
Pin the Tail on . . . Somebody: The Kansas Supreme Court's Decision to Expose Firearms Dealers to Unwarranted Liability*

I. INTRODUCTION

The Kansas Supreme Court's recent decision in *Shirley v. Glass*¹ raised the degree of care applicable to Kansas firearms dealers conducting sales, which in turn elevated the risk of liability for selling firearms to such a high level as to cast considerable doubt on whether Kansas firearms dealers can continue their trade.² In *Shirley*, the Kansas Supreme Court reversed the Kansas Court of Appeals, holding that firearms dealers must exercise the "highest degree of care" when conducting firearms sales.³ As a result, Kansas firearms dealers may be liable for selling a firearm to an incompetent purchaser if a jury determines the dealer had even the slightest possible reason to know of the purchaser's incompetence.⁴ This proposition seems fair until one considers that the supreme court's holding requiring firearms dealers to exercise the "highest degree of care" in determining whether a purchaser is competent to possess a firearm came without instructions.⁵ The highest degree of care is one feather away from negligence per se,⁶ and firearms dealers have been given an expectation with no guidance as to how to live up to it.

This Note analyzes the supreme court's imposition of the highest de-

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1. *Shirley v. Glass*, 308 P.3d 1 (Kan. 2013).

2. *See id.* at 9 (noting the Kansas Court of Appeals' concerns that "a heightened standard of care for merchants might preclude merchants from being able to sell firearms because of the threat of liability").

3. *Id.*

4. *Id.*

5. *Id.*

6. *See Shirley*, 241 P.3d 134, 155 (Kan. Ct. App. 2010), *aff'd in part, rev'd in part*, 308 P.3d 1 (Kan. 2013) ("[T]he 'highest degree of care' standard [] would make every licensed gun dealer negligent per se every time a statutorily ineligible gun purchaser, no matter how deceitful, bought a firearm."); *Wroth v. McKinney*, 373 P.2d 216, 218 (Kan. 1962) ("As the hazard from the use or threatened use of dangerous instrumentalities increases, the responsibility of the person employing them becomes stricter, and in extreme cases, may be the equivalent of insurance of safety.").

gree of care on Kansas firearms dealers conducting firearm sales, and concludes that the imposition of such a high standard is improper because it exposes prudent, blameless dealers to unwarranted liability. The ordinary degree of care standard is preferable because it already holds culpable dealers liable without producing the higher standard's undesirable effect of exposing responsible dealers to liability. Part II of this Note provides the facts of *Shirley* and its procedural history. Part II also delineates the history of negligent entrustment, its application to firearms, and the degree of care that accompanies its application. Part III critiques the Kansas Supreme Court's decision to apply the highest degree of care standard to Kansas firearms dealers and warns of the harm it will inflict on innocent businesses. Part IV concludes that the Kansas Supreme Court was wrong to elevate the care required of Kansas firearms dealers from an ordinary degree to the highest degree, and argues in the alternative for imposition of only an ordinary degree of care standard.

II. BACKGROUND

A. *Shirley v. Glass*⁷

The gravamen of the plaintiff's claim in *Shirley* was that the defendants sold a firearm to a purchaser they knew or should have known was incompetent to possess it.⁸ The tragic series of events that gave rise to *Shirley* culminated in the death of eight-year-old Zeus Graham at the hand of his own father.⁹ Zeus's father, Russell Graham, had a history of violence towards Zeus's mother, Elizabeth Shirley.¹⁰ On multiple occasions, Graham assaulted and threatened Shirley. Most notably, in July 2003, Graham called Shirley to pick up her son from his house.¹¹ When Shirley arrived, Graham viciously attacked her, causing Shirley to obtain a protection-from-abuse order.¹² Shortly after these events, Graham threatened Zeus's life, and on one occasion, attempted to suffocate Zeus in his sleep.¹³

7. *Shirley*, 308 P.3d 1. The case was decided on summary judgment, so the court "review[ed] the evidence in the light most favorable to the nonmoving party," plaintiff, and found the facts as they are relayed in this section. *Id.* at 3.

8. *Id.* at 3-4.

9. *Id.*

10. *Id.* at 3.

11. *Id.*

12. *Id.*

13. *Id.*

Though Graham was a convicted felon and therefore statutorily ineligible to purchase a firearm, on September 5, 2003, he enlisted his grandmother to accompany him to the Baxter Springs Gun & Pawn Shop to purchase a shotgun.¹⁴ Once inside the pawnshop, Graham told the shop's owners, Joe and Patsy George, that he had called earlier about buying a shotgun for his children to use for dove hunting.¹⁵ Graham represented to his grandmother that the shotgun would remain at her house.¹⁶ Both Graham and his grandmother held the shotgun, and Graham indicated they would take it.¹⁷ Graham asked for ammunition and a cleaning kit as well.¹⁸ The shop owner asked Graham whether he had "been a good boy," to which Graham replied that he had a felony.¹⁹ The owner then said, "Let's see if grandma has been a good girl."²⁰

Graham's grandmother completed Form 4473, which is used to determine whether a prospective firearm purchaser is a felon or otherwise prohibited from completing the purchase. She inserted her name as the buyer, despite the form's warning that "[y]ou are not the actual buyer if you are acquiring the firearm(s) on behalf of another person," and that purchasing a firearm on behalf of another is a felony.²¹ Graham's grandmother did not read the form or answer its "yes/no questions because, in her view, she was not purchasing the gun."²² Even so, she successfully passed the required background check and was given youth gun-safety material.²³ Graham presented the cash to pay for the transaction, though it is unclear whether it was he or his grandmother who ultimately gave the money to the shop owner.²⁴ Regardless, Graham left the pawn shop with the shotgun in hand,²⁵ and took it with him when his grandmother dropped him off at home.²⁶ Shortly before midnight on the

14. *Id.*

15. *Id.* at 4.

16. *Id.* at 3.

17. *Id.* at 4.

18. *Id.*

19. *Id.* Graham's grandmother reported this conversation. Joe, however, denied the conversation ever took place. *Id.*

20. *Id.* "Joe later explained that the reason for asking the question was to lighten the mood with a joke, while Patsy explained that the question was not a joke but was intended to determine whether a purchaser could legally buy a gun." *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

same day, Graham called Shirley.²⁷ He told her about getting a gun with his grandmother's help, and that he would shoot Zeus if she did not come over to talk.²⁸ Shirley's boyfriend contacted the police, who instructed Shirley to remain at her home.²⁹ Shirley later called Graham back and left a message that she was coming over.³⁰ Sadly, around the same time that Shirley was leaving the message, Graham shot and killed Zeus before turning the shotgun on himself.³¹

Shirley sued Baxter Springs Gun & Pawn Shop, along with the Georges, for negligently selling a firearm to Graham's grandmother, knowing the firearm was for Graham (who was not competent to purchase a firearm because of his admitted felon status).³² Shirley relied on the tort of negligent entrustment as the legal foundation for her claim, which provides that one who supplies a chattel to someone he knows or should know is incompetent to use it is liable for the harm it causes to another.³³ The district court granted the Georges' motion for summary judgment,³⁴ and Shirley appealed. The Kansas Court of Appeals affirmed the district court's rejection of her negligence per se claim, but reversed the district court's rejection of her negligent entrustment claim against the pawn shop and the Georges.³⁵

Shirley appealed, asking the Kansas Supreme Court to review the court of appeals' rejection of her negligence per se claim as well as the degree of care applicable to firearms dealers conducting sales in her action for simple negligence.³⁶ The supreme court construed Shirley's negligence per se claim to be a negligent entrustment claim, and affirmed the court of appeals' decision to allow negligent entrustment claims against firearms dealers.³⁷

While the supreme court agreed that negligent entrustment ought to

27. *Id.*

28. *Id.*

29. Shirley v. Glass, 244 P.3d 134, 141 (Kan. Ct. App. 2010), *aff'd in part, rev'd in part*, 308 P.3d 1 (Kan. 2013).

30. Shirley, 308 P.3d at 4.

31. *Id.*

32. *Id.* Shirley also brought negligent entrustment and breach of fiduciary duty claims against Graham's grandmother, but dropped them when the grandmother was diagnosed with Alzheimer's disease. *Id.*

33. RESTATEMENT (SECOND) OF TORTS § 390 (1965).

34. *Id.*

35. Shirley v. Glass, 241 P.3d 134, 153, 145 (Kan. Ct. App. 2010), *aff'd in part, rev'd in part*, 308 P.3d 1 (Kan. 2013).

36. Shirley, 308 P.3d at 5.

37. *Id.* at 9.

apply to the sale of a firearm, it starkly disagreed with the court of appeals' refusal to impose the highest degree of care on firearms dealers conducting sales.³⁸ Despite the court of appeals' prediction that the higher standard would expose firearms dealers to liability even where they had no reason to know that a customer was incompetent to purchase a firearm,³⁹ the supreme court strongly asserted that it would neither shy away from nor limit prior rulings requiring those in control of firearms to exercise the highest degree of care to prevent firearms from falling into the hands of those who are legally incompetent to possess such weapons.⁴⁰ As a result of the *Shirley* decision, Kansas firearms dealers are now held to the highest degree of care when conducting firearms sales.⁴¹

B. Negligent Entrustment

The tort of negligent entrustment was first recognized in Kansas by the supreme court in *Priestly v. Skourup* in 1935.⁴² In *Priestly*, a pedestrian who had been struck by a young driver sued the owner of the car on the ground that, as the driver's father, the owner knew his son was a careless driver yet negligently entrusted him with the vehicle anyways.⁴³ Since *Priestly*, negligent entrustment claims in Kansas have developed to encompass four elements: "(1) an entrustment of a chattel, (2) to an incompetent trustee, (3) with knowledge or reason to know of the trustee's incompetence and, (4) the trustee's incompetence while using the chattel is the cause in fact of injury or damage to the trustee and/or another."⁴⁴

Historically, most negligent entrustment claims in Kansas were based on persons supplying vehicles to known careless drivers.⁴⁵ In 2006, the Kansas Court of Appeals first considered whether negligent entrustment may properly apply to the sale of chattels in *Estate of Pember-*

38. *Shirley*, 308 P.3d at 8–10; *Shirley*, 241 P.3d at 154–56.

39. *Shirley*, 241 P.3d at 156.

40. *Shirley*, 308 P.3d at 9.

41. *Id.*

42. 45 P.2d 852, 854 (Kan. 1935) (citing RESTATEMENT (FIRST) OF TORTS § 390 (1934)).

43. *Id.*

44. *Martell v. Driscoll*, 302 P.3d 375, 382 (Kan. 2013).

45. *Estate of Pemberton v. John's Sports Ctr., Inc.*, 135 P.3d 174, 188 (Kan. Ct. App. 2006) (citing *Fogo v. Steele*, 304 P.2d 451, 452–53 (Kan. 1956) ("The vast majority of [negligent entrustment] cases are where the owner has permitted a known reckless or incompetent person to use his or her vehicle.")). See also, e.g., *Richardson v. Erwin*, 255 P.2d 641, 644 (Kan. 1953) (negligent entrustment of automobile); *Pennington v. Davis-Child Motor Co.*, 57 P.2d 428, 430 (Kan. 1936) (same).

*ton v. John's Sports Center, Inc.*⁴⁶ However, the *Pemberton* court ultimately did not resolve the question because it found that, even if the tort were applicable, the plaintiff could not prove all of the required elements.⁴⁷ While ultimately leaving the question unanswered, the court emphasized that the commentary accompanying the Restatement (Second) of Torts codification of negligent entrustment in § 390 “clearly states that it ‘applies to sellers.’”⁴⁸

Outside Kansas, some states have applied negligent entrustment to the sale of chattels,⁴⁹ while others have refused to do so.⁵⁰ In its *Shirley* decision, the court of appeals sided with those states who recognized negligent entrustment in the sale of chattels context. In extending the tort to encompass the sale of chattels, specifically the sale of firearms, the court of appeals held that “the special duty under Section 390, to not give control of firearms or ammunition to a person whom the firearms dealer knows is incompetent or incapable . . . of using those items carefully, has been extended to firearms dealers.”⁵¹ Despite some opposition to this rule,⁵² the Kansas Supreme Court affirmed the court of appeals’ decision, resulting in negligent entrustment claims now reach firearms sales in Kansas.⁵³

C. Degree of Care Applicable to Kansas Firearms Dealers

The extension of negligent entrustment to firearms sales begged the

46. 135 P.3d at 187–88. To that point, Kansas courts had never applied negligent entrustment to the sale of chattels, and had even held that a seller cannot negligently entrust a vehicle to a buyer once the sale is complete. *Id.* at 188; *Kirk v. Miller*, 644 P.2d 486, 490 (Kan. Ct. App. 1982).

47. *Pemberton*, 135 P.3d at 188.

48. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 390 cmt. a (1965)).

49. *E.g.*, *Howard Bros. of Phenix City, Inc. v. Penley*, 492 So. 2d 965, 969 (Miss. 1986) (store had a duty to have some procedures in place to prevent incompetent people from obtaining firearms); *Rains v. Bend of the River*, 124 S.W.3d 580, 597 (Tenn. Ct. App. 2003) (recognizing negligent entrustment in the sale of firearms and ammunition); *Bernethy v. Walt Failor’s, Inc.*, 653 P.2d 280, 283 (Wash. 1982) (recognizing negligent entrustment in firearms sales).

50. *E.g.*, *Fluker v. Lynch*, 938 S.W.2d 659, 662 (Mo. Ct. App. 1997) (refusing to recognize negligent entrustment claim where dealer allegedly sold vehicle to intoxicated driver); *Salinas v. Gen. Motors Corp.*, 857 S.W.2d 944, 949 (Tex. Ct. App. 1993) (refusing to recognize negligent entrustment claim against automobile manufacturer).

51. *Shirley v. Glass*, 241 P.3d 134, 145 (Kan. Ct. App. 2010), *aff’d in part, rev’d in part*, 308 P.3d 1 (Kan. 2013).

52. For an argument against applying negligent entrustment to the sale of chattels, specifically to firearms sales, see Andrew D. Holder, Comment, *Negligent Entrustment: The Wrong Solution to the Serious Problem of Illegal Gun Sales in Kansas* (*Shirley v. Glass*, 241 P.3d 134 (Kan. Ct. App. 2010)), 50 WASHBURN L.J. 743 (2011).

53. *Shirley v. Glass*, 308 P.3d 1, 9 (Kan. 2013).

question of what degree of care firearms dealers must exercise to sufficiently carry out their duties under the law. Naturally, because the Kansas Supreme Court recently affirmed the extension of negligent entrustment to firearms sales, there is no lengthy case law addressing this issue. However, there is an established doctrine pertaining to “dangerous instrumentalities.”⁵⁴ The doctrine proceeds on the logic that some instrumentalities are inherently dangerous, and thus require the possessor to exercise a higher degree of care to satisfy the reasonable care standard.⁵⁵ While an actor is always required to exercise “reasonable care,” the degree of care constituting reasonable care depends on the dangerousness of the situation.⁵⁶ Accordingly, “reasonable care” may require the actor to employ an “ordinary degree of care” or the “highest degree of care,” depending on the dangerousness of the situation.⁵⁷ For example, the highest degree of care is required for reasonable care when using inherently dangerous instrumentalities, such as high-voltage power lines,⁵⁸ natural gas pipes,⁵⁹ and explosives.⁶⁰ Firearms have also long been held to be dangerous instrumentalities that command the highest degree of care from their owners or controllers.⁶¹ However, the dangerous instrumentality cases involving firearms so far have only addressed private owners’ duties in *storing* firearms, not dealers’ duties in *selling* firearms.⁶²

Kansas courts have not clearly articulated the difference between the ordinary degree of care and the highest degree of care standards beyond stating that a difference exists.⁶³ The distinction has puzzled tort law experts Professors William Westerbeke and Stephen McAllister:

54. See *Long v. Turk*, 962 P.2d 1093, 1096 (Kan. 1998) (describing the “dangerous instrumentalities” doctrine).

55. *Id.* at 1097.

56. See RESTATEMENT (SECOND) OF TORTS §298 cmt. b (1965).

57. *Id.* (“[T]he care which it is reasonable to require of the actor varies with the danger involved in his act, and is proportionate to it.”).

58. *Cope v. Kan. Power & Light Co.*, 391 P.2d 107, 112 (Kan. 1964).

59. *Sternbock v. Consol. Gas Utils. Corp.*, 98 P.2d 162, 167 (Kan. 1940).

60. *Clark v. E. I. Du Pont de Nemours Powder Co.*, 146 P. 320, 321 (Kan. 1915).

61. *Wroth v. McKinney*, 373 P.2d 216, 219 (Kan. 1962) (citing *Clark*, 146 P. at 321).

62. See, e.g., *Wood v. Groh*, 7 P.3d 1163, 1166–67 (Kan. 2000) (son removed screws from father’s gun cabinet, accessed handgun, and shot another minor); *Long v. Turk*, 962 P.2d 1093, 1094–95 (Kan. 1998) (son took father’s gun from cabinet and fatally shot another minor); *Wroth*, 373 P.2d at 219 (plumber took 4-year-old son along to work in defendant’s house, where his son found defendant’s loaded pistol in the house and killed himself).

63. William E. Westerbeke & Stephen R. McAllister, *Survey of Kansas Tort Law: Part I*, 49 U. KAN. L. REV. 1037, 1065 (2001).

The supreme court [in *Wood v. Groh*] emphasized that an important difference exists between the reasonable care standard . . . and the ‘highest degree of care’ standard defining the duty to control dangerous weapons. Yet the court never explained how the ‘highest degree of care’ differs from [ordinary] care. An examination of the ‘highest degree of care’ standard in the high power line cases in Kansas seems to suggest that ‘highest degree of care’ is simply another way to describe a reasonable care standard in which the heightened dangerousness of the instrumentality requires commensurately heightened precautions in order to satisfy reasonable care under all the circumstances.⁶⁴

Comment *b* of the Restatement (Second) of Torts § 298 supports this proposition because it provides that “[t]he care required is always reasonable care. This standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his act The greater the danger, the greater the care which must be exercised.”⁶⁵ This Note does not purport to sort out the care-standard definitions in Kansas. It suffices to note that “[t]here is a substantial difference between the . . . ordinary care [and] the highest degree of care [standards],” such that instructing the jury on the wrong standard requires reversal.⁶⁶ Whether courts refer to the care required of a firearms dealer as “the highest degree of care,” or simply assert that transacting in firearms is of amplified dangerousness and requires tremendous precautions, the resulting duty is the same: the highest degree of care requires significantly more on the part of the firearms dealer than does an ordinary degree of care.⁶⁷

D. The Degree of Care in Shirley

In *Shirley*, plaintiff Shirley argued to the Kansas Court of Appeals that two Kansas Supreme Court decisions, *Long v. Turk*⁶⁸ and *Wood v. Groh*,⁶⁹ supported extending the highest degree of care to firearms dealers who conduct the firearms sales at issue in negligent entrustment actions.⁷⁰ Both cases involved minors accessing their father’s firearm and

64. *Id.*

65. RESTATEMENT (SECOND) OF TORTS § 298 cmt. b (1965).

66. *Wood*, 7 P.3d at 1169.

67. *See id.* (noting that “[t]here is a substantial difference between . . . ordinary care [and] the highest degree of care”).

68. *Long v. Turk*, 962 P.2d 1093 (Kan. 1998).

69. *Wood*, 7 P.3d at 1163.

70. *Shirley v. Glass*, 241 P.3d 134, 154 (Kan. Ct. App. 2010), *aff’d in part, rev’d in part*, 308 P.3d 1 (Kan. 2013).

consequently injuring another. In both cases, the supreme court ruled that the highest degree of care applies to firearm owners when carrying out their duties to keep their firearms from an incompetent person's possession.⁷¹ The court of appeals distinguished the cases as involving "an adult's duty to safeguard handguns from minors," and rejected Shirley's argument that the cases instruct that the highest degree of care should apply to firearms dealers conducting sales.⁷² The court of appeals reasoned that the *Shirley* facts involve a different situation: a merchant who sells guns to customers in the ordinary course of business.⁷³ Drawing on this distinction, the court of appeals further reasoned that while an adult must exercise the highest degree of care to prevent *a minor* from obtaining possession of the adult's gun, a firearms dealer is not required to "exercise the 'highest degree of care' to protect *the general public* from the misuse of the gun."⁷⁴

After rejecting Shirley's argument that the highest degree of care applies to firearms dealers conducting sales, the court of appeals expressed its concern that adopting such a care standard would make firearms dealers negligent per se each and every time they sold a firearm to a statutorily ineligible purchaser, regardless of how deceptive or cunning the purchaser, and regardless of how innocent and careful the dealer.⁷⁵ The court hypothesized that applying the highest degree of care to firearms dealers might require them

to investigate whether the firearms purchaser had other people living in the home, whether those people had any violent tendencies or prior felony convictions, whether there were any children in the home, whether the purchaser had a secure gun cabinet in which to lock away his gun, and whether the purchaser had received extensive gun safety education.⁷⁶

The court expressed concern over whether a firearms dealer could even continue his business with the threat of liability the highest degree of care standard would impose upon him.⁷⁷

In refusing to extend the highest degree of care to firearms dealers

71. *Id.* (citing *Long*, 962 P.2d at 1094–96 and *Wood*, 7 P.3d 1163, 1166, 1169).

72. *Shirley*, 241 P.3d at 155.

73. *Id.*

74. *Id.* (emphasis added).

75. *Id.*

77. *Id.*

77. *Id.*

conducting sales, the court of appeals implied that it would be unfair to impose the standard on firearms dealers because (1) federal legislation does not indicate that firearms dealers were intended to bear a duty to investigate, and (2) even reasonable firearms dealers could be liable in cases where there was no indication that the customer was incompetent to possess a firearm.⁷⁸

To the contrary, the Kansas Supreme Court found that the court of appeals erred in limiting *Wood* and *Long* to situations where gun owners failed to prevent minors from accessing their guns.⁷⁹ The supreme court reasoned that comment *b* of the Restatement (Second) of Torts § 298 does not instruct that there should be a limit to the rule that firearms always require their controller to exercise the highest degree of care.⁸⁰

The supreme court also asserted that because the degree of care standard is interconnected with the foreseeability of harm,⁸¹ firearms sellers are subject to a higher degree of care than, for example, a marble seller, because it is “more foreseeable that a firearm may cause serious injury” than would a marble, whose dealer is subject to a lower standard of care.⁸² The court strongly stated that it would not shy away from its prior holdings that firearms carry with them a duty to exercise the highest degree of care in preventing those considered too incompetent to use them from possessing them.⁸³ Supporting its ruling, the court reasoned that the legislature has determined that convicted felons are at special risk to misuse firearms, so it follows that a firearms dealer must exercise the highest degree of care to prevent felons from purchasing firearms.⁸⁴

E. Laws Applicable to Kansas Firearms Dealers

In addition to satisfying the requisite standard of care, firearms dealers must comply with gun control legislation. Among the chief purposes of federal gun control legislation is “to deny access to firearms to certain classes of individuals deemed to constitute more of a threat to the community” than the general population.⁸⁵

78. *Id.* at 155–56.

79. *Shirley v. Glass*, 308 P.3d 1, 9 (Kan. 2013).

80. *Id.*

81. *Id.* (citing *South v. McCarter*, 119 P.3d 1, 13–14 (2005)).

82. *Id.* (citing *Jacoves v. United Merch. Corp.*, 9 Cal. App. 4th 88, 116 (1992)).

83. *Id.*

84. *Id.*

85. W. A. Harrington, Annotation, *Lawfulness of Sale or Other Disposition of Firearms or Ammunition Under 18 U.S.C.A. § 922(d)*, 34 A.L.R. FED. 430, § 2(a) (1977).

The Gun Control Act of 1968 requires firearms dealers to obtain a license under § 923(a) in order to sell firearms.⁸⁶ The Act prohibits dealers licensed under the Gun Control Act from selling firearms to individuals who fall into proscribed categories.⁸⁷ Section 922 of the Act provides that it is illegal for a dealer to sell a firearm to anyone he has “reasonable cause to believe” is a felon; “a fugitive from justice”; a controlled substance user or addict; a person who “has been adjudicated as a mental defective or has been committed to any mental institution”; an illegal alien; a person who was dishonorably discharged from the Armed Forces; a person who has renounced his U.S. citizenship; a person who has a restraining order against him for “harassing, stalking, or threatening an intimate partner” or the intimate partner’s child; or a person who “has been convicted in any court of a misdemeanor crime of domestic violence.”⁸⁸

However, “there is no mandatory verification procedure regarding sales or dispositions with respect to the status of an individual (for example, a felon or a narcotic addict) barred from receiving firearms under the statute,” except that a dealer must require the customer to complete Transaction Record Form 4473.⁸⁹ The purpose of Form 4473 is to determine whether a firearms purchaser is legally able to purchase a firearm.⁹⁰ The dealer must ensure that the purchaser includes his name, sex, address, date and place of birth, height, weight, race, citizenship, home state, and a “certification by the [purchaser] that [he] is not prohibited by the Act from . . . receiving a firearm.”⁹¹ After the purchaser completes the form, the dealer must verify the purchaser’s identity by inspecting the purchaser’s “identification document,”⁹² for example, his driver’s license.⁹³ Then, the dealer must perform a “background check” by contacting the National Instant Criminal Background Check System (NICS) and providing the purchaser’s information.⁹⁴ The dealer may transfer the firearm to the purchaser only if the NICS informs the dealer that “it has no information that receipt of the firearm by the transferee would be in violation of Federal or State law,”⁹⁵ or if three days have elapsed and

86. 18 U.S.C. § 923(a) (2004).

87. *Id.* § 922(d).

88. *Id.* § 922(d)(1)–(9).

89. Harrington, *supra* note 85, at § 2(b); 27 C.F.R. § 478.124 (2010).

90. 27 C.F.R. § 478.124 (2010).

91. *Id.* § 478.124(c)(1).

92. 27 C.F.R. § 478.11 (2012).

93. 27 C.F.R. § 478.124(c)(3)(i) (2010).

94. 27 C.F.R. § 478.102(a) (2008).

95. *Id.* § 478.102(a)(2)(i).

NICS has not informed the dealer that the purchaser is ineligible to receive a firearm.⁹⁶

III. ANALYSIS

Before turning to the prudence and effects of *Shirley*'s holding that Kansas firearms dealers' conduct must meet the highest degree of care, it is helpful to acknowledge that the *Shirley* defendants clearly were not conducting business in a safe manner. The defendants did not uphold their duties and should be held liable for their failures. The author also acknowledges that many preventable firearm tragedies occur each year and empathizes with the victims. However, cognizant of the many *re-sponsible* firearms dealers in the marketplace, a heavy heart should not blindly pin the tail of liability on a prudent dealer simply because he was a party to a transaction far removed from the ultimate tragedy. Just as bad facts make bad law, it is unfair to use firearms dealers as a vehicle for remedying public harms where our laws, public officials, or other institutions fall short.

Public policy and common sense mandate laws that require dealers to operate safely. However, policy and common sense also dictate that merchants should have a real opportunity to continue their trade. A law authorizing free-for-all firearms sales would be ill-advised; but a legal scheme espousing the legality of firearms sales while simultaneously imposing liability through a back door degree of care mechanism is equally irrational. The law should reflect the middle ground between safety and practicality in firearms transactions. As long as the legislature continues to authorize firearm sales, the blame flowing from a bad sale should fall on only the blameworthy parties.

When considering which care standard achieves fair and desired results, it is important to be mindful of the four elements of a negligent entrustment claim.⁹⁷ In a negligent entrustment claim against a firearms dealer, the plaintiff is likely to have the least difficulty establishing three of these elements: (1) the defendant entrusted a chattel (2) to an incompetent trustee (3) who through his incompetent use of the chattel hurt somebody.

96. *Id.* § 478.102(a)(2)(ii).

97. *Martell v. Driscoll*, 302 P.3d 375, 382 (Kan. 2013) (“(1) an entrustment of a chattel, (2) to an incompetent trustee, (3) with knowledge or reason to know of the trustee’s incompetence and, (4) the trustee’s incompetence while using the chattel is the cause in fact of injury or damage to the trustee and/or another.”).

First, entrustment is easy to prove. The plaintiff must simply demonstrate that a sale occurred, a fact that is not likely to be disputed when there is proof of a sale (i.e., the required documentation that accompanies a firearm transfer or a sales receipt).

Second, as to establishing the trustee's incompetence, two factors ease the plaintiff's burden: the "hindsight bias" phenomenon and the admissibility of character evidence. Hindsight bias "describes the tendency of actors to overestimate the *ex ante* prediction that they had concerning the likelihood of an event's occurrence after learning that it actually did occur."⁹⁸ Jurors, equipped with hindsight bias by nature, will hear evidence about the trustee's reputation and prior acts.⁹⁹ As Professor Geoffrey Rapp explains, "[e]xpecting juries and judges to overcome their own hindsight bias is demonstrably unscientific."¹⁰⁰ So, even if the trustee's reputation and prior acts alone do not warrant his categorization as incompetent, jurors by nature cannot resist considering the trustee's tortious act that harmed the plaintiff when finding whether or not the trustee was incompetent *at the time the entrustment occurred* (i.e., before the harm at issue in the claim occurred).¹⁰¹ Because "hindsight bias will lead juries . . . to find defendants liable more frequently than if" their analysis were on "an *ex ante* basis . . . [,] plaintiffs will win cases they deserve to lose."¹⁰² Hindsight bias necessitates the fact that "the greatest advantage of basing an action on the theory of negligent entrustment is that [character] evidence of specific prior acts of negligence of the trustee, as well as evidence of his general reputation for traits which show his incompetence, is admissible."¹⁰³

Lastly, there would be no claim if someone were not injured. Plaintiffs generally would not choose to incur the costs of litigation if there was no injury. As with entrustment, this element is not likely to be dis-

98. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1095 (2000) (citation omitted).

99. See Jimmie E. Tinsley, 2 AM. JUR. PROOF OF FACTS 2D 651, § 2 (Bancroft-Whitney Company ed., rev. 2014) (citation omitted) (explaining that the trustee's reputation and prior acts are admissible to prove his incompetence, along with "his intoxication, his incapacity due to a physical or mental defect, his propensity for recklessness, or his inexperience, due to age or some other reason, in use of the chattel").

100. Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111, 160 (2008) ("Expecting juries and judges to overcome their own hindsight bias is demonstrably unscientific.").

101. See *id.*

102. *Id.* at 159.

103. Tinsley, *supra* note 99, at § 4.

puted.

This illustrates that the crucial element of the claim is the fourth: whether the firearm dealer knew or had reason to know that the purchaser was incompetent. The degree of care to which firearms dealers are held has the greatest bearing on this element because it determines how exhaustive a firearms dealer's inquiry must be for him to not have had reason to know of the entrustee's incompetence.

Because imposing the highest degree of care on firearms dealers conducting sales is likely to be outcome determinative in negligent entrustment claims against them, the danger that blameless dealers will shoulder unwarranted liability is better characterized as an inevitable reality than as a potential risk. The court of appeals was correct when it distinguished *Shirley* and firearms sales from cases involving firearm storage and usage. The highest degree of care standard is impractical, unattainable, unnecessary, and will expose blameless dealers to unwarranted liability. The ordinary degree of care standard should apply to Kansas firearms dealers conducting sales because it imposes liability where appropriate without exposing prudent, blameless firearms dealers to unwarranted liability (as the highest degree of care standard does).

A. The Court of Appeals Correctly Distinguished Wood and Long from the Facts of Shirley

The Kansas Supreme Court disagreed with the Kansas Court of Appeals' drawing of a distinction between *Shirley* and *Wood* and *Long* based on the differences between firearms cases addressing parental authority and those addressing the responsibilities of a merchant.¹⁰⁴ The supreme court instructed that *Wood's* holding was not so limited. Rather, the supreme court asserted that *Wood* stood for the principle that "a defendant is held to the highest standard of care 'when dealing with a dangerous instrumentality,'" based on the principle "that the law requires one to be as cautious as reasonably possible when dealing with an object that has obviously lethal capabilities."¹⁰⁵

However, the supreme court got it wrong. The court of appeals' distinction was correct. The same degree of care should not be applied to two dissimilar situations simply because they involve firearms. *Wood* and *Long* involved simple negligence claims and addressed a private

104. *Shirley v. Glass*, 308 P.3d 1, 9 (Kan. 2013).

105. *Id.* (citing *Wood v. Groh*, 7 P.3d 1163, 1168 (Kan. 2000)).

firearm owner's insufficient storage of his firearms, a completely different factual situation from dealers conducting firearm sales. The characteristics and conventions of firearm sales vastly differ from those of firearm storage and use, and the Restatement (Second) of Torts does not suggest that the degree of care applicable to the dissimilar situations should be the same.

1. The *Storage* of Firearms is Distinct from the *Sale* of Firearms

In *Wood* and *Long*, the supreme court focused on an owner's duty to exercise the highest degree of care in *storing* a firearm, and did not consider the applicability of the standard to a consumer transaction. A firearms dealer, as the owner of a firearm, should exercise the same high degree of care in *storing* his stock of firearms as any other firearm owner. However, a dealer's storage of his stock differs from the sale thereof, and so should the degree of care required.

In *Long*, a minor unscrewed his father's gun-cabinet compartment, obtained his .357 Magnum handgun and bullets, and used them to shoot another teenager to death.¹⁰⁶ Like the supreme court would do in *Wood* two years later, the *Long* court identified the issue as whether the owner of a handgun—a dangerous instrumentality—must “exercise the highest degree of care in *safeguarding* it.”¹⁰⁷ Ultimately, the court held that the handgun owner “owes the public a duty to *store* his .357 Magnum in a safe and prudent manner, taking into consideration the type of handgun, where the ammunition is located, and the circumstances of the gun's use.”¹⁰⁸ The court instructed that a jury must decide whether the owner fulfilled his duty to exercise the highest degree of care in storing the firearm.¹⁰⁹ The *Long* court left untouched the question of what degree of care a firearms dealer must exercise in selling firearms, and rather examined the particulars of firearm storage and their impact on the owner's storage duty.

Likewise, the supreme court's holding in *Wood* narrowly addressed the storage of firearms, and the case did not involve a firearm sale. In *Wood*, a 15-year-old boy broke into his father's secured gun cabinet and obtained an empty handgun and ammunition clip.¹¹⁰ He took it to a

106. *Long v. Turk*, 962 P.2d 1093, 1094–95 (Kan. 1998).

107. *Id.* at 1096 (emphasis added).

108. *Id.* at 1098 (emphasis added).

109. *Id.* at 1099.

110. *Wood v. Groh*, 7 P.3d 1163, 1166 (Kan. 2000).

drinking party, where the handgun accidentally discharged and struck his friend in the buttocks.¹¹¹ The *Wood* court noted that “[t]he factual issue to be decided by the jury was whether the [parents who owned the handgun] were negligent in storing the gun.”¹¹² The court analyzed storage only: it even differentiated between an unloaded gun stored separately and one stored alongside ammunition.¹¹³ Implying that an unloaded gun stored separate from ammunition might not even be a dangerous instrumentality, the court stated that “[s]torage of the ammunition in the same location as the gun in this case resulted in the gun being easily loaded and made it a dangerous instrumentality.”¹¹⁴ The supreme court scrutinized the storage of the handgun in a locked cabinet to which the owner retained the only key, finding it possibly insufficient because the boy “only had to use a screwdriver to gain access to the cabinet.”¹¹⁵ Ultimately, the *Wood* court held that the district court erred by finding that a handgun is not a dangerous instrumentality when stored in an unloaded state. The *Wood* court further held that the district court erred in “not instructing the jury that the highest standard of care is required when dealing with a dangerous instrumentality.”¹¹⁶ Like the *Long* court, the *Wood* court did not contemplate the standard of care applicable to a firearm sale. Through its highly fact-driven storage analysis, *Wood* answered the question of what degree of care an owner must exercise in storing his firearm, but it did not provide instruction as to what degree of care a firearms dealer must exercise in selling firearms.

Neither *Wood* nor *Long* even contemplated a firearm sale and addressed narrowly the standard of care applicable to firearm storage. The cases provide no instruction upon what degree of care should apply to the sale of a firearm. The only applicability of *Wood* and *Long* to firearm dealing is that dealers should exercise the highest degree of care in storing their inventory.

The activities of storing and selling firearms have nothing in common, beyond the fact that they both involve firearms. Storage is defined as “[t]he act of storing goods,”¹¹⁷ which means “[t]o reserve for future

111. *Id.* at 1167.

112. *Id.* (emphasis added).

113. *Id.*

114. *Id.*

115. *Id.* at 1170.

116. *Id.* at 1169.

117. AM. HERITAGE COLL. DICTIONARY 1362 (4th ed. 2004).

use.”¹¹⁸ The question in a negligence action for insufficient storage precautions is whether a firearm owner sufficiently stored his firearm to the exclusion of others.¹¹⁹ As the cases instruct, whether a firearm is negligently stored depends upon factors such as location, type of compartment, proximity to ammunition, locking mechanism, and general characteristics of the storage facility that render it secure or unsecure.¹²⁰

A sale, on the other hand, is defined as “[t]he exchange of goods or services for an amount of money or its equivalent; the act of selling.”¹²¹ Distinct from a negligent storage scenario (in which the firearm is likely taken against the owner’s will or at least without his knowledge and supervision), a sale involves a merchant voluntarily vending a firearm to another person. Whether a firearm dealer’s sale was sufficiently safe would not depend on how he stored the firearm before the sale. It would depend on a completely different set of factors, such as whether he conducted a background check and heeded any indications that the buyer was not competent to execute the purchase.

Clearly neither *Wood* nor *Long* are controlling, but they also are not instructive of the degree of care applicable to the sale of firearms. Thus, the court of appeals properly distinguished firearm storage from firearm sales, and wisely considered the differing circumstances of firearms sales in refusing to apply the highest degree of care to firearms dealers conducting sales.

2. The Restatement (Second) of Torts Does Not Imply That the Highest Degree of Care Applies to Firearm Sales

In *Shirley*, the supreme court supported its extension of *Wood* and *Long* to firearms sales by citing comment *b* of the Restatement (Second) of Torts § 298 as support for the proposition that the highest degree of care always applies to those in control of firearms.¹²² Comment *b* states:

The care required is always reasonable care. This standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his act, and is proportionate to it. The greater the danger, the greater the care which must be exercised.

118. *Id.*

119. *Wood*, 7 P.3d at 1169 (“The factual issue to be decided by the jury was whether the Grohs were negligent in storing the gun.”).

120. *See, e.g., Wood*, 7 P.3d at 1166; *Long v. Turk*, 962 P.2d 1093, 1094–95 (Kan. 1998).

121. AM. HERITAGE COLL. DICTIONARY 1224 (4th ed. 2004).

122. *Shirley v. Glass*, 308 P.3d 1, 9–10 (Kan. 2013).

As in all cases where the reasonable character of the actor's conduct is in question, its utility is to be weighed against the magnitude of the risk which it involves. (See § 291.) The amount of attention and caution required varies with the magnitude of the harm likely to be done if care is not exercised, and with the utility of the act. Therefore, if the act has little or no social value and is likely to cause any serious harm, it is reasonable to require close attention and caution. So too, if the act involves a risk of death or serious bodily harm, and particularly if it is capable of causing such results to a number of persons, the highest attention and caution are required even if the act has a very considerable utility. *Thus those who deal with firearms, explosives, poisonous drugs, or high tension electricity are required to exercise the closest attention and the most careful precautions, not only in preparing for their use but in using them.* Likewise, a driver approaching a railway crossing is required, for the protection of his passengers, to take precautions to ascertain whether a train is approaching, which would be unduly burdensome at any point where the only danger lay in the possibility of a trivial mishap.¹²³

Comment *b*, like *Wood* and *Long*, does not contemplate a firearm sale, but rather firearm usage.¹²⁴ The supreme court reasoned that “[c]omment *b* suggests that no such limitation is necessary” on the highest degree of care's applicability to any situation involving a firearm.¹²⁵ However, the court should not have inferred from comment *b* that the highest degree of care applies to sales of firearms. Comment *b* simply does not address the issue of firearm sales. The lack of an express boundary in comment *b* to the highest degree of care's application does not translate to a blanket application of that standard to any situation involving a firearm. Section 298 illustrates the principal that an actor is negligent if he fails to act with reasonable care—i.e., to act as a reasonable person in his position would act.¹²⁶ Comment *b* merely elaborates on what constitutes reasonable care, and on how heightened dangerousness may command a higher degree of care to satisfy reasonable care.¹²⁷

The language of comment *b* does not contemplate a sales transaction. The sentence attaching the highest attention and caution to firearms attaches it to their *use*, not their sale: “those who deal *with* firearms . . . not only in *preparing* for their *use* but in *using* them” must employ the high-

123. RESTATEMENT (SECOND) OF TORTS § 298 cmt. b (1965) (emphasis added).

124. *Id.*

125. *Shirley*, 308 P.3d at 9.

126. RESTATEMENT (SECOND) OF TORTS § 298 (1965).

127. *Id.* at cmt. b.

est degree of care.¹²⁸ This sentence solidifies that the statement was directed at users of firearms because it clarifies that the highest degree of care encompasses not only use, but also preparation for use (i.e., user activities, not dealer activities).¹²⁹ “With” is commonly defined as “in the performance, use, or operation of”¹³⁰ while “use” typically means “[t]o put into service or apply for a purpose; employ.”¹³¹ Based on these common usages, selling a firearm does not fall within *use*. Using a firearm would entail firing it. Similarly, preparing for use would include loading the firearm, transporting it, cleaning it, sighting it, and other related activities.

One might argue that purchasing a firearm is encompassed within preparation for use, because a person must obtain a thing before he can use it. However, that interpretation is improper because it proves too much. People buy things with the *intention* of using them in the future, but they do not *prepare* to use them until an event occurs that triggers their desire to actually *use* the thing. If the purchase of a chattel were considered a part of preparing for its use, then a firearm purchase that happened twenty years prior would be considered preparation for a shooting that occurred today—an event that was not even in the purchaser’s contemplation. Additionally, the cases involving the other dangerous instrumentalities to which comment *b* refers do not involve sale of the goods, but the actual use of them.¹³²

Comment *b* certainly instructs that the highest degree of care applies to the *use* of dangerous instrumentalities, which is logical because the foreseeability of the danger is high. Concededly, the sale is a necessary precedent to the use. However, the *sale* is far removed from the actual use. The danger involved in selling firearms is not as high as in firearm usage because a sale is several steps removed from the firing of the weapon. Most all would recognize that the sale of a vehicle is not as dangerous as a vehicle operating on the freeway, just as the sale of a baseball bat is not as dangerous as a bat in full swing. Less danger is involved in firearm sales than firearm use because firearms are less capable of causing great foreseeable harm at the moment of sale than at the time of use. It is well established that “the duty of care is intertwined with the

128. *Id.* (emphasis added).

129. *Id.*

130. AM. HERITAGE COLL. DICTIONARY 1574 (4th ed. 2004).

131. *Id.* at 1510.

132. See *Cope v. Kan. Power & Light Co.*, 391 P.2d 107, 112 (Kan. 1964) (*use* of high electricity); *Clark v. E. I. Du Pont de Nemours Powder Co.*, 146 P. 320, 321 (Kan. 1915) (*use* of explosives).

foreseeability of harm,”¹³³ and that the care “require[d] of the actor varies with the danger involved in his act.”¹³⁴ While the highest degree of care applies to the use of a firearm, it should not apply to the sale of a firearm, where the dangerous instrument is not yet being used.

The supreme court’s sweeping conclusion in *Shirley* that the “Restatement principle that the law requires one to be as cautious as reasonably possible when dealing with an object that has obviously lethal capabilities” necessitates imposing the highest degree of care on firearms dealers ignores the fundamental restatement principle itself: that the degree of care varies based on dangerousness.¹³⁵ If one firearm activity is highly dangerous, the highest degree of care should apply. Conversely, if an activity involving a firearm does not entail such heightened dangerousness, the highest degree of care is not a practical standard.

While the highest degree of care naturally applies to a firearm in certain contexts, it does not follow that the standard applies in all situations. The supreme court in *Wood* seems to have carefully defined only a *loaded* firearm as a dangerous instrumentality, implying that a firearm is not a dangerous instrumentality in its unloaded state: “[s]torage of the ammunition in the same location as the gun in this case resulted in the gun being easily loaded and made it a dangerous instrumentality.”¹³⁶ Nearly forty years before this quote from *Wood*, the Kansas Supreme Court suggested that an unloaded firearm is not a dangerous instrumentality: “Defendant owned . . . a certain dangerous instrumentality, to-wit: A *loaded* revolver kept in defendant’s bedroom in an easily accessible location.”¹³⁷ That court specifically labeled a *loaded* firearm as dangerous, possibly implying that unloaded firearms belong in a different category. Thus, the supreme court has acknowledged that a firearm is not a dangerous instrumentality in every context, such as when it is not loaded.

If an unloaded firearm, which is no more dangerous than any heavy object which could theoretically be used to strike someone, does not require the highest degree of care, the underlying rationale must be that the threat of danger is lower than with a loaded firearm. It follows then that the threat of danger in the sale of firearms is lower than in the actual use of firearms, and justifies a lower degree of care. While *using* a firearm

133. *Shirley v. Glass*, 308 P.3d 1, 9 (Kan. 2013) (citing *South v. McCarter*, 119 P.3d 1, 13 (Kan. 2005)).

134. RESTATEMENT (SECOND) OF TORTS § 298 cmt. b (1965).

135. *Shirley*, 308 P.3d at 9.

136. *Wood v. Groh*, 7 P.3d 1163, 1169 (Kan. 2000).

137. *Wroth v. McKinney*, 373 P.2d 216, 217 (Kan. 1962) (emphasis added).

warrants the highest degree of care, *selling* one does not because it does not pose the same threat of danger. Other state courts have recognized that the degree of care required in *using* a firearm differs from that required in *selling* a firearm. In *Jacoves v. United Merchandising Corp.*, the California Court of Appeal for the Second District noted that while the highest degree of care applies to the “use or possession” of firearms, a seller must only “exercise[] the control which an ordinary person would reasonably exercise so as not to cause injury to another.”¹³⁸

In short, Section 298 does not suggest that the highest degree of care applies to each and every situation involving a firearm. Rather, it stands for the principle that the degree of care required of an actor varies with the danger of his act.¹³⁹ As comment *b* provides, the actual use of a firearm commands the actor’s highest degree of care. However, the activity of firearms sales is separate from firearm use, and the degree of care should diverge to meet the circumstances of the differing activities.

B. The Highest Degree of Care Standard Imposes Unwarranted Liability on Prudent Dealers

In addition to not being supported by case law, the supreme court’s decision to impose the highest degree of care on firearms dealers conducting sales exposes prudent dealers to unwarranted liability. Under the highest degree of care, there are situations where firearms dealers simply cannot avoid fault. If firearms remain legal to sell, it is nonsensical to retroactively punish their sale. The inherent dangerousness of firearms is undeniable, but it does not follow that dealers have human behavior expertise and clairvoyant abilities to discern competent users from incompetent users, absent discoverable indicators. *Shirley* imposes an unfair and unattainable standard upon Kansas firearms dealers, the effect of which will almost certainly impose liability on responsible and blameless dealers.

138. 11 Cal. Rptr. 2d 468, 486–87 (Cal. Ct. App. 1992).

139. *See generally* RESTATEMENT (SECOND) OF TORTS § 298 (1965). Section 298 provides:

When an act is negligent only if done without reasonable care, the care which the actor is required to exercise to avoid being negligent in the doing of the act is that which a reasonable man in his position, with his information and competence, would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another.

Id.

1. The Highest Degree of Care Standard is Unattainable

Firearms dealers are not equipped to live up to the highest standard of care. The court of appeals warned that “the ‘highest degree of care’ standard [] would make every licensed gun dealer negligent per se every time a statutorily ineligible gun purchaser, no matter how deceitful, bought a firearm.”¹⁴⁰ The court presented two examples in which “[n]o resources exist for a firearms dealer to use to catch a deceitful gun buyer”: (1) a deceitful straw-purchaser who gives off no indication that the firearm is meant for another person, and (2) a purchaser who was previously “adjudicated mentally defective.”¹⁴¹ In both examples, “the ‘highest degree of care’ standard would establish negligence in situations where a reasonable firearms dealer would have no idea that the gun buyer is . . . incompetent.”¹⁴² The result of a responsible and careful firearms dealer being held liable for something he could not possibly prevent is more than undesirable, it is antithetical to the fundamental principles of justice.

The court of appeals also cautioned that such a standard would “impose a duty on a firearms dealer to investigate almost every firearms transaction because just requiring the purchaser to fill out, initial, and certify [ATF Form 4473] would be insufficient to meet the ‘highest degree of care.’”¹⁴³ The court of appeals hypothesized that a dealer might be required to

investigate whether the firearms purchaser had other people living in the home, whether those people had any violent tendencies or prior felony convictions, whether there were any children in the home, whether the purchaser had a secure gun cabinet in which to lock away his gun, and whether the purchaser had received extensive gun safety education.¹⁴⁴

One could make a strong argument that asking such questions would be a good practice for all firearms dealers, and could possibly prevent tragedies. However, the reality is that these questions were hypothesized by a seasoned court with the benefit of hindsight. Firearms legislation

140. Shirley v. Glass, 241 P.3d 134, 155 (Kan. Ct. App. 2010), *aff'd in part, rev'd in part*, 308 P.3d 1 (Kan. 2013).

141. *Id.*

142. *Id.* at 156.

143. *Id.* at 155.

144. *Id.*

has equipped firearms dealers with ATF Form 4473, which will help them determine if a customer is *statutorily ineligible*,¹⁴⁵ and not a list of probing questions which might assist the dealer in uncovering signs of incompetency. It is unrealistic to believe that the tools firearms dealers possess—ATF Form 4473 and sensory perception—will equip them to accurately predict whether each and every customer is competent to possess a firearm.

Firearms dealer expertise lies in firearm stock and salesmanship, not behavioral science or detection of hidden agendas. If a purchaser fills out ATF Form 4473, presents appropriate identification, passes the background check, and displays no readily apparent warning signs, the firearms dealer should be free to complete the transaction without fear of recourse. With hindsight bias, one might disingenuously propose a precautionary measure that would have uncovered the incompetence, when in all reality a reasonable dealer was helpless to stop the tragic result. In short, if the end goal is greater safety in firearms transactions, the means are to provide firearms dealers with the tools to achieve that goal, not to manufacture a care standard that provides relief *after the fact*, at the expense of the easiest scapegoat.

The Kansas Supreme Court did not address the concerns raised by the court of appeals, and merely shrugged off the threat of unwarranted liability for gun dealers by noting that the “fear [of virtually unlimited liability for gun owners] has proven unfounded.”¹⁴⁶ The court supported its assertion that there is no threat of unwarranted liability by noting that “Kansas courts have not been subject to a deluge of cases asserting negligent entrustment by gun owners as a result of the requirement that gun owners exercise great caution in allowing access to their weapons.”¹⁴⁷ The problem with this assertion is that it has not yet been clear that negligent entrustment applied to firearms sales as *Shirely* is the first case to do so. So, until now, plaintiffs and their lawyers were unaware of the viability of bringing negligent entrustment claims in response to firearms tragedies.

The cases that the supreme court relied on in *Shirley*, *Wood* and *Long* were not actions for negligent entrustment in the firearms sales context; they were simple negligence actions against private firearm owners for failure to securely store their firearms. So, whether or not

145. 27 C.F.R. § 478.124 (2010).

146. *Shirley v. Glass*, 308 P.3d 1, 9 (Kan. 2013).

147. *Id.*

there has been a “deluge” of negligence claims against firearms owners for not sufficiently storing their firearms is irrelevant to whether firearms dealers are now at great risk of being held liable for not meeting the highest degree of care in *selling* firearms. Moreover, before *Shirley*, the case in which the Kansas Court of Appeals came closest to recognizing negligent entrustment with respect to the sale of a chattel *involved the sale of a firearm* to a troubled boy who used it to commit suicide.¹⁴⁸ Hence, the opinion’s assertion that there has not *yet* been a “deluge of cases asserting negligent entrustment *by gun owners*”¹⁴⁹ provides scant reassurance to firearms dealers regarding the risk of continuing their trade. If negligent entrustment claims for the sale of firearms were attempted before *Shirley* recognized negligent entrustment in the firearms sales context, a “deluge of cases” is likely now that the supreme court has not only opened the door, but imposed a standard that makes establishing negligence easy.

Unless firearms dealers are furnished with the tools that make performing up to the highest degree of care feasible, the imposition of the highest degree of care standard will serve as a mechanism to hold blameless dealers liable for harms they were incapable of preventing. The Kansas Court of Appeals was right to refuse to apply the highest degree of care to firearms dealers conducting sales.

2. The Highest Degree of Care Standard Imposes Unwarranted Liability

Unwarranted liability follows from an unattainable standard of care. The highest degree of care should not apply to firearms dealers because it imposes liability on wholly innocent and prudent dealers.

In *Wood*, the court reversed the defense verdict because there was a real chance that the jury would have found differently if they had been instructed on the correct standard.¹⁵⁰ The supreme court held that the jury could have found differently under the high standard of care because while locking a gun cabinet might easily satisfy ordinary care, the jury could have found that the parents did not exercise the highest degree of care because their gun cabinet could be breached by a prying screw driver.¹⁵¹ The dissent warned that applying the highest degree of care to gun

148. *Estate of Pemberton v. John’s Sports Ctr., Inc.*, 135 P.3d 174, 187–91 (Kan. Ct. App. 2006).

149. *Shirley v. Glass*, 308 P.3d 1, 9 (Kan. 2013) (emphasis added).

150. *Wood v. Groh*, 7 P.3d 1163, 1170 (Kan. 2000).

151. *Id.* at 1169–70.

storage “makes it almost absolute liability to own a gun,” and asked “[w]hat more can a gun owner do than lock up an unloaded gun and keep [the only] key.”¹⁵² Similarly, in *Long*, the court found that a jury could find the owner’s firearm storage insufficient because his gun cabinet could be taken apart by removing the screws.¹⁵³

If securing a firearm by lock and holding the only key can potentially fail to meet the highest degree of care standard in gun storage, then it follows that firearm dealers face enormous challenges in complying with the standard when conducting sales. Firearms dealers at the very least will be subjected to litigation expenses because the high standard effectively precludes the court from granting summary judgment. The result in the firearm storage cases is defensible because the owner has complete control over his storage. One is able to assess an inanimate storage device for its sufficiency. However, a firearms dealer has no control over his customers, and is ill-equipped to predict their behavior absent readily apparent warning signs.

3. The Ordinary Degree-of-Care Standard Imposes Liability in Appropriate Circumstances

While the highest degree of care has the negative impact of imposing liability on responsible dealers, it does not affect the imposition of liability on blameworthy dealers who would escape under an ordinary degree of care. An ordinary degree of care standard imposes liability in appropriate circumstances, which is likely why other states have opted for that route.¹⁵⁴

152. *Id.* at 1173 (Abbott, J., dissenting).

153. *Long v. Turk*, 962 P.2d 1093, 1095, 1100 (Kan. 1998).

154. *See, e.g.*, *Bernethy v. Walt Failor’s, Inc.*, 653 P.2d 280, 283 (Wash. 1982) (en banc) (impliedly holding that reasonable care standard applies to question of whether store clerk was negligent in selling gun to man who was intoxicated and used it to shoot his wife); *Rains v. Bend of the River*, 124 S.W.3d 580, 597 (Tenn. Ct. App. 2003), *appeal denied* July 31, 2003 (impliedly imposing reasonable care standard in finding that plaintiff’s negligent entrustment claim against seller failed because no evidence showed that trustee’s conduct or demeanor demonstrated incompetence); *Kalina v. Kmart Corp.*, No. CV-90-269920, 1993 WL 307630, at *5 (Conn. Aug. 5, 1993) (citing *Amendola v. Geremia*, 571 A.2d 131, 133 (Conn. App. Ct. 1990)) (holding that reasonable care applies to common law negligent entrustment claims in the context of firearms sales); *Jacoves v. United Merch. Co.*, 11 Cal. Rptr. 2d 468, 487 (Cal. Ct. App. 1992) (holding that firearms dealers must exercise ordinary care in conducting firearms sales). *See also* *Zuver v. Gottner*, 944 So. 2d 1259, 1261 (Fla. Dist. Ct. App. 2007) (considering a negligent entrustment claim in storage, not sale, context, and holding that “[a]n instruction that Gottner was required to use ‘the highest degree of care’ would have removed from the jury’s determination how much care a reasonable man should use in safeguarding his weapon,” and that reasonable care applied).

Under the facts of *Shirley*, the pawn shop owners clearly failed to exercise ordinary care. That case involved an obvious straw-person sale: even though the 77-year-old grandmother completed the ATF form, Graham, who had readily admitted to the store owners that he was a felon, picked out a shotgun, provided the money for the purchase, and carried the gun out of the shop. Under those circumstances, no reasonable firearms dealer would have believed that the gun was not ultimately being purchased for Graham. Nevertheless, the *Shirley* firearms dealers turned a blind eye. The *Shirley* dealers are culpable, and their selling techniques fall far below the exercise of ordinary care, constituting an intentional illegal firearm sale. The ordinary degree of care standard already imposes liability on firearms dealers like the ones in *Shirley*. There is no need to elevate the standard so as to snag wholly innocent, prudent dealers along with the negligent ones, when the ordinary care standard already strikes the proper balance.¹⁵⁵

IV. CONCLUSION

The ordinary degree of care standard imposes liability on firearms dealers who have failed to do what is in their power to protect the public from incompetent persons with firearms. The higher standard does no more than the ordinary standard to hold irresponsible dealers accountable, but instead exposes responsible dealers to unwarranted liability. The higher standard provides the public with no more protection from the danger of incompetent persons with firearms because it is unattainable in the first place—firearms dealers cannot predict that a seemingly well-adjusted person without a criminal background will use the purchase to inflict harm on others. The supreme court was wrong to impose the highest degree of care on firearms dealers conducting sales, and as a consequence, prudent and blameless dealers will be swept up along with the negligent ones (who would already be held liable under the ordinary care standard). Ultimately, the imposition of the highest degree of care on firearms dealers conducting sales will only result in unwarranted liability, not fewer tragedies. Therefore, because the highest degree of care

155. Compare *Howard Bros. of Phenix City, Inc. v. Penley*, 492 So. 2d 965, 969 (Miss. 1986) (finding store liable under ordinary care standard where clerk handed minor a pistol before ensuring that he was of age), and *Jacoves*, 11 Cal. Rptr. 2d at 487–88 (holding seller not liable for negligent entrustment as a matter of law under ordinary care standard because fact that entrustee who used rifle to commit suicide was a young adult and “wanted to purchase a firearm without waiting two weeks for its delivery” would not “manifest to the ordinary observer that Jonathan was mentally impaired, incompetent or irresponsible with regard to the handling of firearms”).

standard harms more innocent people than it will protect, it should be abandoned.