Consequently, many times victims must bear not only the pain of their injuries, but also the cost. In an effort to redress this discrepancy, some attorneys have taken their clients' causes to the courtroom, targeting the merchants who sell the weapons that have injured their clients rather than the weapon's user.[3]

The Michigan Court of Appeals' decision in *Buczkowski v. McKay*,[4] reversed by the Michigan Supreme Court,[5] played a part in the growing trend towards holding merchants liable for the negligent acts of their customers. In *Buczkowski*, the appeals court upheld the trial court's finding that a retailer had breached its duty of care by dispensing ammunition to an intoxicated customer who later used that ammunition to injure a third party.[6] The appeals court used a negligent en-

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[1] In 1968, firearms were used in over 8,900 murders, 65,000 assaults and 99,000 robberies. *See* U.S. DEPARTMENT OF JUSTICE, FBI UNIFORM CRIME REPORTS 1 (1969). Ten years later, firearms were used in over 11,800 murders, 125,000 assaults and 170,200 robberies. *See* U.S. DEPARTMENT OF JUSTICE, FBI UNIFORM CRIME REPORTS at 13, 19, 21 (1979), *cited in* Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common Law Approach*, 51 FORDHAM L. REV. 771, 778 (1983).

[2] A 1979 law review article estimated that $500 million is spent annually on treatment of gunshot wounds. Sam Fields, *Handgun Prohibition and Social Necessity*, 23 ST. LOUIS U. L.J. 35, 35 (1979).

[3] Dennis Henigan, *Gun Control Through Tort Law*, LEGAL TIMES, Aug. 19, 1991 at 25; Robert M. Howard, *The Negligent Commercial Transaction Tort: Imposing Common Law Liability on Merchants for Sales and Leases to "Defective" Purchasers*, 1988 DUKE L.J. 755 [hereinafter *The Negligent Commercial Transaction Tort*]; *see infra* part II.B.

[4] Docket Nos. 89-113420, 113888, slip op. (Mich. Ct. App. July 23, 1990).

[5] Buczkowski v. McKay, 490 N.W.2d 330 (Mich. 1992).

[6] The trial jury awarded the plaintiff $1.5 million in damages for permanent injury to both of his hands. The injury occurred when the defendant attempted to shoot the windows out of the plaintiff's car and a bullet ricocheted from a tire rim and lodged in the plaintiff's hand. Brief for

trustment analysis concentrating on the retailer's failure to detect the infirmities in the purchaser, rather than the dangerous nature of the product supplied.[7]

The Michigan Supreme Court, however, found that the retailer did not have a legal duty to protect the plaintiff, a member of the general public, from the criminal act of its co-defendant.[8] This Note argues that the decision of the Michigan Supreme Court is correct as it strikes the appropriate balance between individual rights and public safety interests, and preserves the marketplace for merchants of all types of commercial goods.

This Note examines whether the retailer's position in the chain of distribution of ammunition could ever warrant the heightened level of scrutiny placed upon it by the Michigan Court of Appeals. In light of the parallel policy concerns for regulating firearms and ammunition argued by the plaintiff, Part I surveys firearms regulation and past efforts to impose third party liability in the related gun manufacturing industry. Part II sets forth the facts of the case and reasoning used by the court of appeals in *Buczkowski v. McKay*. This part concludes that, on the facts presented, the retailer's lack of notice regarding the purchaser's deficiencies made a finding of duty inappropriate, and the application of the negligent entrustment analysis unwarranted.

After reviewing the basis for the lack of foreseeability in the facts of this case and the vague limits assigned to the retailer's duty of care, Part III analyzes the social and economic consequences which an expansive interpretation of *Buczkowski v. McKay* could produce. Out of sympathy for the injured plaintiff, it may be tempting to dismiss the Michigan Supreme Court's analysis of *Buczkowski v. McKay*. However, such sentimentality should be resisted because the analysis used by the Court of Appeals sets a harmful precedent for other types of sales exchanges, and threatens the economic well-being of all individu-

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Plaintiff-Appellee on appeal at 1, *Buczkowski*, 490 N.W.2d 330 (Mich. 1992)(No. 89-770). The defendant stated he had no doubt the slug he used in the shooting was purchased that evening. *Id.* at 5. *See infra* part II.

[7] The trial court gave the following instruction patterned after RESTATEMENT (SECOND) OF TORTS, § 390: "When the seller of a product sells to a person that he knows or has reason to know is incompetent to use the product in a reasonably safe manner so as to avoid foreseeable unreasonable risk of injury to others, the seller is subject to liability." Brief for Plaintiff-Appellee on appeal at 20, *Buczkowski*, 490 N.W.2d 330 (Mich. 1992) (No. 89-113420).

[8] *Id.*

als. Absent the limits set forth by the Michigan Supreme Court,[9] the analysis used by the Court of Appeals would have a staggering impact upon commercial transactions generally. A finding of duty based on foreseeability is hence essential to the appropriate outcome of this case.

I. BACKGROUND

A three-tiered structure of regulation is currently in place to limit gun distribution in the United States. On the federal level, there is the Gun Control Act of 1968.[10] The Act prohibits dealers from selling firearms to various categories of prospective buyers, including minors, convicted criminals or anyone adjudicated as a mental defective.[11] In addition, every state has its own set of laws that may include provisions which parallel or supplement the federal requirements.[12] Finally, local ordinances may provide even more restrictive standards.[13]

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[9] The Michigan Supreme Court found that duty should not be found in the absence of a defective or inherently dangerous product, or a legislatively-defined class of purchasers incompetent to buy ammunition. Buczkowski v. McKay, 490 N.W.2d 330 (Mich. 1992).

[10] 18 U.S.C. §§ 921-928 (1992).

[11] The Act makes it a crime for a dealer to sell firearms to certain categories of individuals, including: 1) persons who the dealer has reasonable cause to believe are less than 21 years of age (for a handgun) or less than 18 years of age (for a rifle or shotgun); 2) as to handguns, persons who the dealer has reasonable cause to believe do not reside in the licensee's state; and 3) persons who would be prohibited from purchasing the gun under state laws or local ordinances applicable to the licensee. 18 U.S.C. § 922(b) (1992).

Under the Act, it is unlawful for any person, including dealers, to sell a firearm to any person if there is reasonable cause to believe that the prospective buyer: 1) has been convicted of, or is under indictment for, a crime punishable by imprisonment for a term exceeding one year; 2) a fugitive from justice; 3) is an unlawful user of, or is addicted to, any controlled substance; 4) has been adjudicated as a mental defective or has been committed to any mental institution; 5) is an illegal alien; or 6) has received a dishonorable discharge from the Armed Forces. 18 U.S.C. § 922(d) (1992).

A dealer fulfills this statutory duty if he has the purchaser complete a Form 4473 and examines some customary form of identification, records the transaction, and furnishes the information to the federal government on request. 27 C.F.R. § 178.124(c) (1992).

[12] For example, a state's law may include its own listing of categories of persons barred from purchasing firearms. Some states also have mandatory waiting periods applicable to certain kinds of firearms. Rules to protect children are also prevalent. *See* STAFF OF SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., SURVEY OF SELECT STATE FIREARM CONTROL LAWS, IN FEDERAL REGULATION OF FIREARMS 204-28 (Comm. Print 1982) (Ronhovde & Sugars), *cited in* Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1914 (1984).

[13] At least 42 Michigan cities and townships have ordinances limiting the handling of firearms, including prohibition of handgun possession while under the influence of drugs or alcohol. Rick Pluta, *Gun Control Bills Clear House*, UNITED PRESS INTERNATIONAL, Nov. 29, 1990 (Distribution: Michigan).

This patchwork of gun regulation ranges from the most perfunctory compliance with the federal statute,[14] to almost complete abolition.[15] As a result of the lack of uniformity in gun control measures, individuals remain vulnerable to gun violence, even in areas of tight control.[16]

Not satisfied with legislative attempts to combat the ineffectiveness of gun control statutes,[17] a growing number of personal injury suits have sought to fight the battle over gun control in the courtroom by imputing liability to the weapons manufacturers and retailers.[18] Actions seeking substantial damages against careless gun dealers are viewed as providing an incentive to those gun dealers to act in a responsible manner. Proponents of such liability assert that only when manufacturers and retailers are faced with the threat of liability will they alter their conduct in order to minimize the risk of harm that their products pose to innocent people. Tracing the progression of this shift of gun control efforts from the legislature to the courtroom, the following part of this Note examines the legal basis underlying the proposed theories for imposing manufacturer liability. This part goes on to relate

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[14] Many states do not prescribe significant prerequisites for handgun purchases beyond the requirements of the Gun Control Act of 1968. *See, e.g.*, AZ. STAT. ANN. §§ 41-3101 - 3175 (1977 & Supp. 1992-93) (no prerequisite to purchase); OKLA. STAT. ANN. tit. 21, § 1271-1289.22 (West 1958 & Supp. 1982-83) (no prerequisite to purchase).

[15] A ban on private possession of handguns was enacted by the Village of Morton Grove, Illinois. MORTON GROVE, ILL. CODE § 132.102 (1981). The ordinance was sustained under the U.S. Constitution as well as the Illinois Constitution. Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983). *But see* Doe v. City & County of San Francisco, 136 Cal. App. 3d 509 (1982) (San Francisco City Ordinance File No. 175-82-1 June 28, 1982), where similar legislation failed to survive judicial scrutiny.

[16] Despite the ban of all gun sales in the District of Columbia since 1976, District police confiscated more than 8,000 illegal guns in 1989 and 1990. Stephen Chapman, *Fighting a Scary Weapon With an Even Scarier One*, CHI. TRIB., Feb. 10, 1991, at C3. Officials say about 70% of the 8,500 guns recovered by the District police since January 1988 have been traced to dealers in neighboring jurisdictions such as Virginia and Maryland that have more relaxed laws. Leslie Phillips, *D.C. Gun Law Triggers Debate*, USA TODAY, Dec. 19, 1990, at 12A.

Likewise, studies from the U.S. Bureau of Alcohol, Tobacco & Firearms document the flow of guns to the northeastern United States. Of 16,374 guns confiscated by New York City police in 1988, only 738 had been reported stolen. Most of the remainder were bought in Florida, Texas, Virginia, and Ohio. Daniel Golden, *The Arming of America*, THE BOSTON GLOBE, Apr. 23, 1989, (Magazine) at 16.

[17] Following the killing of five schoolchildren in Stockton, California in Jan. 1989, lawmakers in 18 states introduced bills to regulate guns, but only 3 passed. Dennis Hevesi, *Legislatures Face a Barrage of Measures Banning Guns*, N.Y. TIMES, Sept. 17, 1989, § 1 at 34.

[18] *See e.g.*, Note, *Legal Limits of a Handgun Manufacturer's Liability for the Criminal Act of Third Person*, 49 MO. L. REV. 830, n.3 (1984) (indicating articles in numerous periodicals discussing litigation brought against handgun manufacturers); *See supra* note 3.

the line of cases dealing with gun manufacturer liability to the transition toward retailer liability—first for gun sales, and then for sales of ammunition.

A. *Manufacturer Liability*

Lawsuits targeting firearms retailers were preceded by a line of cases targeting weapons manufacturers. Attempts to hold weapons manufacturers liable for misuse of their products are in fact an ongoing effort.[19] It is, therefore, useful to examine the success and failure of the legal theories set forth in these manufacturer suits in order to predict the form retailer suits might take.

Two recurring patterns of liability theory emerge in the debate over manufacturer liability. The patterns are strict products liability theories[20] and characterization of gun use as an ultrahazardous activity.[21]

In asserting personal injury claims against manufacturers based on strict products liability, plaintiffs have defined the manufacturers' duty as a duty to the public not to market defective products.[22] On this basis, plaintiffs have argued that handgun manufacturers should be liable for negligently failing to control the distribution of their products in a

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[19] *See infra* note 31, regarding approval of the District of Columbia referendum for strict liability for makers and sellers of assault weapons.

[20] A seller is strictly liable in tort when he sells any product in a defective condition unreasonably dangerous to another and physical harm is thereby caused to the plaintiff. RESTATEMENT (SECOND) OF TORTS § 402-A (1966). For representative cases rejecting the "defective product" theory for gun manufacturers, *see* Caveny v. Raven Arms Co., 665 F. Supp. 530 (S.D. Ohio 1987), *aff'd.*, 849 F.2d 608 (6th Cir. 1988); Delahanty v. Hinckley, 564 A.2d 758 (D.C. 1989); Addison v. Williams, 546 So. 2d 220 (La. App. 1989).

Imposing a duty of safety upon retailers and manufacturers to persons injured by the use or misuse of product sold, without regard to the type of product or whether it was defective, is in effect absolute liability. Such absolute liability was rejected by the Michigan courts in Prentis v. Yale Mfg. Co., 365 N.W.2d 176 (Mich. 1984).

[21] For representative cases rejecting application of the ultrahazardous activity doctrine, *see, e.g.*, Moore v. R.G. Industries, 789 F.2d 1326 (9th Cir. 1986); Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); Delahanty v. Hinckley, 564 A.2d 758 (D.C. 1989); Coulson v. DeAngelo, 493 So. 2d 98 (Fla. Dist. Ct. App. 1986).

[22] RESTATEMENT (SECOND) OF TORTS § 402-A (1966).

manner that prevents their sale to persons likely to misuse them,[23] and to warn of the danger of misuse.[24]

Similar to the reasoning of products liability claims is the characterization of gun use as an ultra-hazardous activity. Here, the defendant is held liable if an activity is found to be abnormally dangerous, even though he may have exercised the utmost care to prevent the harm.[25]

Despite the repeated rejection by courts of both of these theories regarding liability of gun manufacturers, the Maryland Court of Appeals upheld manufacturer liability in *Kelley v. R.G. Industries*[26] based on a special exception to the ultrahazardous activity doctrine. The *Kelley* court held the manufacturer liable for producing "Saturday Night Specials" on the principle that the design, manufacture, and marketing of such small, easily concealable handguns used overwhelmingly for criminal purposes constituted an abnormally dangerous activity. The case thus created a special exception to the general rule of non-liability. The decision did not meet with legislative approval, however, and the Maryland General Assembly immediately overturned the court's decision.[27]

Current gun control efforts are directed toward forcing the U.S. Congress and state legislatures to ban semi-automatic weapons.[28] Like the handguns that were the focus of the court's attention in *Kelley* and other manufacturer liability cases, assault weapons are readily associ-

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[23] A negligent distribution theory has been rejected by those courts that have addressed it. *See* Armijo v. Ex Cam, Inc., 656 F. Supp. 771 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988); Trespalacios v. Valor Corp. of Florida, 486 So. 2d 649 (Fla. Dist. Ct. App. 1986); Riordan v. International Armament Corp., 477 N.E.2d 1293 (Ill. Ct. App. 1985).

[24] This theory has been rejected on the ground that there is no duty to warn of an obvious hazard. *See Riordan*, 477 N.E.2d at 1293.

[25] RESTATEMENT (SECOND) OF TORTS § 519 (1966). When analyzing whether or not an activity should be considered an ultra-hazardous activity, the following factors are to be considered: a) existence of a high degree of risk of some harm to the person, land or chattels of others; b) likelihood that the harm that results from it will be great; c) inability to eliminate the risk by the exercise of reasonable care; d) extent to which the activity is not a matter of common usage; e) inappropriateness of the activity to the place where it is carried on; and, f) extent to which its value to the community is outweighed by its dangerous attributes. *Id.* § 520.

[26] 497 A.2d 1143, 1150 (Md. 1985).

[27] 1988 MD. LAWS 533 (H.B. 1131, § (H)(1)).

[28] In 1989, President Bush approved a measure to ban imported assault weapons, but a persistent effort in Congress to extend that ban to domestic assault weapons has not been successful. Enrique J. Gonzales, *D.C., New York Police Chiefs Team Up to Back Two Anti-Gun Bills*, WASH. TIMES, Sept. 11, 1990, Part B (Metropolitan) at B4.

ated with criminal activity.[29] Lobbying legislatures does not, however, preclude gun control advocates from turning to the courtroom if their legislative efforts fail.

While the experience in Maryland may have discouraged courts in other states from following the *Kelley* court's lead with regard to handguns, the battle over court involvement when it comes to gun ownership is far from over. For example, despite the failure of past gun manufacturer suits, a recent group of claims asserting design flaws in guns that lack a "magazine safety disconnect" are focused on holding semiautomatic manufacturers liable.[30] Additionally, voters in Washington, D.C. strongly approved a referendum in November 1991 allowing people injured by certain assault weapons to collect damages from the weapons' manufacturers *and sellers*, without showing negligence.[31] The issue of civil liability of gun manufacturers and sellers for injuries involving as-

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[29] The Federal Bureau of Alcohol, Tobacco and Firearms estimates there are 200 million privately owned guns in the country, about 1 million of them in the assault gun category. It estimates that an assault weapon is 20 times more likely to be used in crime than a conventional firearm. Dennis Hevesi, *Legislatures Face a Barrage of Measures Banning Guns*, N.Y. TIMES, Sept. 17, 1989, § 1, at 34.

The current attention being focused on assault weapons is due to a recent spate of killings in which they were used. In 1989, five children were killed and 29 wounded at the hands of a mental incompetent using an assault weapon at a Stockton, Calif. elementary schoolyard; 8 were killed and 12 injured in a 1989 massacre involving use of a semi-automatic rifle by a man in Louisville, Ky.; and in Oct. 1991 in Killeen, Tx., the worst gun-related massacre in U.S. history occurred when a lone gunman left 23 dead and 20 others injured. Elaine Davenport, *Town Baffled by Killer's Motive*, THE INDEPENDENT, Oct. 18, 1991, Foreign News, at p. 12.

[30] Raine v. Colt Indus., 757 F. Supp. 819 (S.D. Mich. 1991), *cited in* Don J. DeBenedictis, *Boy Scout Gun Suit Rejected*, ABA JOURNAL, Jan. 1992, p. 21. At least one federal judge, in Detroit, has followed the course of other failed firearms manufacturer suits and rejected a magazine-safety suit, holding that the dangers of guns are "open and obvious," and therefore no duty exists for manufacturers to warn. *Id.*

[31] A referendum to hold manufacturers and retailers of assault weapons liable for any injuries or deaths inflicted in the city was approved by 77% of the voters in the District of Columbia in November 1991. Named in the bill are MAC-10 and MAC-11 pistols, the Tec 9 pistol, Israeli-made Uzi and Galil, the AK-47 rifle, the "street sweeper" shotgun and several other types of assault weapons. The list was taken from a Senate bill that would have banned such weapons, but which has never won congressional approval. Rene Sanchez, *Voters Pass Law Making Gun Merchants Liable*, WASH. POST, Nov. 6, 1991, at A27.

The D.C. Council first approved the law in December 1990, but two months later voted to reject it after Mayor Sharon Pratt Kelly persuaded the Council that the opposition to the measure in Congress could jeopardize the District's chances of receiving $100 million in emergency aid. The efforts of the National Rifle Association to challenge the referendum in court have failed twice. *Id.*

The referendum is the nation's first law of its kind, and similar strict liability measures have been proposed in New York, Illinois, Minnesota and Oregon. Tamar Lewin, *Anti-Gun Forces Want to Hold Sellers Liable*, N.Y. TIMES, Nov. 5, 1991, at A23. The measure's effectiveness in carrying out its purpose has been questioned, however, as no suits have been filed as of eight

sault weapons, and all guns in general, is therefore far from resolved. Considering that the plaintiff in *Buczkowski* argued by analogy to manufacturer liability that retailers should be governed by allegedly comparable policy concerns, the debate over gun manufacturer liability should thus be closely studied for emerging trends in legal theories to be applied in potential retailer lawsuits.

B. *Shifting the Focus of Liability From Manufacturer to Retailer*

In legislatures and courts, gun control advocates have been frustrated in their efforts to hold manufacturers liable for crimes and accidents involving guns, primarily because manufacturers are too far removed from the sales transaction.[32] Retailers, however, are subject to a different analysis. Retailers are in direct control of distribution, and, consequently, are in a better position to monitor gun purchases. Unlike a finding of liability against manufacturers, the duty analysis for retailers applies to the individual seller's direct judgment in making a sale.[33]

Courts and some commentators have long-realized that using a standard of care set forth by a gun control statute is inadequate to encompass all situations in which a gun could potentially be misused.[34] However, neither the courts nor commentators have deemed it appropriate to apply a more stringent standard.[35]

The reluctance to find negligence is not, however, universal. Notable are awards in several recent suits aimed at "straw purchasers"; that is, a person who purchases property for another to conceal the identity of the real purchaser. In Virginia, for instance, a circuit court jury ordered a gun dealer to pay $100,000 in damages based on a negligent

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months after its passage. Keith A. Harriston, *Eight Months Later, No Suits Filed Under D.C. Gun Liability Law*, WASH. POST, Aug. 26, 1992, at D3.

[32] *See* Note, *Manufacturers' Strict Liability for Injuries from a Well-Made Gun*, 24 WM. & MARY L. REV. 467, 478 (1983).

[33] The inquiry concerning causation in order to determine liability is also different when applied to retailers. For a plaintiff to successfully allege that a manufacturer's product was the cause-in-fact of the injury, he has the extraordinary burden of showing that the injury would not have occurred had there been no handgun available or that a specific manufacturer's weapon shot him. The hurdle of proving cause in fact becomes even more difficult to surmount upon realizing that people may very well be able to obtain guns even if manufacturers were to stop producing weapons today, because of the large number of guns already in existence and the black market that would likely arise. These difficulties are not as great with regard to retailers.

[34] *See* Note *supra* note 32, at 477.

[35] *Id.* For an argument for the expanded duty proposition, *see* Stuart Speiser, *Disarming the Handgun Problem by Directly Suing Arms Maker*, 11 NAT'L L.J. 29 (1981). *See infra* note 104.

entrustment analysis.[36] In that case, the gun dealer sold a semiautomatic pistol to an adult, which was later used by a teenager to kill a school teacher. In California, an action based on a negligent entrustment analysis did not even make it to court. The defendant retailer agreed to pay $400,000 to the wife of a man killed in a random freeway shooting to settle the matter.[37] In these cases, the courts found that the dealers could have reasonably foreseen that the product purchased was intended ultimately for use by someone not covered by the statutory scheme.

Even where the dealer violated no law in the sale of firearms, at least two courts have, nonetheless, held the dealer liable for failing to adhere to a duty of ordinary care.[38] In *Salvi v. Montgomery Ward*,[39] for instance, the Illinois Court of Appeals upheld a jury verdict of dealer liability for the sale of an air gun to a minor. Because no statute forbade such a sale, the court's holding was based on ordinary negligence. Similarly, in *Decker v. Gibson Products Co. of Albany*,[40] a federal court upheld a jury's finding of civil liability. In that case, a dealer had sold a gun to a person he knew had been previously convicted of felonious aggravated assault, but whose civil rights had been restored.

In addition, courts have been willing to extend a duty to investigate in circumstances where statements were made to a dealer indicating possible future criminality,[41] and for injury due to negligent sales to

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[36] The owners of Guns Unlimited in Isle of Wight County, Virginia were found negligent in selling a gun to an adult when it was obvious that the purchase was intended for a minor. Pierre Thomas, *Gun Shop Liable in Virginia Killing*, WASH. POST, Jan. 17, 1992, at D1.

[37] Ellingsen v. Traders Sports Inc., No. 654015-1, slip op. In that case the clerk sold the gun to the shooter's friend when he could not produce any identification, despite store policy against doing so. Lawrence A. Boxer, *Getting at the Guns: How to Use the Tort Laws*, THE RECORDER, July 29, 1991, at 5; *see also* West v. Mache of Cochran, 370 S.E.2d 169 (Ga. Ct. App. 1988); *but see* Hilberg v. F.W. Woolworth, 761 P.2d 236 (Colo. Ct. App. 1988).

[38] *See* Salvi v. Montgomery Ward, 489 N.E.2d 394 (Ill. App. Ct. 1986); Decker v. Gibson Products Co. of Albany, 679 F.2d 212 (11th Cir. 1982); James L. Isham, Annotation, *Liability of One Who Provides, By Sale or Otherwise, Firearm or Ammunition to Adult Who Shoots Another*, 39 A.L.R.4th 517 (1991).

[39] 489 N.E.2d at 394.

[40] 679 F.2d at 212.

[41] Rubin v. Johnson, 550 N.E.2d 324 (Ind. Ct. App. 1990) (statements made by purchaser to dealer constitute sufficient evidence to allow case to go to jury on whether they meet the statute's "unsound mind" requirement); Cullen & Boren - McCain Mall, Inc. v. Peacock, 592 S.W.2d 442 (Ark. 1980) (purchaser's comment suggested criminal intent); *but see* Bryant v. Winn-Dixie Stores, Inc., 786 S.W.2d 547 (Tex. Ct. App. 1990) (trial court properly granted summary judgment to defendant store where the store sold ammunition to convicted criminal but state statutory scheme did not impose a duty of inquiry).

mentally incompetent purchasers.[42] Whether the courts in these cases found the dealer liable for injuries inflicted by the gun based on principles of negligence per se or evidence of negligence, they have in common the dealer's failure to adhere to federal, state, or local regulatory procedures.

The focus of civil liability in the above cited cases is not on the person who did the shooting, but rather on the dealer for making it possible for the person who pulled the trigger to have access to the gun. The form of negligent entrustment analysis employed in the above cited cases departs from the conventional use of the negligent entrustment doctrine. Traditionally, liability for negligent entrustment has arisen in circumstances where an owner loans his car keys to someone that the owner knows or should know is not responsible, perhaps through intoxication or immaturity, and the irresponsible person causes injury to a third party.[43] The injury that results from the driver's negligent behavior is said to have been foreseeable by the owner. The owner is thus responsible for the injury, though the only act he committed was the loaning of his keys.[44]

The underlying rationale of the negligent entrustment doctrine, imposing liability for an indirect act where the risk of harm is foreseeable, has been used in a variety of contexts.[45] A prominent example of the doctrine's enlargement is dram shop legislation, where tavernkeepers are held responsible for the injuries their patrons cause to third parties.[46] Just as the car owner should have been able to fore-

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[42] Phillips v. Roy, 431 So. 2d 849 (La. Ct. App. 1983) (imposing duty to observe in the sale of a pistol to a person with a history of mental illness); West v. Mache of Cochran, Inc., 370 S.E.2d 169 (Ga. Ct. App. 1988). *But see* Chapman v. Oshman's Sporting Good, Inc., 792 S.W.2d 785 (Tex. Ct. App. 1990) (rejecting the idea that the dealer or its employee could have anticipated the gun sold would be used for criminal purpose).

[43] Henry Woods, *Negligent Entrustment Revisited: Development 1966-76*, 30 ARK. L. REV. 288 (1976) [hereinafter Woods, *Negligent Entrustment II*]; Henry Woods, *Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability*, 20 ARK. L. REV. 101 (1966) [hereinafter Woods, *Negligent Entrustment I*].

[44] Woods, *Negligent Entrustment I*, *supra* note 43, at 103.

[45] *See* Pritchett v. Kimberling Cove, Inc., 568 F.2d 570 (8th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) (boats); Meister v. Fisher, 462 So. 2d 1071 (Fla. 1984) (golf carts); Brown v. Vanity Fair Mills, Inc., 277 So. 2d 893, 896 (Ala. 1973) (tools). *See generally The Negligent Commercial Transaction Tort*, *supra* note 3.

[46] *See, e.g.*, Rappaport v. Nichols, 156 A.2d 1 (N.J. 1959). In *Rappaport*, the New Jersey Supreme Court held that an illegal sale of liquor to a minor (and, the court said in dicta, to an intoxicated person) under circumstances in which the seller should have known that the buyer was underage (or drunk) constitutes negligence. *Id.* at 9. *See also* Kelly v. Gwinnell, 476 A.2d 1219, 1224 (N.J. 1984) (social host's liability for serving intoxicated guest analogous to car owner's liability for lending car to intoxicated person).

see the risk in loaning his automobile to an incompetent driver, the bartender, as the dispenser of alcohol, is in a position to realize the potentially harmful effect of the spirits he serves. Even in states that do not have a civil liability statute to establish a duty of care, some courts have implied a duty of care to bartenders for dispensing alcohol.[47] The negligent entrustment analysis with regard to alcohol is used so extensively, in fact, that only four states still maintain the common law rule restricting liability for negligent conduct in these circumstances to the actor himself.[48]

C. *Use of Negligent Entrustment in Michigan Courts*

Michigan has a statute specifically providing for civil liability in cases of alcohol-related injuries,[49] and has not hesitated to extend the underlying rationale of the negligent entrustment analysis to other contexts where a civil liability statute is not available. For instance, in *Fredericks v. General Motors*,[50] the Michigan Court of Appeals extended the doctrine by focusing on the manner in which a product was supplied rather than on its unsafe nature. In that case, the plaintiff lost his hand while operating an unguarded power press.[51] Acknowledging that the negligent entrustment doctrine traditionally had been limited to motor vehicle cases, the Michigan court asserted that "the theory of negligent entrustment does not hinge on the nature of the chattel, but on the supply of the chattel to probable negligent users."[52]

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[47] The court in *Rappaport*, reached its result even though the New Jersey legislature had repealed the Prohibition era statutes that had imposed strict liability for damages flowing from illegal alcohol sales. *See* 1932 N.J. LAWS 453-54 (repealing Act of Mar. 29, 1921, 1921 N.J. LAWS 184); 1934 N.J. LAWS 83, 104 (repealing Act of Mar. 17, 1922, 1922 N.J. LAWS 628). The decision was justified on social policy grounds, in absence of a civil liability statute. *Rappaport*, 156 A.2d at 1.

[48] Kansas, Maryland, Virginia and Delaware continue to follow the common law rule of nonliability for the alcohol seller. *See* Fudge v. City of Kansas City, 720 P.2d 1093 (Kan. 1986); Williamson v. The Old Brogue, Inc., 350 S.E.2d 621 (Va. 1986); Wright v. Moffitt, 437 A.2d 554 (Del. 1981).

While Virginia is one of the last states to allow liability under a negligent entrustment analysis for alcohol sales, Virginia is in the forefront in allowing negligent entrustment liability for straw purchase gun sales. *See supra* note 36.

[49] MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1988).

[50] 211 N.W.2d 44 (Mich. 1973).

[51] *Id.*

[52] *Id.* at 46.

Nor was the nature of the chattel the concern of the Michigan Supreme Court in *Moning v. Alfono*.[53] In that case, the court focused on the inexperience of the purchaser, and the supplier's knowledge of that inexperience, in finding the retailer liable for selling a slingshot to a minor.[54] Thus, the Michigan courts have played an active role in turning attention in third party liability cases away from the producers of the dangerous product and towards the merchant who supplies to product to an unfit user.

II. BUCZKOWSKI V. MCKAY

A. *Facts of the Case*

The circumstances that gave rise to *Buczkowski* occurred when a shotgun slug intentionally fired by William McKay had the unintended result of harming the plaintiff's hands, requiring one finger to be amputated and his left wrist to be surgically fused. Testifying that he was angry at the plaintiff for spending time with his girlfriend, defendant McKay planned to shoot the windows out of the plaintiff's car. He and a friend went to the sporting goods department of a K-Mart located in Detroit on a Saturday night to purchase shotgun shells. McKay admitted that he had been on a drinking binge for two days when he walked into the store. He picked up a box of 20 gauge shotgun slugs from a shelf and took them to the counter to purchase them.[55]

McKay then drove to the plaintiff's house and attempted to shoot the windows out of the plaintiff's car, prompting the plaintiff to come out of his house and into the backyard to see what was happening. Instead of destroying the car, however, the slug fired by McKay ricocheted from the tire rim of the car and struck the plaintiff's hand. Defendant stated he had no doubt that the slug he used in the shooting came from the ammunition he had purchased from the retailer that

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[53] 254 N.W.2d 759, 768 n. 24 (Mich. 1977). In *Moning*, the court held that "manufacturers, wholesalers and retailers of slingshots can be expected to foresee that they will be used to propel pellets and that a person within range may be struck." *Id.* at 759.

[54] *But see* Bojorquez v. House of Toys, Inc., 62 Cal. App. 3d 930, 933, 133 Cal. Rptr. 483, 484 (1976).

[55] The defendant retailer testified that ammunition is placed on open shelves only during hunting season which begins in November, and denies they would have been so readily available at the time of the disputed purchase in July. Brief for Plaintiff-Appellee on Appeal at 9, *Buczkowski*, 490 N.W.2d 330 (Mich. 1992) (No. 89-113420).

evening.[56] The jury awarded the plaintiff $1.5 million in damages. The verdict was affirmed by the Court of Appeals[57] and the Michigan Supreme Court granted the appeal.[58]

B. *Summary of the Michigan Supreme Court's Reasoning*

The Court of Appeals concluded that a retailer of a product owes a duty of care to a bystander affected by its product and that the jury determines whether the retailer created an unreasonable risk of harm. The Michigan Supreme Court rejected this reasoning, and found no duty of care existed in the absence of a defective or inherently dangerous product, or where the legislature has defined a class of purchasers who may be deemed legally incompetent.[59]

Consistent with this expanded interpretation of the negligent entrustment doctrine discussed in Part I,[60] the jury instruction in *Buczkowski* focused attention on the deficiencies the merchant should have detected in the purchaser.[61] The Michigan Court of Appeals closely followed the reasoning in *Moning v. Alfono*[62] in determining that the retailer owed a duty of care to third parties for the foreseeable injuries inflicted by their customers. In *Moning*, the Michigan Supreme Court held that the retailer of a product owed a duty of due care to a bystander harmed by that product.[63] Accordingly, the Court of Appeals in *Buczkowski* held that it was proper for the jury to determine whether the defendant retailer created an unreasonable risk of harm to plaintiff by selling shotgun shells to an intoxicated customer.[64] As for proximate cause, the court inferred that when a dealer sells to a customer, with suspicions that the customer may not use the product responsibly, any harm that may result is a part of the risk attributable to the tortfeasor's activity, and is thus foreseeable.[65]

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[56] *Id.* at 5.

[57] Docket Nos. 89-113420, 113888, slip op. (Mich. Ct. App. July 23, 1990).

[58] Buczkowski v. McKay, 471 N.W.2d 558 (Mich. 1991).

[59] Buczkowski v. McKay, 490 N.W.2d 330 (Mich. 1992).

[60] *See supra* notes 37-54 and accompanying text.

[61] *See supra* note 7.

[62] 254 N.W.2d 759 (Mich. 1977). *See supra* note 53 and accompanying text.

[63] *Id.*

[64] Buczkowski v. K-Mart Corp., No. 89-113420 at 2 (Mich. App. July 23, 1990).

[65] *Id.*

By upholding the trial court's negligent entrustment jury instruction,[66] the Michigan Court of Appeals implicitly accepted that constructive knowledge is enough for a finding of liability.[67] The court, while not requiring a finding of visible intoxication, nevertheless stated categorically that the defendant was intoxicated at the time of the purchase.[68]

III. ANALYSIS

The Michigan Supreme Court declined to adopt the Court of Appeals' rationale, and refused to find that the retailer owed a duty of care to the plaintiff, a member of the general public. Having found no duty to exist between the parties in the action, the court did not reach the proximate cause issue. The Michigan Supreme Court discussed two bases for deciding whether a duty of care existed: first, whether harm was actually foreseeable; or, second, whether as a matter of policy K-Mart should bear the burden of the plaintiff's loss despite the actual lack of foreseeability.[69] While this Note argues that the supreme court properly rejected the court of appeals' finding of duty due to lack of foreseeability, the supreme court's mode of analysis is potentially flawed for opening the door to a finding of duty based on policy reasons alone.

In analyzing how the Michigan Supreme Court reached a different conclusion from the Court of Appeals on the issue of whether a duty between the parties in *Buczkowski* existed, the following part of this Note will first describe the foundational requirements the Michigan

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[66] *Id.* at 3.

[67] Defendant Appellant K-Mart's Application for Leave to Appeal, *Buczkowski* (No. 89-113420) cites authority that Michigan courts have specifically disapproved the wording of RESTATEMENT (SECOND) OF TORTS § 320 that the entrustor may be liable if he only has reason to know the entrustee will use the chattel in a dangerous manner, in favor of knowledge or special knowledge. Muscat v. Khalil, 388 N.W.2d 267 (Mich. App. 1986). Moreover, the Michigan Supreme Court in Fredericks v. General Motors Corp, 311 N.W.2d 725 (Mich. 1981), held that to sustain a cause of action for negligent entrustment,

> [a] plaintiff must prove that defendant knew or should have known of the unreasonable risk propensities of the entrustee. . . . To prove an entrustor should have known an entrustee was likely to use the entrusted chattel in an unsafe manner, peculiarities of the entrustee sufficient to put the entrustor on notice of that likelihood must be demonstrated.

311 N.W.2d at 727.

[68] Buczkowski v. K-Mart Corp., No. 89-113420, slip op. at 1 (Mich. App. July 23, 1990).

[69] Buczkowski v. McKay, 490 N.W.2d 330 (Mich. 1992).

Supreme Court deemed necessary for finding that a duty exists in a particular case. This Note asserts that the foreseeability-based analysis employed by the Michigan Supreme Court in *Buczkowski* was not only essential to the correct outcome of the case, but also preserves economic freedom for consumers and separation of powers between the legislative and judicial branches of government.

A. *Duty*

The Michigan Supreme Court's discussion of duty based either on foreseeability or policy reasoning is subject to at least two interpretations. First, it could be construed to mean that due to a lack of foreseeability, the court found no duty to exist, and the court supplementally included a discussion of the policy concerns involved. In the alternative, the Supreme Court's discussion could be read as providing two independent bases for finding duty; that is, that policy reasons alone could be used as an independent basis to find duty, regardless of a lack of foreseeability. Because the policy concerns presented by the Michigan Supreme Court implicate foreseeability concerns, this Note argues that *Buczkowski* should not be read as providing a basis for finding a duty ground solely upon policy concerns.

The supreme court diverged from the holding of the court of appeals on the issue of duty. The Michigan courts reached these differing results because of their differing approaches to the question of duty. The court of appeals analyzed "duty" based on the relational obligation between the plaintiff and the defendant, without any direct discussion of the policy basis for its finding of duty. While the Michigan Court of Appeals found a general duty to exist between retailers and members of the general public, the Michigan Supreme Court required more particularized circumstances. The Michigan Supreme Court found that a duty would only exist where the product sold was defective or inherently dangerous, or where the legislature had defined a class of purchasers who are deemed legally incompetent to buy that product.[70] The supreme court, however, restricted its inquiry to duty to use "reasonable care."[71] Because a legal duty does not arise from every relation, the supreme court's approach provides a more useful precedent in setting forth the specific factors it considered.

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[70] *Id.* at 333.
[71] *Id.* at 337.

The supreme court adopted foreseeability as the starting point for its analysis of duty. The supreme court went on to state that other considerations may be "and usually are"[72] more important. The supreme court cited *Samson v. Saginaw Professional Bldg., Inc.* for the proposition that the balancing of societal interests, the severity of the risk, the burden upon the defendant, likelihood of occurrence and the relationship between the parties are other factors to be considered.[73] This Note argues that none of the considerations set forth displace the requirement of foreseeability, however, and the decision in *Buczkowski* should be limited to this framework. Without the finding of foreseeability, there would be little to separate the opinions of the supreme court and of the court of appeals except the policy predilections of the members of the bench.

B. *Foreseeability*

Unlike the Court of Appeals, the Michigan Supreme Court flatly rejected that intoxication in fact is sufficient to warrant imposition of duty.[74] The Supreme Court refuted the finding of foreseeability made by the Court of Appeals by first distinguishing the instant case from the facts of *Moning v. Alfono*,[75] and second, by requiring notice of the likelihood of purchaser misuse.

1. Distinguishing *Moning*

Relying on the analysis in *Moning v. Alfono*,[76] the court of appeals found a duty on the part of the retailer to refrain from selling merchandise to a customer when it was apparent that doing so would create an unreasonable risk of foreseeable harm. In *Moning*, the Michigan Supreme Court defined the measure of the reasonableness of the risk as "depend[ing] on whether its magnitude is outweighed by its utility."[77]

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[72] *Buczkowski*, 490 N.W.2d at 333.

[73] Samson v. Saginaw Professional Bldg., Inc., 224 N.W.2d 843, 848 (Mich. 1975).

[74] *See supra* note 68. The supreme court held that the issue is not, therefore, whether it is foreseeable that an intoxicated customer may injure another with a non-defective product, but whether a retailer in the supermarket setting presented should be liable for a clerk's failure to foresee a customer's criminal purpose. *Buczkowski*, 490 N.W.2d at 335.

[75] 254 N.W.2d at 759 (Mich. 1977). *See supra* note 53 and accompanying text.

[76] *Id.*

[77] *Id.* at 762. Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such

In this balancing of societal interests, courts must balance public safety with the due process principle that notice be given before depriving an individual of a property right.

The Court of Appeals in *Buczkowski* found that the allegedly intoxicated defendant's conduct was as foreseeable as that of the child who purchased a slingshot and injured his friend in *Moning*.[78] The Michigan Supreme Court, however, distinguished *Moning* because that case dealt with children, a class traditionally given additional protection in the law of torts.[79]

2. Requirement of Actual Notice

The Michigan Supreme Court also rejected the court of appeals' finding that intoxication in fact is sufficient in a negligent entrustment analysis. The court of appeals had reached its conclusion despite Michigan case law requiring knowledge or reason to have knowledge for a finding of negligent entrustment,[80] and despite contrary precedent in similar cases from other jurisdictions.[81]

The supreme court found a lack of evidence demonstrating any notice to the retailer in *Buczkowski*.[82] The court of appeals stated that the purchaser was intoxicated.[83] However, the court's conclusion was absent any objective measure. Testimony was presented by the mother, girlfriend, and a co-defendant that the purchaser had been drinking heavily for several days. These witnesses all knew the defendant well and had special knowledge of his behavior when intoxicated.[84] They were not, however, the individuals present at the point-of-sale. This type of ex post finding gives no indication whether defendant was ex-

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magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done. RESTATEMENT (SECOND) TORTS § 291 (1966).

[78] *Buczkowski*, No. 89-113420, slip op. at 2 (Mich. App. July 23, 1990).

[79] 490 N.W.2d at 334. It is easier for third parties to identify children and predict their behavior than it is to identify an intoxicated purchaser, much less predict his behavior. In addition, the burden on retailers to determine age is far less than the burden they face in determining the sanity and lawful intent of customers, or a customer's ability to control himself under pressure.

[80] *See* Muscat v. Khalil, 388 N.W.2d 267, 273 (Mich. 1986); *see supra* note 67.

[81] K-Mart Enterprises of Florida, Inc. v. Keller, 439 So.2d 283 (Fla. App. 1983), *review denied*, 450 So.2d 487 (Fla. 1984) (awarded $1 million verdict on statutory violation claim; required proof of actual or constructive knowledge of the buyer's incompetence).

[82] 490 N.W.2d at 333.

[83] *Buczkowski*, No. 89-113420, slip op. at 1 (Mich. App. July 23, 1990).

[84] Brief for Plaintiff-Appellee on Appeal at 8, *Buczkowski*, 490 N.W.2d 330 (Mich. 1992)(No. 89-113420).

hibiting any outward manifestations of intoxication, such as slurred speech or stumbling, which might have alerted the reasonable seller to his condition at the time he purchased the ammunition.

The plaintiff in *Buczkowski* argued that the distinction between intoxication and visible intoxication is a distinction without a difference.[85] However, the value of concrete evidence ascertainable by an objective audience should not be minimized, and has not been minimized in other jurisdictions.[86] In *Viscomi v. K-Mart Discount Stores, Inc.*,[87] a case factually similar to *Buczkowski*, the court denied dealer liability because the plaintiff could not show visible intoxication. The absence of a visible intoxication standard or other readily apparent standard removes the retailer's last vestige of foreseeability to anticipate harm to third parties. Thus, foreseeability should be regarded as a prerequisite for liability.

By recognizing that the retailer's pre-transaction procedures governing ammunition did not detect all irresponsible persons, the court of appeals held the retailer to a stricter level of inquiry than that required by the statute.[88] The stricter level of inquiry and consequent lower threshold of knowledge set a foreboding precedent for other types of gun dealer liability cases. Under the analysis set forth by the Court of Appeals, it is plausible to assume that the retailer could be held answerable for injuries caused by minors. This is true despite the fact that the minor was not present in the store, and the gun or ammunition was purchased by competent, adult customers who gave no indication they would not be the user of the gun. To protect themselves from lia-

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[85] Supplemental Brief for Plaintiff-Appellee on Appeal at 6, *Buczkowski*, 490 N.W.2d 330 (Mich. 1992)(No. 89-113420).

[86] *See, e.g.*, Bernethy v. Walt Failor's, Inc., 653 P.2d 280 (Wash. 1982) (purchaser's blood alcohol concentration measured at .23%, a level presumptively considered to be visibly intoxicated).

[87] 534 N.E.2d 332 (N.Y. 1988), *appeal denied, sub. nom.* Viscomi v. Kresge Co., 561 N.E.2d 890 (N.Y. 1990).

[88] MICH. COMP. LAWS § 3.111 (1991), effective at the time of the transaction in *Buczkowski*, requires purchasers of rifles and shotguns to conform to the federal gun control act of 1968, but does not mention ammunition. S.B. 245, 86th Leg., 1991 Mich. Reg. Sess., sets out categories of prohibited purchasers, and references the federal bill, but does not specifically mention intoxication. H.B. 4431, 86th Leg., 1991 Mich. Reg. Sess. prohibits a merchant from selling ammunition to an indicted criminal the merchant *knows* is under indictment. Thus, the restrictions, if they require more than the standards outlined in the federal statute, require knowledge of the deficiency on the part of the seller.

bility, retailers would be forced to second-guess the motivations of all their customers.[89]

C. *Policy*

The analysis of the Michigan Supreme Court explicitly incorporates policy considerations in achieving the appropriate societal balance. The Supreme Court offers a frank discussion of the policy factors it considered.[90] The divergent results reached by the Supreme Court and the Court of Appeals are largely due to the Supreme Court's reliance on *King v. R.G. Industries*,[91] a case not even considered in the opinion of the Court of Appeals. In addition, the Michigan Supreme Court gave a more thorough treatment of the economic implications involved not only regarding liability for gun sales, but for commercial transactions in general.

1. Reliance on *King v. R.G. Industries*

The Michigan Supreme Court first rejected the plaintiff's argument that the policy considerations for firearm regulation are equally applicable to ammunition and thereby warrant liability. Quite to the contrary, the Michigan Supreme Court relied on *King v. R.G. Industries*,[92] finding that the legislature was the proper forum to settle such questions of manufacturer liability and declining to impose liability in such situations.

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[89] The concerns that arise from the additional burden placed on retailers rise to constitutional dimensions. The delay and invasion of privacy implicated when a retailer is forced to investigate is likely to infringe on the individual constitutional right to own a gun. "A well-regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST., amend. II. *See* Gardiner, *To Preserve Liberty — A Look at the Right to Keep and Bear Arms*, 10 N.KY. L. REV. 63 (1982). Particularly with the patchwork of regulation that currently exists, and with the manufacture of guns still legal, imposing liability on retailers will create a situation where a gun is legally purchased in one state, transported to another and the law-abiding merchant in the foreign jurisdiction would still be held liable. Steve Twomey, *The Business End of D.C.'s Gun Bill*, WASH. POST, Aug. 12, 1991, at A1.

[90] Considerations of policy justifying the result ordained by the fiction of foreseeability require frank policy discussion because a court can, of course, always simply hang its hat on the wall and say that anyone can foresee anything. *Buczkowski*, 490 N.W.2d at 334, (citing May v. Goulding, 111 N.W.2d 862 (Mich. 1961)).

[91] 451 N.W.2d 874 (Mich. Ct. App. 1990).

[92] *Id.*

Moreover, the *King* court was skeptical that placing the economic burden of crime on the defendant would have "a substantial impact on crime."[93] Thus, the Michigan Supreme Court in *Buczkowski* found that in circumstances where the good is minimally regulated, such as ammunition, and the defendant has satisfied all of the regulations imposed, the only reason left for applying the fiction of foreseeability is shifting the burden of plaintiff's loss.[94] With the sale of ammunition the court is faced with an instrumentality that by itself is relatively unlikely to cause great harm; rather, it is when the ammunition is combined with a gun that the potential for great harm increases dramatically. Thus, the sale of ammunition is a weaker case for liability.[95] The lack of a policy justification, coupled with contrary authority from other jurisdictions dealing with ammunition sales,[96] was not enough to persuade the supreme court that a sufficient policy justification for finding that a duty existed.

2. Economic Implications

a. *Unlimited Scope*

The decision by the court of appeals in *Buczkowski* has the potential to be very broadly applied. Even though the appeals court may not have intended its analysis to be used in cases of other dangerous instru-

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[93] *Id.* at 345.

[94] *Buczkowski*, 490 N.W.2d at 336-37.

[95] *Cf.* O'Toole v. Carlsbad Shell Serv. Station, 202 Cal. App. 3d 151, 247 Cal. Rptr. 663 (1988), *review denied*, (unpublished) (Cal. Aug. 18, 1988) where liability was imposed for providing the motivating force for harm. A state statute limiting the liability of persons who serve alcoholic beverages to intoxicated persons for injuries caused by intoxicated persons did not preclude a gasoline station owner from being held liable for deaths caused by an intoxicated motorist who purchased gasoline from the station employees. The gas station's liability derives from its having furnishing a chattel, gasoline, which was considered the motivating force that put a known drunken driver in a position where she foreseeably would endanger another. Just as the merchant in *O'Toole* supplied gasoline, the retailer in *Buczkowski* supplied the ammunition that was the motivating force that put an intoxicated, angry individual in a position to do harm. The critical distinction, however, is that the merchant in *O'Toole* openly acknowledged recognition that the customer was intoxicated by detaining the driver for over an hour. The retailer in *Buczkowski*, by contrast, in no way outwardly acknowledged recognition of the customer's intoxication.

[96] *See* Bryant v. Winn-Dixie Stores, Inc., 786 S.W.2d 547 (Tex. Ct. App. 1990), *cert. denied*, 111 S. Ct. 1090 (1991) (granted summary judgment where no statutory violation and no negligence where clerk had not observed anything unusual about the customer); Schmit v. Guidry, 204 So.2d 646 (La. Ct. App. 1967) (declined to impose legal duty under statute where minor who purchased shotgun shells from a store later shot another boy).

mentalities, its decision nonetheless sets a precedent for retailer liability in the case of any product that has the potential to be misused by the incompetent or inexperienced. For instance, at the same time the defendant in *Buczkowski* purchased the ammunition, he also purchased a knife. Had the plaintiff's injury somehow been negligently inflicted with a knife, an expansive reading of *Buczkowski* would require a finding of liability against the retailer. For that matter, an intoxicated customer purchasing a baseball bat or scissors should be prohibited by the retailer from doing so under this analysis, until the retailer has performed independent investigation and found fitness to use goods — not only for their intended purpose, but any conceivable purpose.

b. *Uncertainty in Business Relations*

The Michigan Supreme Court recognized the serious problems that an expansive imposition of retailer liability poses for American businesses. In this part of its analysis, the Supreme Court relied on *Vic Potamkin Chevrolet, Inc. v. Horne*,[97] where the plaintiff sued a car dealership for negligently selling an automobile to a driver whom the dealership knew to be incompetent. The Florida court rejected the plaintiff's assertion that "sellers have a duty to protect the world against incompetent product users"[98] and rejected application of negligent entrustment to the sale of automobiles.[99] The *Vic Potamkin* court believed that imposing dealer liability based on a customer's infirmities would create a situation where merchants, to protect themselves from liability, would have to investigate each customer's competence. The consequent delay and uncertainty would then cause businesses to shirk their duty "to foster certainty in business relationships."[100] In addition, the Florida court noted that the legislature is the appropriate forum to deal effectively with the various interests involved.[101]

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[97] 505 So. 2d 560 (Fla. Dist. Ct. App. 1987) (en banc), *aff'd*, 533 So. 2d 261 (Fla. 1988).

[98] *Id.* at 562.

[99] *Vic Potamkin Chevrolet*, 505 So. 2d at 563. *But see* Dillon v. Suburban Motors, Inc., 212 Cal. Rptr. 360, *appeal dismissed as moot*, 705 P.2d 1260 (Cal. 1985) (en banc) (which seems to support the proposition that any knowledge on the part of a dealer that an unqualified driver intends to take part in the purchase and use of vehicle created a duty to avoid the transaction altogether).

[100] *Vic Potamkin Chevrolet*, 505 So. 2d at 563 (quoting Muller v. Stromberg Carlson Corp., 427 So. 2d 266, 270 (Fla. Dist. Ct. App. 1983)).

[101] *Id.*

A finding of duty in *Buczkowski* would foster the very types of uncertainty in business relations feared by the court in *Vic Potamkin*. The values involved and the balancing of competing interests are issues best left to the legislature to resolve.

c. *Increased Costs*

Uncertainty in business relations fostered by a liability rule will in turn affect all dealers and consumers. Dealers would be faced with the increased cost of obtaining liability insurance.[102] The dramatic increase in insurance rates for tavern owners following the extension of civil liability in dram shop cases is the type of insurance rate increases merchants in all types of businesses face if subjected to this rule.[103]

Owners would likely spend resources to keep these liability insurance costs to a minimum through preventive measures such as training their employees to recognize defective purchasers or installing some type of detection device. All of these costs would likely be passed through to consumers in the form of higher prices. The end result would be that consumers, and not manufacturers or retailers, ultimately would bear the cost of a liability rule. Perhaps a higher price for guns, covering the cost of injuries caused by the weapons, would be a more accurate reflection of market demand in some cases. However, this "deep pocket" technique would eventually be impoverishing if applied to all types of products, and has the potential to greatly hinder legitimate economic activity. In any case, decisions concerning the

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[102] "It could cause insurers to over-reserve for retailers and thus raise their rates," according to Victor Schwartz, counsel to the Product Liability Alliance. Counsel for American Insurance Association stated that insurers may either refuse to write liability insurance or increase the cost of liability coverage for retailers that sell potentially dangerous products because insurers do not know what liability rules will be applied. Michael Schachner, *Retailer Liable for Shooting Committed with Gun it Sold*, BUSINESS INSURANCE, June 12, 1989, at 2.

[103] Plaintiffs may extract many times more in monetary damages from tavern owners than from individual drunk drivers. In Michigan, for example, a tavern's insurance company settled a wrongful death claim for over $7 million. Cansler v. Pine Knob Invest. Co., No. 84-275551-NI (Mich. Cir. Ct. Oakland County Oct. 25, 1985).

According to Richard Weiner, a New Jersey attorney representing several insurance carriers, insurance rates for New Jersey's bars and restaurants have tripled. He added that 50 to 60 percent of the 8,000 to 10,000 taverns and restaurants in New Jersey no longer have liability insurance. In an effort to control rates and the availability of insurance, some states, including Connecticut, have placed a ceiling on the amount of damages that can be awarded in such a suit at $50,000. *See* CONN. GEN. STAT. § 30-102 (1985). In addition, state legislators have expressed fear that homeowner's insurance premiums will follow the same course. Jillian Mincer, *Victims of Drunken Driving are Suing the Drivers' Hosts*, N.Y. TIMES, Aug. 9, 1985, at B5.

value society places on gun ownership are better left to the legislature and the democratic process than the courts.

3. Separation of Powers Concerns

A particularly troubling aspect of the debate over firearms is that support for merchant liability may be due to dissatisfaction with the results of the democratic process. Indeed, attempts to use the courts as vehicles to create merchant liability can be viewed as a blatant circumvention of the legislative process.[104] In the gloss it gave to the duty analysis, the court of appeals overlooked the important issue of which branch is best suited to handle the broad policy issues involved. The Michigan Supreme Court directly addressed this issue in its reliance on *King*, and correctly found that the legislature, and not the court, is the most appropriate forum for handling the broader policy concerns involved.

On a policy level, the legislature is the better equipped of the two branches of government to examine and balance the interests involved. In addition, the legislative debate allows for the input of values and views from society as a whole rather than two self-interested parties. Addressing the issue in the courtroom, and assuming that guns are used only for criminal activity, gives short shrift to legitimate gun uses, such as hunting, target shooting, and collecting. An examination of utility should not ignore those preferences that cannot be assigned a monetary value, including the psychic security which guns provide and the amount of criminal activity their presence may deter.

A liability rule in circumstances like *Buczkowski*, when the retailer is not on notice, threatens the very system designed to protect individual rights. When courts look only at the compensation and deterrence motive regarding guns in this isolated case, they destroy all incentives for individuals to protect their own rights.

From the standpoint of efficiency, allowing plaintiffs to circumvent the legislative process to obtain compensation would come at a high cost. Efficient avoidance measures are only effective where the party held liable is in a position to prevent the damage complained of at the

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[104] *See, e.g.*, Elizabeth Peer et al., *Taking Aim at Handguns*, NEWSWEEK, Aug. 2, 1982, at 42 ("[Plaintiffs' attorney Stuart] Speiser . . . believes the courts are a far more efficient vehicle than Congress for dealing with gun control, since judges and juries enjoy immunity from the political pressures of the gun control lobby.")

lowest possible cost.[105] Clearly, in the situation here, the most efficient way to prevent misuse is found in the misusers themselves. One way to accomplish this is by enforcing statutes already enacted.[106]

In addition, much of the concern is directed toward the influence well financed political action committees wield over legislators. In a democratic system, however, societal preferences will prevail in the legislative process. If people truly oppose gun ownership, their proponents will organize, garner an equal or greater amount of resources to participate in the lobbying process, and these views will eventually prevail. The seeming lack of influence currently may indicate a divided constituency more than a failure of the system to respond to constituent desires. Legislatures have been quick to limit extension of judicially created dram shop liability in the absence of statute.[107] This sort of judicial legislating is even less acceptable when public sentiment is not uniform as in the case of gun control and retailer liability. Moreover, the Maryland legislature's quick response to the Maryland Supreme Court's decision in *Kelley* may be an indication of legislative intolerance in this area.[108]

Any rule regarding gun ownership must balance competing interests. It would not be appropriate to only look at the economics of imposing a liability rule. An economic approach that ignores psychological value choices artificially undervalues utility to the parties not

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[105] *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, 1-28 (1987).

[106] For instance, the District of Columbia already has one of the nation's toughest laws on gun sales and ownership and yet has one of the highest homicide rates, suggesting that any gun law is futile. Pierre Thomas, *COG Urges Tougher Laws*, WASH. POST, Aug. 14, 1991, at A1.

The violent-crime rate for Michigan reported by the FBI soared 25 percent after "deprisonization" in the late 1970s. Starting in 1986 the inmate population doubled in five years and the crime rate dropped back to its former level. This was accomplished at an outlay of $888 million to build and expand prisons plus millions of dollars to keep the prisons operational. Eugene H. Methvin, *An Anti-Crime Solution: Lock Up More Criminals*, WASH. POST, Oct. 27, 1991 (Outlook), at C4, col. 3.

[107] *See, e.g.*, Coulter v. Superior Court of San Mateo County, 577 P.2d 669 (Cal. 1978), *abrogated by* CAL. BUS. & PROF. CODE § 25,602(c) (West 1985); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 485 P.2d 18, 23 (Or. 1971), *limited by* 1979 OR. LAWS ch. 801 § 2, *repealed by* 1987 OR. LAWS ch. 774, § 14.

[108] No other jurisdiction has followed Kelley v. R.G. Industries, 497 A.2d 1143 (Md. 1985), the theory being rejected in the following cases: Armijo v. Ex Cam, Inc., 656 F. Supp. 771 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988); Caveny V. Raven Arms Co., 665 F. Supp. 530 (S.D. Ohio 1987), *aff'd*, 849 F.2d 608 (6th Cir. 1988); Richardson v. Holland, 741 S.W.2d 751 (Mo. Ct. App. 1987).

involved in the litigation.[109] Nor would it be appropriate to only consider the psychological elements involved in the gun ownership debate because the economic impact could be enormously detrimental if liability rules were unrestrained. In order to achieve a suitable balance, the proper rule must set forth clear guidelines for the merchant and the consumer. This can be accomplished more effectively in the legislature after a full review of the relevant considerations than on the basis of a discrete evidentiary record presented in the judicial forum.

CONCLUSION

Effective remedies to the problem of gun violence in our society are difficult to achieve, and any solution will probably be costly. Lack of uniformity in federal, state, and local regulations impedes effective police enforcement of existing criminal statutes. A judicial quick-fix in the form of civil liability when the retailer has no objective measure of foreseeability, however, would have detrimental economic repercussions throughout the entire economy.

Recognizing that the Michigan Supreme Court's decision could be a harbinger of similar applications of the negligent entrustment doctrine in other states, this Note advocates the approach adopted by the Michigan Supreme Court in *Buczkowski*. The court limited the doctrine's application to those circumstances where the retailer can reasonably foresee harm based on some objective measure which would gauge a client's ineptitude or inexperience. Use of such objective measures rather than reliance on after-the-fact findings would achieve the desired outcome more effectively in such cases. Policy concerns may properly be used to buttress a finding of foreseeability, but should not be used to supplant such a determination. The incremental advantages to safety that otherwise may be gained from holding a retailer responsible for gun and ammunition transactions may never be realized. In addition, the elimination of foreseeability as an element of retailer liability in firearms-related cases would logically extend to other commercial

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[109] Attempting to apply the economic theory set forth by Judge Richard A. Posner in *A Theory of Negligence*, 1 J.LEGAL STUDIES 29 (1972), Professor Vandall has concluded that the analysis is not appropriate in the gun control context. Frank J. Vandall, *Judge Posner's Negligence-Efficiency Theory: A Critique*, 35 EMORY L.J. 383 (1986). Analyzing Posner's liability standard as applied in Richman v. Charter Arms, 571 F. Supp. 192 (E.D. La. 1983), *rev'd*, 762 F.2d 1250 (5th Cir. 1985), Vandall argues that assigning quantifiable variables is impossible because the variables are intrinsically laden with non-verifiable factors. Thus, an economic analysis is not useful to determine liability. *Id.*

contexts, surely imposing a detrimental economic impact upon a host of other types of sales exchanges.

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