SO HOW DO YOU HOLD THIS THING AGAIN?: WHY THE TEXAS SUPREME COURT SHOULD TURN THE SAFETY OFF THE NEGLIGENT ENTRUSTMENT OF A FIREARM CAUSE OF ACTION

Comment*

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* Selected as one of the Book 2 Outstanding Student Articles by the Volume 45 Board of Editors. This award was made possible through the generous donations of the Volume 44 Board of Editors and Kaplan.

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I. *RICHARDSON V. CRAWFORD*: A HANDGUN IN THE GRASP OF UNSTABLE HANDS

Her system littered with alcohol, Ambien, and Hydrocodone, Gretchen left the house after an altercation with her husband, determined to show him that he could not stop her from getting drugs when she wanted them.[1] But Gretchen didn't go straight to her drug dealer.[2] Instead, she returned to her office building and went straight to Michael's desk drawer—and the loaded .38 Smith & Wessen snub-nose, five-shot revolver her co-worker kept in it.[3] All the women in the office knew about Michael's gun.[4] He told them all that they could borrow it any time that they needed.[5] Gretchen decided this was just such a time; she took the gun—and murdered her husband with it.[6]

1. *See* Richardson v. Crawford, No. 10–11–00089–CV, 2011 WL 4837849, at *2 (Tex. App.—Waco Oct. 12, 2011, pet. denied) (mem. op., not designated for publication). This narrative illustrates the factual account and legal holdings of *Richardson v. Crawford.*
2. *See id.* at *1–*2.
3. *See id.* at *2.
4. *See id.*
5. *See id.*
6. *See id.*

The husband's family sued Michael for negligent entrustment of a firearm in *Richardson v. Crawford*.[7] On appeal, the Waco Court of Appeals declined to recognize the cause of action, holding that Gretchen's use of the gun was not foreseeable. But her co-workers knew better.[8]

Gretchen was not known around the office for her charm.[9] Intimidating, manipulative, hateful, and vindictive, she frightened co-workers.[10] Depressed and abusing pain pills, Gretchen called herself a "walking time bomb."[11] Co-workers saw her asleep at her desk.[12] Though she was married with children, Gretchen often exchanged "off-color" emails with Michael, and the pair frequently went on lunch dates.[13] She told Michael she was unhappy with her marriage.[14] She told him about her other affairs.[15] She even joked about poisoning her husband.[16]

From the husband's family's point of view, Michael was negligent in allowing Gretchen to have access to the gun, given the emotional instability and depression she revealed during their lunchtime conversations.[17] Additionally, they claimed that she was incompetent to use a gun.[18] Gretchen admitted that she was not "fit or qualified to use a handgun for off-site self-defense protection."[19] And she certainly lacked any license to carry a firearm.[20]

In analyzing the issue of foreseeability, the court noted that "[a] danger is foreseeable if its *general character* might reasonably be anticipated."[21] Despite this notion and all of the evidence, the court held that the event that needed to be foreseen was Gretchen's use of the gun to shoot her husband—rather than simply foreseeing that a depressed, drug-addicted "walking time bomb" might use an available and already-loaded handgun to shoot someone.[22]

Richardson illustrates the need for the Texas Supreme Court to recognize and provide a framework for a negligent entrustment of a firearm cause of action.[23] Though the Texas Supreme Court has yet to acknowledge or interpret

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7. *See id.* at *3.
8. *See id.* at *1, *7.
9. *See id.* at *1.
10. *See id.*
11. *See id.* at *5 (quoting Gretchen Williams Richardson's deposition) (internal quotation marks omitted).
12. *See id.* at *1.
13. *See id.* (quoting Michael Lee Crawford's testimony) (internal quotation marks omitted).
14. *See id.*
15. *See id.* at *5.
16. *See id.*
17. *See id.* at *4.
18. *See generally id.* at *7 (citing Gretchen's incompetence due to her disturbed emotional state and ongoing drug abuse).
19. *See id.* at *5.
20. *See id.* at *7.
21. *Id.* at *6 (emphasis added).
22. *See id.* at *5, *7.
23. *See id.*

such a claim, it nevertheless denied review of the *Richardson* case, which was not selected for publication.[24]

This Comment explores the complexities of a claim for negligent entrustment of a firearm.[25] Part II reviews the history of negligent entrustment of a chattel and highlights the claim's role in society.[26] Next, Part III explores the wide application of a negligent entrustment claim and the similarities between automobiles and handguns.[27] Part IV examines Texas's existing case law on this cause of action, as well as its legal and legislative history on firearms.[28] Subsequently, Part V describes how the claim for negligent entrustment of a firearm is in accordance with the Texas legislature's intent, existing Texas case law, actions taken by other state courts, and public policy.[29] For these reasons, Part VI argues that the Texas Supreme Court should recognize negligent entrustment of a firearm as a cause of action and recommends two appropriate paths for the court to accomplish this goal: (1) extend the Restatement (First) of Torts § 390 to firearms, or (2) adopt the Restatement (Second) of Torts § 390 and apply it to firearms.[30] Finally, Part VII concludes with a brief review of the purposes, benefits, and implications of a negligent entrustment of a firearm cause of action for Texas citizens.[31]

II. SIGHTING IN THE SCOPE: THE HISTORY OF NEGLIGENT ENTRUSTMENT OF A CHATTEL

A. Development of the Doctrine

Negligent entrustment—like most of American common law—has its roots in English history.[32] In the early 1816 English case of *Dixon v. Bell*, the court recognized a negligent entrustment cause of action.[33] In *Dixon*, the defendant, Bell, sent his ten-year-old servant-girl "to fetch away the gun so loaded."[34] Unfortunate consequences resulted when the young girl, "an unfit and improper person to be sent," retrieved the gun.[35] At some point during her return to Bell, the gun in the girl's possession fired, hitting the face of the plaintiff's son and "[striking] out his right eye and two of his teeth."[36] The

24. *See id.* at *1; *Orders on Petitions for Review*, THE SUPREME COURT OF TEX., http://www.supreme.courts.state.tx.us/historical/2012/jan/011312.htm (last visited Sept. 26, 2013).
25. *See infra* Parts II–VII.
26. *See infra* Part II.
27. *See infra* Part III.
28. *See infra* Part IV.
29. *See infra* Part V.
30. *See infra* Part VI.
31. *See infra* Part VII.
32. *See* Dixon v. Bell, [1816] 105 Eng. Rep. 1023, 1024 (K.B.).
33. *See id.*
34. *Id.* at 1023.
35. *Id.*
36. *Id.*

court held that Bell incurred liability by entrusting the young girl with the gun.[37] *Dixon* is among the earliest cases to acknowledge that a person who entrusts a chattel to another who is likely to harm herself or others may be liable to the injured claimant.[38]

During the 1920s, American courts began applying—and expanding—this doctrine of negligent entrustment.[39] In *Anderson v. Daniel*, a Mississippi case decided in 1924, a father entrusted his Ford to his sixteen-year-old son, who drove it into the plaintiff.[40] The court held that the father's knowledge of his son's reckless nature and incompetence made him liable for negligence.[41] Legally charged with the car's control, the father had to "suffer the consequences" of his entrustment.[42] Both of the entrustees in *Dixon* and *Anderson* were minors in a special relationship.[43] But as the doctrine continued to develop and expand, courts began to find liability in other circumstances.[44] Eventually, the cause of action was codified into the Restatement (First) of Torts, and subsequently, the Restatement (Second) of Torts.[45]

B. Codification into the Restatement of Torts

The Restatement (First) of Torts and the Restatement (Second) of Torts recognize a cause of action for negligent entrustment in § 308 and § 390.[46] To plead negligent entrustment, a claimant should understand the relationship between these two provisions. Initially, § 308 broadly defines the tort of negligent entrustment:

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37. *See id.* at 1024.

38. *See* Daniel S. Whitebook, Note, *Who's Driving, Anyway?: The Status of Negligent Entrustment in Florida After* Horne v. Vic Potamkin Chevrolet, Inc., 12 NOVA L. REV. 939, 951 (1998).

39. *See infra* text accompanying notes 40–41.

40. *See* Anderson v. Daniel, 101 So. 498, 499 (Miss. 1924).

41. *See id.* at 499–500.

42. *See id.* at 499.

43. *See id.*; Dixon v. Bell, [1816] 105 Eng. Rep. 1023, 1023 (K.B.).

44. *See, e.g.*, Murray v. Pasotex Pipe Line Co., 161 F.2d 5, 7 (5th Cir. 1947) (stating that an "owner's liability is based upon his own negligence in entrusting a dangerous instrumentality . . . to a known incompetent" (quoting Russell Constr. Co. v. Ponder, 186 S.W.2d 233, 235 (Tex. 1945)) (internal quotation marks omitted)); Greeley v. Cunningham, 165 A. 678, 679 (Conn. 1933) (stating that the ruling by the trial court found that a man was negligent when he entrusted his car to a woman he should have known to be incompetent in the operation of the vehicle); *see also* Kayce H. McCall, Lydia v. Horton*: You No Longer Have to Protect Me from Myself*, 55 S.C. L. REV. 681, 682 (2004) (examining a first-party negligent entrustment cause of action and its possible ramifications in South Carolina).

45. *See infra* Part II.B. The principle of negligent entrustment is not found in the Restatement (Third) of Torts. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. (1998). The Restatement (Third) of Torts focuses primarily on products liability theories. *See id.*

46. *See* RESTATEMENT (SECOND) OF TORTS: PERMITTING IMPROPER PERS. TO USE THINGS OR ENGAGE IN ACTIVITIES § 308 (1965); RESTATEMENT (SECOND) OF TORTS: CHATTEL FOR USE BY PERS. KNOWN TO BE INCOMPETENT § 390 (1965); RESTATEMENT (FIRST) OF TORTS: PERMITTING IMPROPER PERS. TO USE THINGS OR ENGAGE IN ACTIVITIES § 308 (1934); RESTATEMENT (FIRST) OF TORTS: CHATTEL FOR USE BY A PERS. KNOWN TO BE INCOMPETENT § 390 (1934).

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.[47]

But § 390 tapers the definition laid out in § 308 by articulating a more limited trigger for liability:[48]

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in, or be in the vicinity of its use, is subject to liability for bodily harm resulting to them**.**[49]

Together, the two provisions create an understandable and consistent concept: § 308 defines the negligent act, while § 390 explains the potential liability for committing it.[50]

In contrast with § 308, § 390 focuses on the supply of a chattel to an incompetent person, irrespective of the purpose for which the chattel is utilized.[51] Section 390 also determines the liability of a person who supplies a chattel to another for the receiver's personal use and purpose.[52] More notably, distinct from § 308, § 390 focuses on the specific entrustment of a chattel—eschewing the word "things" used in § 308.[53] This distinguishing factor provides the basis for the section's favored use among courts and practitioners.[54] But before a claimant examines the application of a § 390 cause

47. RESTATEMENT (SECOND) OF TORTS § 308.

48. *See* RESTATEMENT (SECOND) OF TORTS § 390; Casebolt v. Cowan, 829 P.2d 352, 365 (Colo. 1992) (en banc) (finding that § 390 focuses on the duty and specific standard of care in supplying chattels for another's use).

49. RESTATEMENT (SECOND) OF TORTS § 390. There is no substantive difference in the language between the Restatement (First) of Torts § 390 and the Restatement (Second) of Torts § 390. *See* McCall, *supra* note 44, at 682. However, comment (a) of the Restatement (Second) of Torts § 390 inserts one sentence that explains the word "supplies." *See* RESTATEMENT (SECOND) OF TORTS § 390 cmt. a.

50. *Compare* RESTATEMENT (SECOND) OF TORTS § 308 ("It is negligence to permit a third person to use a thing or to engage in an activity . . . to create an unreasonable risk of harm to others."), *with* RESTATEMENT (SECOND) OF TORTS § 390 ("One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely . . . to use it in a manner involving unreasonable risk of physical harm . . . is subject to liability for physical harm resulting to them.").

51. *See* RESTATEMENT (SECOND) OF TORTS § 390 cmt. a.

52. *See id.*

53. *See* RESTATEMENT (SECOND) OF TORTS §§ 308, 390.

54. *See* Robert H. McWilliams Jr., *Negligent Entrustment in South Carolina: An Analysis of South Carolina's Consistent Application and Inconsistent Statements of the Standard After* Gadson v. ECO Services of South Carolina, Inc., 59 S.C. L. REV. 633, 635 (2008).

of action, a general understanding of negligent entrustment's function in legal society is beneficial.[55]

C. The Function of Negligent Entrustment

Negligent entrustment reflects society's concern that entrusting an item to an unfit operator engenders a risk to the public.[56] Generally, a person is not accountable for the negligent acts of others.[57] Negligent entrustment appears to conflict with this principle.[58] But on a closer inspection, the doctrine arises from a separate link in the causal chain.[59] Negligent entrustment follows negligence by the entrustee, but the entrustee's negligent act does not impose liability—the actionable tort is the act of entrustment.[60] The entrustment—the exchange of a chattel from entrustor to entrustee—creates the cause of action.[61] Negligent entrustment simply extends the causal chain—focusing backwards to the moment that set the events in motion, rather than looking at the cumulative negligent act that produced the injury.[62]

The cause of action represents a common-sense duty.[63] Society wants people who are in control of a chattel to use reasonable care when entrusting it to someone else.[64] Presumably, reasonable care supports public policy by preventing harm to society.[65] Negligent entrustment represents this ideal.[66]

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55. *See infra* Part II.C.

56. *See* Kennedy v. Baird, 682 S.W.2d 377, 378 (Tex. App.—El Paso 1984, no writ); *infra* Part V.D.

57. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965) ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another" absent a special relationship.).

58. *Compare* RESTATEMENT (SECOND) OF TORTS § 315 (the defendant is not liable unless a special relationship exists), *with* RESTATEMENT (SECOND) OF TORTS § 390 (the defendant's standard of care and liability differs when entrusting chattel to a third party).

59. *See Kennedy*, 682 S.W.2d at 378; Edward J. Littlejohn, *Torts*, 21 WAYNE L. REV. 665, 680 (1975); *see also* Benjamin Walther, Comment, *Cyberbullying: Holding Grownups Liable for Negligent Entrustment*, 49 HOUS. L. REV. 531, 562 (2012) (explaining the theory behind negligent entrustment).

60. *See* McWilliams, *supra* note 54, at 634–35.

61. *See* Pac. Indem. Co. v. Harrison, 277 S.W.2d 256, 261 (Tex. Civ. App.—Dallas 1955, no writ) (Dixon, J., concurring) ("The word entrust has been defined by both lay and legal authorities in substance to mean to commit something to another with a certain confidence regarding his care, use or disposal of it." (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1941))); McWilliams, *supra* note 54, at 635.

62. *See* McWilliams, *supra* note 54, at 635.

63. *See Kennedy*, 682 S.W.2d at 378 ("The establishment of the negligent entrustment [cause of action] . . . was developed by the courts because of the realization that one who entrusts [a chattel] to another owes a duty to the general public not to be negligent in such entrustment."); *cf.* Bernethy v. Walt Failor's, Inc., 653 P.2d 280, 283 (Wash. 1982) ("We consider it not only common sense, but common law and justice, that one cannot let or loan to another, knowing that other to be reckless and incompetent, and in such a condition that he would be reckless and incompetent, an instrumentality which may be a very dangerous one in charge of such a person." (quoting Mitchell v. Churches, 206 P. 6, 8 (Wash. 1922))).

64. *See* Moning v. Alfono, 254 N.W.2d 759, 768 (Mich. 1977) ("The doctrine of negligent entrustment is . . . an ordinary application of general principles for determining whether a person's conduct was reasonable in light of the apparent risk."); *see also* Walther, *supra* note 59 (explaining the theory behind negligent entrustment).

65. *See* Hatcher v. Mewbourn, 457 S.W.2d 151, 152 (Tex. Civ. App.—Texarkana 1970, writ ref'd n.r.e.) (noting that when a person can "foresee that his conduct will involve an unreasonable risk of harm to other[s] . . . he is then under a duty to them to exercise the care of a reasonable man as to what he does or

Section 390 creates the most liberal standard for negligent entrustment.[67] This characteristic made an as-constructed application of § 390 a rare occurrence among the states.[68] Indeed, most states limit the applicability of § 390.[69] Limits on claims for negligent entrustment of a firearm generally rely on two factors: (1) the nature and character of the chattel, and (2) the entrustor's knowledge concerning the entrustee.[70] Courts limit the application of § 390 in an effort to avoid creating excessive risks of liability for potential defendants.[71]

For example, Texas's common law holdings restrict and foreclose the applicability of negligent entrustment of a chattel to sellers.[72] Michigan law, in contrast, does exactly the opposite.[73] These wide-ranging differences in state law application of § 390 muddy the waters of negligent entrustment.[74] And this confusion has bedeviled Texas courts attempting to apply the doctrine.[75]

III. LOADING THE AMMO: WHAT CAN YOU NEGLIGENTLY ENTRUST?

Black's Law Dictionary defines a chattel as "[m]ovable or transferable property . . . a physical object capable of manual delivery and not the subject matter of real property."[76] This definition encompasses a vast array of objects—both inanimate and living.[77] Texas's case law is rich in actions of negligent entrustment.[78] The following cases provide a brief background of the wide applications of negligent entrustment in Texas.[79]

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does not do" (quoting WILLIAM L. PROSSER, LAW OF TORTS (3d. ed. 1964)) (internal quotation marks omitted)). *But see* Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 828 (2004) (implying that negligent entrustment hampers business).

66. *See Alfono*, 254 N.W.2d at 768.

67. *See* RESTATEMENT (SECOND) OF TORTS § 390 (1965).

68. *See Alfono*, 254 N.W.2d at 778; Whitebook, *supra* note 38, at 951–53.

69. *See* Wilbanks v. Brazil, 425 So. 2d 1123, 1125 (Ala. 1983) (limiting entrustment to a certain category of chattel); RESTATEMENT (SECOND) OF TORTS § 390 cmt. a; Walther, *supra* note 59, at 549.

70. *See* Walther, *supra* note 59, at 549.

71. *See* Kyte v. Philip Morris Inc., 556 N.E.2d 1025, 1029 (Mass. 1990) (stating that expanding entrustment liability could result in "stretch[ing] common law liability concepts beyond reason").

72. *See* Nat'l Convenience Stores, Inc. v. T.T. Barge Cleaning Co., 883 S.W.2d 684, 686 (Tex. App.—Dallas 1994, writ denied).

73. *See Alfono*, 254 N.W.2d at 767–68, 768 n.24.

74. *Compare id.* at 774–75 (finding negligent entrustment when defendant entrusted a slingshot to a child), *with* Bojorquez v. House of Toys, Inc., 133 Cal. Rptr. 483, 484 (Cal. Ct. App. 1976) (rejecting a finding of negligent entrustment when defendant entrusted a slingshot to a child).

75. *See infra* Part III.A–B and text accompanying note 286.

76. BLACK'S LAW DICTIONARY 251 (8th ed. 2004).

77. *See* Dee v. Parish, 327 S.W.2d 449, 452 (Tex. 1959) (entrustment of a horse); Newkumet v. Allen, 230 S.W.3d 518, 522 (Tex. App.—Eastland 2007, no pet.) (entrustment of a boat).

78. *See, e.g.*, *Dee*, 327 S.W.2d at 452; *Newkumet*, 230 S.W.3d at 522.

79. *See infra* Part III.A–B.

A. The Many Applications of § 390

In the Texas Supreme Court case of *Dee v. Parish*, Dee, a twelve-year-old girl, was thrown from a horse entrusted to her by Parish.[80] Parish, the operator of a riding stable, left Dee on a trail ride—a trail beyond her experience level.[81] Citing the Restatement (First) of Torts § 390, the court remanded the case to the trial court to determine whether Parish knew or should have known that Dee's inexperience would likely cause her to ride the horse in an unreasonably risky manner.[82] The evidence, the court noted, supported the conclusion that Dee should not have been allowed to "be turned loose" with so little training or experience.[83] The Texas Supreme Court held that such an apparent knowledge of inexperience would make Parish liable for the injuries sustained by Dee.[84]

In 2007, the Eastland Court of Appeals analyzed the doctrine of negligent entrustment for a boat in *Newkumet v. Allen*.[85] Three minors were injured when one girl, with her parents' permission, took her friends out on the family boat and turned too sharply, causing an accident.[86] The plaintiffs alleged a negligent entrustment claim against the driver's parents.[87] The court analyzed the case under the elements of negligent entrustment for an automobile, finding that the plaintiffs failed to show that the parents knew or should have known of their daughter's incompetence.[88] To come to this determination, the court held that the girl was a "responsible, well-behaved young lady who had been trained how to operate a boat, had experience operating a boat, had taken the required boater course, and had received her certificate to operate a boat."[89] This showing of the daughter's education conclusively disproved negligent entrustment of the boat.[90]

Other state courts have expanded negligent entrustment to nearly countless scenarios—even to cases involving golf clubs and pit bulls.[91] But across the country, one chattel capable of negligent entrustment is analyzed and litigated more than any other chattel: the automobile.[92] Understanding the theories behind negligently entrusting an automobile provides the foundation for

80. *See Dee*, 327 S.W.2d at 451.

81. *See id.*

82. *See id.* at 452; RESTATEMENT (FIRST) OF TORTS § 390. *Dee v. Parish* is the only instance in which the Texas Supreme Court relied on § 390. *See infra* Part VI.B.

83. *See Dee*, 327 S.W.2d at 451.

84. *See id.*

85. *See* Newkumet v. Allen, 230 S.W.3d 518, 522 (Tex. App.—Eastland 2007, no pet.).

86. *See id.* at 522.

87. *See id.*

88. *See id.* at 522–23.

89. *Id.* at 525.

90. *See id.*

91. *See* Wilbanks v. Brazil, 425 So. 2d 1123, 1123 (Ala. 1983) (entrusting golf clubs); Moore v. Myers, 868 A.2d 954, 966 (Md. Ct. Spec. App. 2005) (entrusting a pit bull), *modified by* Tracey v. Solesky, No. 02207, 2012 WL 1432263 (Md. Apr. 26, 2012) (not designated for publication), *superseded by* Tracey v. Solesky, 427 Md. 627 (2012).

92. *See infra* Part III.B.

grasping the significant similarities between entrusting an automobile and entrusting a handgun.[93]

B. Negligent Entrustment of an Automobile

In the early Texas case of *Seinsheimer v. Burkhart*, the Texas Commission of Appeals addressed one of its first cases encompassing the negligent entrustment of an automobile to an "incompetent."[94] In *Burkhart*, a grandmother entrusted her automobile to her grandson's friend.[95] The court made its ruling based on what it considered a sound principle:

> An owner who lends his automobile to another, knowing that the latter is an incompetent, reckless, or careless driver, is liable for such person's negligence; the owner's liability in such cases is based upon his own negligence in [e]ntrusting the automobile to such a person.[96]

The court found that the friend was a person she knew or should have known was incompetent to drive and held the grandmother liable for negligent entrustment of the automobile.[97] Eight years later, the Texas Supreme Court addressed a very similar issue in *Mundy v. Pirie-Slaughter Motor Co.* with the addition of a new factor: the driver's license.[98]

In *Mundy*, the plaintiff sued the defendant for damages sustained when the plaintiff's tractor mower was hit by an automobile owned by the defendant.[99] Evidence offered by the plaintiff showed that the driver of the automobile lacked a driver's license.[100] Citing *Burkhart*, the court applied the doctrine of

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93. *Compare* Mundy v. Pirie-Slaughter Motor Co., 206 S.W.2d 587, 590 (Tex. 1947) (entrusting an automobile to an unlicensed driver), *with* Kennedy v. Baird, 682 S.W.2d 377, 377 (Tex. App.—El Paso 1984, no writ) (entrusting a firearm to an unlicensed operator).

94. *See* Seinsheimer v. Burkhart, 122 S.W.2d 1063, 1063 (Tex. 1939). This court, as well as the many other courts that recognize the doctrine of negligent entrustment, use the term "incompetent" as both an adjective and a noun—referring to one's careless or reckless actions, or character. *See id.* at 1066; *see also* J. A. H., *Torts—Automobiles—Bailor's Liability for Negligence of Bailee*, 11 TEX. L. REV. 564, 565 (1933) (stating that in negligent entrustment cases, "[t]he basis of the negligence is the knowledge of the *incompetency* or dangerous habits of the bailee" (emphasis added)).

95. *See Seinsheimer*, 122 S.W.2d at 1067.

96. *Id.* (quoting 5 AM. JUR. *Automobiles* § 355 (1936)) (internal quotation marks omitted). The court applied this test with no mention of § 390, though the language is very similar. *See* RESTATEMENT (SECOND) OF TORTS § 390 (1965).

97. *See* Edwards v. Valentine, 926 So. 2d 315, 320 (Ala. 2005) (In the context of negligent entrustment of an automobile, "[e]ntrustment can include either [1] actual entrustment, [2] continuing consent to use the vehicle, or [3] leaving the vehicle available for use." (quoting Note, *Negligent Entrustment in Alabama*, 23 ALA. L. REV. 733, 738 (1971)) (internal quotation marks omitted)); *Seinsheimer*, 122 S.W.2d at 1067.

98. *See Mundy*, 206 S.W.2d at 589; *see also* Russell Constr. Co. v. Ponder, 186 S.W.2d 233, 236 (Tex. 1945) (finding that the defendant negligently entrusted a truck to a person he knew to be an incompetent driver).

99. *See Mundy*, 206 S.W.2d at 588.

100. *See id.*

negligent entrustment.[101] The court held the lack of any driver's license to be a determinative factor in the driver's incompetence.[102]

To succeed on this claim, the court laid out the following test: (1) the defendant, as owner, permitted the operator to drive the automobile; (2) the operator did not have a driver's license; (3) the defendant knew the operator did not have a license; (4) the operator, under the defendant's permission, negligently drove the automobile; and (5) such negligence caused the injuries to the third party.[103] After noting the importance and purpose of the license, the court remanded the case to allow the plaintiff to introduce evidence that the driver did not have a license.[104] The possession of a license is also one of the key similarities between an automobile and a handgun.[105]

C. Different Bullet, Same Bite: Commonalities of Automobiles and Handguns

At first glance, the comparison between an automobile and a handgun appears uneven.[106] But examining the similar implications in policy and practicality, the association is more level.[107] Three elements arise from negligent entrustment of an automobile: a license requirement, a dangerous instrumentality, and responsibility.[108] Analyzing these factors in light of a handgun, the comparisons are parallel.[109]

1. License: Insuring a Minimum of Competence and Skill

A driver's license's "principal purpose is to insure a minimum of competence and skill on the part of drivers for the protection of persons who might be injured or have their property damaged by negligent or reckless

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101. *See id.*; *Seinsheimer*, 122 S.W.2d at 1066.

102. *See Mundy*, 206 S.W.2d at 589. *But see* Williams v. Steves Indus., Inc., 699 S.W.2d 570, 574 (Tex. 1985), *superseded by statute as stated in* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994) ("[W]hether a driver has a license does not determine whether a driver is *in fact* incompetent."); *cf.* Richardson v. Crawford, No. 10–11–00089–CV, 2011 WL 4837849, at *7 (Tex. App.—Waco Oct. 12, 2011, pet. denied) (mem. op., not designated for publication) (noting that the defendant did not know that Gretchen lacked experience handling firearms or was emotionally unstable).

103. *See Mundy*, 206 S.W.2d at 591.

104. *See id.*

105. *See infra* Part III.C.

106. *See* Byers v. Hubbard, 669 N.E.2d 320, 322 (Ohio Ct. App. 1995).

107. *See* Reeves v. King, 534 So. 2d 1107, 1108 (Ala. 1988); *see also* Pitts v. Ivester, 320 S.E.2d 226, 227 (Ga. Ct. App. 1984) (holding that, in some situations, "there is little difference between a car and a gun[;] . . . [t]herefore, there is no reason to require further inquiry of a firearm entrustee than of an automobile entrustee" (citation omitted)).

108. *See Mundy*, 206 S.W.2d at 588 (license requirement); Moody v. Clark, 266 S.W.2d 907, 912 (Tex. App.—Texarkana 1954, writ ref'd n.r.e.) (dangerous instrumentality); John R. Ashmead, *Putting a Cork on Social Host Liability: New York Rejects a Trend* D'Amico v. Christie, 55 BROOK. L. REV. 995, 1029 (1989) (responsibility).

109. *See Reeves*, 534 So. 2d at 1108 (stating that the causes of action are the same).

operation of motor vehicles on the highways."[110] Moreover, the driver's license exists partly to prevent the lending of automobiles to people shown by examination of the State to be incompetent to drive.[111]

Texas requires a driver's license in order to operate a car.[112] Likewise, carrying a handgun outside of a person's own premises in Texas requires a concealed handgun license.[113] A concealed carry license represents knowledge and skill to operate a handgun.[114] The license also aids the implementation of the state's policy of disfavoring transfers of handguns to unfit persons.[115] Entrustment of the instrument to an unlicensed operator who later negligently injures a third party creates a causal connection between the entrustor and the injured third party.[116] Whether for an automobile or a handgun, a minimum of competence and skill is necessary to handle the dangerous nature and character of the instrument.[117]

2. *Dangerous Instrumentality: Nature and Capability*

As discussed earlier, one of the essential factors in a negligent entrustment action is the nature and character of the chattel, i.e., the instrumentality.[118] A comparison of the instrumentality between an automobile and a handgun reveals distinct uses and dangers.[119]

An automobile, albeit very capable of causing and creating danger, is intended as a safe vehicle for transportation.[120] A handgun, on the other hand, is intended for danger by definition.[121] A district court in Maryland succinctly recognized this distinction by noting that "using a car to run someone down is not what one normally does with a car. However, while shooting someone may not be what everyone with a firearm does, [it is] arguably the intended usage of

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110. *See Mundy*, 206 S.W.2d at 589; *see also* TEX. TRANSP. CODE ANN. § 521.025 (West 2011).

111. *See Mundy*, 206 S.W.2d at 590.

112. *See* TRANSP. § 521.025 (laying out the purpose of the license).

113. *See* TEX. PENAL CODE ANN. § 46.02 (West 2011); *see infra* Part IV.B.3.

114. *See generally* TEX. GOV'T CODE ANN. § 411.188 (West 2013) (setting out the minimum standards of proficiency to obtain a handgun license).

115. *See id.*

116. *See Mundy*, 206 S.W.2d at 590.

117. *See infra* Part III.C.2.

118. *See* supra text accompanying note 70.

119. *See infra* text accompanying notes 120–28.

120. *See* Ford Motor Co. v. Evancho, 327 So. 2d 201, 203 (Fla. 1976) (finding that "the intended use of an automobile [is] not just to provide a means of transportation but . . . to provide a means of safe transportation" (quoting Larsen v. Gen. Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968)) (internal quotation marks omitted)).

121. *See* McLaughlin v. United States, 476 U.S. 16, 17 (1986) (holding that even an unloaded handgun is a dangerous weapon); Prather v. Brandt, 981 S.W.2d 801, 806 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *see also* Robert H. Wood, *Toy Guns Don't Kill People—People Kill People Who Play with Toy Guns: Federal Attempts to Regulate Imitation Firearms in the Face of Toy Industry Opposition*, 12 N.Y. CITY L. REV. 263, 269 (2009) (discussing the United States Supreme Court's resolution of conflict amongst other courts by finding that weapons, in many different forms, were dangerous by definition under a federal statute).

the instrumentality."[122] Though the two objects differ in uses, the possible dangers in operating an automobile and a handgun are significantly similar.[123]

An automobile is widely accepted as a dangerous instrumentality.[124] A firearm, arguably, is an inherently dangerous instrumentality.[125] Further, a handgun is also an inherently dangerous instrument due to its size.[126] Both an automobile and a handgun are capable of inflicting death and serious bodily harm.[127] These dangers demonstrate the rationale for encouraging responsibility while operating such instruments.[128]

3. *Responsibility: An Exercise of Care*

Negligent entrustment reflects a societal concern that those with a dangerous instrument should bear the responsibility of using care when entrusting that instrument to another person.[129] Responsibility is a "state of being . . . moral[ly], legal[ly], or mental[ly] accountab[le]"—a duty.[130] Those persons found responsible enough to operate a car or carry a concealed handgun are given a license.[131] Licensed operators of automobiles and concealed handguns have a duty to exercise the high degree of care that corresponds with the level of danger that automobiles and handguns are capable of producing.[132]

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122. McGuiness v. Brink's Inc., 60 F. Supp. 2d 496, 499 (D. Md. 1999) (examining the duty owed to the public at large when a dangerous instrumentality, such as a firearm, is involved).

123. *See infra* text accompanying notes 124–28.

124. *See* State v. Adkins, 320 N.E.2d 308, 311 (Ohio Ct. App. 1973) (noting that "[t]he automobile is not inherently dangerous, but in the hands of a careless or reckless operator, an automobile may become a dangerous instrument"); *see also* William E. Adams Jr., *Tort Law: 2005–08 Review of Florida Case Law*, 33 NOVA L. REV. 21, 40 (2008) (discussing the dangerous instrumentality of vehicles); David Luria, *Death on the Highway: Reckless Driving As Murder*, 67 OR. L. REV. 799, 827 (1988) (explaining that automobiles are capable of being used as a lethal weapon, "one often more deadly than a gun").

125. *See* Seitz v. Zac Smith & Co., 500 So. 2d 706, 710 (Fla. Dist. Ct. App. 1987) ("While the phrase 'dangerous instrumentality' and 'inherently dangerous instrumentality' have often been used interchangeably, it should be remembered that they do not mean the same thing. While an automobile has long been held to be a dangerous instrumentality, it is not inherently dangerous in and of itself, rather it is dangerous only in its use and operation." (citing Chrysler Corp. v. Wolmer, 499 So. 2d 823, 823 n.1 (Fla. 1986))); Jacobs v. Tyson, 407 S.E.2d 62, 64 (Ga. Ct. App. 1991); Wood v. Groh, 7 P.3d 1163, 1169 (Kan. 2000).

126. *See* Burkett v. Freedom Arms, Inc., 704 P.2d 118, 121 (Or. 1985) (holding that the use of a concealed handgun is an abnormally dangerous activity because "the danger inhere[s] in the activity itself").

127. *See supra* text accompanying notes 120–22.

128. *See infra* Part III.C.3.

129. *See* Byers v. Hubbard, 669 N.E.2d 320, 323 (Ohio Ct. App. 1995); Kennedy v. Baird, 682 S.W.2d 377, 378 (Tex. App.—El Paso 1984, no writ).

130. *See Responsibility*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/responsibility (last visited Sept. 27, 2013).

131. *See* TEX. GOV'T CODE ANN. § 411.172(a) (West 2009) (concealed carry license); TEX. TRANSP. CODE ANN. § 521.025 (West 2011) (driver's license).

132. *See* Wood v. Groh, 7 P.3d 1163, 1169 (Kan. 2000) (stating that "inherently dangerous instrumentalities . . . [are] commensurate with the dangerous character of such instrumentalities").

Placing a duty on those who own the chattel to entrust their chattel responsibly, in theory, safeguards the public.[133]

IV. CROSSHAIRS ON THE TARGET: NEGLIGENT ENTRUSTMENT OF A FIREARM

A. *What Texas Courts and the Fifth Circuit Have Said So Far*

Texas case law on a negligent entrustment of a firearm claim is slim—there are only three reported cases, one of which includes the Fifth Circuit's *Erie* application of Texas law.[134] Though few in number, these cases correctly identify the proper rationale for recognizing the cause of action and further support this Comment's final recommendation.[135]

1. *Kennedy*

In *Kennedy v. Baird*, the plaintiffs brought an action against a father for the acts of his adult son.[136] Evidence showed that the son intentionally shot at the plaintiffs with the father's "rifle as they drove up the driveway."[137] The plaintiffs based their claim on negligent entrustment of the rifle.[138]

Examining a case of first impression, the court noted that at the time of its writing "there [was] no prior precedent in Texas to establish a negligent entrustment of a firearm cause of action."[139] The court quickly mentioned, "[h]owever, [that] Texas has long had a cause of action for negligent entrustment of an automobile."[140] An automobile in the possession of a person who is incompetent to handle it, the court found, creates a potential threat to the public.[141] Liability is based not on a theory of vicarious responsibility, but upon

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133. *See* Rodgers v. McFarland, 402 S.W.2d 208, 210 (Tex. App.—El Paso 1966, writ ref'd n.r.e.) (negligent entrustment is found in the liability of an owner's negligence in "turning [an] incompetent loose on the public").

134. *See* Morin v. Moore, 309 F.3d 316, 324 (5th Cir. 2002); Prather v. Brandt, 981 S.W.2d 801, 806 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); Kennedy v. Baird, 682 S.W.2d 377, 378 (Tex. App.—El Paso 1984, no writ). *But see* Richardson v. Crawford, No. 10–11–00089–CV, 2011 WL 4837849, at *5 (Tex. App.—Waco Oct. 12, 2011, pet. denied) (mem. op., not designated for publication) (declining to recognize a negligent entrustment of a firearm cause of action).

135. *See infra* Parts V–VI.

136. *See Kennedy*, 682 S.W.2d at 377. Although a number of cases involving entrustment of a weapon pertain to a minor, there are exceptional cases in which the entrustment of the weapon pertain to an adult. *See* Angell v. F. Avanzini Lumber Co., 363 So. 2d 571, 572 (Fla. Dist. Ct. App. 1978) (finding a cause of action when a person supplied a firearm to a person who was obviously demented and who immediately used the weapon to kill a third person).

137. *See Kennedy*, 682 S.W.2d at 377.

138. *See id.*

139. *Id.* at 378.

140. *Id.* (citing Mundy v. Pirie-Slaughter Motor Co., 206 S.W.2d 587, 588 (Tex. 1947)).

141. *See Mundy*, 206 S.W.2d at 591 (finding that the "danger anticipated and intended to be prevented . . . is that such [incompetent] persons, if given the opportunity to drive, will do so negligently and will cause damage to other persons"); *Kennedy*, 682 S.W.2d at 378.

the negligent act of entrusting the automobile to the incompetent.[142] Using Texas case law on the negligent entrustment of automobiles, the court extended the rationale to firearms: "[a] firearm is a deadly weapon per se . . . and under certain circumstances, the owner may be charged with responsibility for the use made of it where the control of the weapon has passed to another."[143]

In addition to case law, the court in *Kennedy* also cited and followed the underlying principles of the Restatement (Second) of Torts § 390 in its recognition of the cause of action.[144] Ultimately, the plaintiffs' claim failed due to insufficient evidence that the father had "actual knowledge . . . of his son's propensity to commit the act complained of or to use the rifle dangerously" so as to foresee the likelihood of danger in entrusting the rifle.[145] Nonetheless, *Kennedy* stands as the first Texas decision to recognize the use and need of a negligent entrustment of a firearm cause of action.[146] Fourteen years later, another Texas court was given the opportunity to acknowledge the cause of action in *Prather v. Brandt*.[147]

2. *Prather*

The defendant in *Prather* committed a drive-by shooting with a shotgun—a gift given to him by his father for Christmas.[148] The plaintiff sued the father on the theory of negligent entrustment of the shotgun.[149] Citing *Kennedy*, the court based its ruling on the rationales of a negligent entrustment of an automobile cause of action and the Restatement (Second) of Torts § 390.[150]

Applying the same requirements of a negligent entrustment of an automobile claim to the father's entrustment of the shotgun to his son, the court found that the plaintiff did not show that the father knew or should have known that his son "was incompetent, reckless, or otherwise likely to act negligently with the shotgun."[151] On the contrary, the record reflected that the father taught the son, on many occasions, the proper procedures to responsibly use the shotgun.[152] For this reason, the court held that the claim of negligent

142. *See Kennedy*, 682 S.W.2d at 378; *see also* Seinsheimer v. Burkhart, 122 S.W.2d 1063, 1067 (Tex. 1939) (citing 5 AM. JUR. *Automobiles* § 355 (1936)).

143. *Kennedy*, 682 S.W.2d at 378 (citing TEX. PENAL CODE ANN. § 1.07(a)(11)(A) (West 1974)).

144. *Id.* at 379; RESTATEMENT (SECOND) OF TORTS § 390 (1965).

145. *Kennedy*, 682 S.W.2d at 379–80. *But see* Richardson v. Crawford, No. 10–11–00089–CV, 2011 WL 4837849, at *5 (Tex. App.—Waco Oct. 12, 2011, pet. denied) (mem. op., not designated for publication) (holding that the act to be foreseen was the shooting of an individual person, rather than foreseeing that the defendant would likely use the gun dangerously).

146. *See Kennedy*, 682 S.W.2d at 378 (citing PENAL § 1.07(a)(11)(A)).

147. Prather v. Brandt, 981 S.W.2d 801, 804 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

148. *Id.*

149. *See id.*

150. *See id.* at 806 (relying on *Kennedy*, 682 S.W.2d at 379); RESTATEMENT (SECOND) OF TORTS § 390 cmt. b. (1965)

151. *See Prather*, 981 S.W.2d at 806 (applying the negligent entrustment of an automobile factors from Soodeen v. Rychel, 802 S.W.2d 361, 362 (Tex. App.—Houston [1st Dist.] 1990, writ denied)).

152. *See id.* at 806.

entrustment of the shotgun failed.[153] The next court to recognize the negligent entrustment of a firearm cause of action in Texas was the Fifth Circuit.[154]

3. *Morin*

In *Morin v. Moore*, a police officer stored his AK-47 assault rifle in his son's room.[155] The officer allegedly knew his son to be "a psychologically unstable drug user that revered the Nazi ideology."[156] The son later took the assault rifle from his room and murdered the plaintiffs' family members.[157] The plaintiffs filed a negligent entrustment of a firearm claim against the officer.[158] Applying Texas law through an *Erie* determination, the circuit court stated, "[w]e are emphatically not permitted to do merely what we think best; we must do that which we think the [Texas Supreme Court] would deem best."[159]

That analysis, however, relied on Texas appellate court case law because the Supreme Court of Texas had yet to recognize a negligent entrustment of a firearm cause of action.[160] Applying *Kennedy*'s reliance on the Restatement (Second) of Torts § 390, the Fifth Circuit stated that to succeed on the claim:

> a plaintiff must prove that the owner entrusted the firearm to a person who he knew, or had reason to know, would be likely "because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the [owner] should expect to share in or be endangered by its use."[161]

In this case, the plaintiffs alleged that the father was aware of his adult son's psychological problems, including a cocaine and prescription pill addiction.[162] On these facts, the Fifth Circuit remanded the case to examine the father's knowledge of the son's incompetency.[163]

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153. *See id.*

154. *See infra* Part IV.A.3.

155. Morin v. Moore, 309 F.3d 316, 318 (5th Cir. 2002). The court noted that the officer's entrustment, or permission, could "be implied from his storage of the weapon in" his son's bedroom, giving his son access to the weapon. *Id.* at 327; *see also* Dailey v. Quality Sch. Plan, Inc., 380 F.2d 484, 486 (5th Cir. 1967). For a more comprehensive discussion on the negligent storage of firearms, see Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189, 1189 (2000).

156. *Morin*, 309 F.3d at 318.

157. *See id.*

158. *See id.* at 319.

159. *Id.* at 324 (alterations in original) (quoting Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 397 (5th Cir. 1986) (en banc)); *see* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

160. *See Morin*, 309 F.3d at 324 (noting that "[t]he Texas Supreme Court has not yet spoken on the issue of negligent entrustment of a firearm").

161. *Id.* (alteration in original) (quoting Kennedy v. Baird, 682 S.W.2d 377, 379 (Tex. App.—El Paso 1984, no writ); RESTATEMENT (SECOND) OF TORTS § 390 (1965)).

162. *See id.* at 325.

163. *See id.*

"Under the circumstances of this case," the Fifth Circuit held, "we are confident that Texas courts would allow a negligent entrustment claim."[164] By this acknowledgement, the Fifth Circuit recognized the need for the cause of action in the Texas legal system.[165] On remand, the defendants settled the claim with the plaintiffs, paying damages for noneconomic losses.[166] Long before negligent entrustment of a firearm was recognized in *Kennedy*, *Prather*, and *Morin*, though, the uses and abuses of firearms were embedded into the heart of Texas history.[167]

B. Deep in the Heart of Texas: A Brief Look at the Role of Firearms in Texas History

In Texas, "[e]very citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing [of] arms, with a view to prevent crime."[168] As evidenced from the language of the Texas Constitution, arms—firearms—play an essential role in the state's history.[169]

1. Handguns, Shotguns, and Rifles: One of These Things Is Not Like the Other

As early as 1875, the Texas Supreme Court refused to find that the word "arms" only referred to those used by a soldier or militiaman.[170] The guaranteed right to keep and bear arms refers to arms that "are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense."[171] The court reasoned that if arms "[do] not include the double-barreled shot-gun, the huntsman's rifle, and *such pistols at least as are*

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164. *Id.*

165. *See id.*

166. *See* Stipulated Final Order of Dismissal and Approval of Settlement of Minor Plaintiffs' Claims and Distribution of Funds at 1, Morin v. City of Harlingen, No. B-00-104 (S.D. Tex. Nov. 28, 2003).

167. *See Morin*, 309 F.3d at 318; Prather v. Brandt, 981 S.W.2d 801, 804 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); Kennedy v. Baird, 682 S.W.2d 377, 379 (Tex. App.—El Paso 1984, no writ); *infra* Part IV.B.

168. TEX. CONST. art. I, § 23 (1876); *see also* John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1124 (1995) (noting the role of firearms in the settlement of Texas).

169. *See* REPUB. TEX. CONST. OF 1836, Declaration of Rights para. 14, *reprinted in* H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1069, 1084 (Austin, Gammel Book Co. 1898) ("Every citizen shall have the right to bear arms in defence of himself . . . ."); THE DECLARATION OF INDEPENDENCE (Repub. of Tex. (1836)), *reprinted in* H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1063, 1065 (Austin, Gammel Book Co. 1898) (stating that the Mexican Government "has demanded us to deliver up our arms, which are essential to our defence—the rightful property of freemen"). This ideal is also consistent with federal jurisprudence on the Second Amendment. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 206 (1983) (giving an in-depth analysis of the Second Amendment on the federal level).

170. *See* State v. Duke, 42 Tex. 455, 458 (1874).

171. *Id.*

not adapted to being carried concealed, then the only arms which the great mass of the people of the [s]tate have, are not under constitutional protection."[172] Even at this early stage of Texas's history, the court distinguished pistols from shotguns and rifles.[173] In particular, the court further differentiated those pistols that are capable of concealment.[174] This fact alone, the court recognized, separates pistols—otherwise known as handguns—from other firearms, such as rifles and shotguns.[175]

The United States Code sets out the differences between the legal definitions of a handgun, shotgun, and rifle:[176]

> "The term 'handgun' means . . . a firearm which has a short stock and is designed to be held and fired by the use of a single hand . . . ."[177]
>
> The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.
>
> . . . .
>
> The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger.[178]

By the Code's own language, both the shotgun and rifle are intended to be "fired from the shoulder."[179] The handgun's intended use, however, is by only one hand.[180] The Texas Supreme Court found that the ability to conceal a handgun separates the weapon from any other commonly stored firearm.[181] In addition to the court's finding, the Texas legislature has also spoken on the issue.[182]

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172. *Id.* at 458–59 (emphasis added).
173. *See id.* at 459.
174. *See id.*
175. *See id.*
176. *See* 18 U.S.C. § 921(a)(5), (a)(7), (a)(29)(A) (2006). Texas has a similar provision that separately defines a firearm and a handgun. *See* TEX. PENAL CODE ANN. § 46.01(3), (5) (West 2011). Under Texas's statute, a "'[f]irearm' means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use." *Id.* A "'[h]andgun' means any firearm that is designed, made, or adapted to be fired with one hand." *Id.* The Texas statute does not separately define a shotgun or rifle. *See id.*
177. 18 U.S.C. § 921(a)(29)(A).
178. *Id.* § 921(a)(5), (a)(7).
179. *See id.*
180. *See id.* § 921(a)(29)(A).
181. *See infra* text accompanying note 186.
182. *See* TEX. PENAL CODE ANN. § 46.02 (West 2011).

2. Handguns in the Texas Legislature: A History of Being Targeted

Section 46.02 of the Texas Penal Code is specifically tailored to regulate the use of a handgun.[183] The Code makes it illegal to intentionally, knowingly, or recklessly carry a handgun outside of a person's own premises.[184] Passed in 1871, the original version of this law was meant to end the tales of gunslingers carrying a pistol on their hips in the streets and saloons.[185] The Texas Supreme Court dealt specifically with what has now become § 46.02 in *State v. Duke*.[186] The court determined that the legislature specifically intended to address only handguns.[187] Even today, § 46.02 only addresses the illegal use of handguns.[188] No section of the Texas Penal Code defines the illegality of carrying a non-handgun firearm.[189] Bizarre though it may seem, no law prevents an individual from openly carrying his rifle or shotgun down the main street of any city in Texas.[190] Replace that rifle or shotgun with a handgun, on the other hand, and a criminal charge is possible (assuming the carrier lacks a concealed handgun license).[191]

3. Texas Concealed Handgun License: A Showing of Competence and Skill

Reacting to the complaints by handgun owners, Texas legislators passed the Concealed Handgun Law in 1995.[192] Under this law, qualified individuals receive a license that allows them to carry a handgun outside of their own premises if the handgun is concealed.[193] To qualify for this license, applicants must meet a number of requirements, including residency, criminal history, age, and state qualification.[194] In order to attain state qualification, an individual must go through an extensive application and background check.[195] Additionally, an applicant must complete and pass a handgun proficiency test to

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183. *See id.*

184. *See id.*

185. *See id.*; Waddell v. State, 37 Tex. 354, 355 (1873) ("[T]he Legislature intended to suppress the absurd and vicious practice of bearing upon the person such weapons as pistols.").

186. *See* PENAL § 46.02; State v. Duke, 42 Tex. 455, 458 (1875).

187. *See Duke*, 42 Tex. at 459 ("[As to] pistols as within the meaning of the word, we are of the opinion that the Act in question is nothing more than a legitimate and highly proper regulation of their use . . . . We hold that the statute under consideration is valid, and that to carry a pistol under circumstances where it is forbidden by the statute, is a violation of the criminal law of the State.").

188. *See* PENAL § 46.02(a) ("A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun.").

189. *See id.*

190. *See id.* (assuming that the individual is not a convicted felon); PENAL § 46.04 (addressing the penalties of a felon carrying a firearm).

191. *See* PENAL § 46.02. The penalty of this offense ranges from a class A misdemeanor to a third degree felony. *See id.*

192. *See* TEX. GOV'T CODE ANN. §§ 411.172–.208 (West 2009).

193. *See* GOV'T § 411.172.

194. *See id.*

195. *See* GOV'T § 411.174. An applicant must submit, inter alia, proof of residency, license fees, a birth certificate, fingerprints, and a certification of handgun proficiency. *See id.*

display a sufficient level of skill and aptitude to use a handgun.[196] Once a Texan meets the qualifications and receives the permit to carry a concealed handgun, he or she avoids prosecution under § 46.02 of the Texas Penal Code.[197]

The current stance on handguns in Texas represents a deeply-rooted notion that handguns should be treated differently than other firearms.[198] This notion, coupled with the existing Texas case law on the cause of action, provides the Texas Supreme Court with a sufficient background to recognize the tort of negligent entrustment of a firearm.[199] Just as Texas's past supports the cause of action, the potential benefits in Texas's future gained by acknowledging the claim supports Texas courts' recognition of the cause of action.[200]

V. PULLING THE TRIGGER: WHY THE TEXAS SUPREME COURT SHOULD RECOGNIZE NEGLIGENT ENTRUSTMENT OF A FIREARM AS A CAUSE OF ACTION

The Texas Supreme Court has yet to recognize or acknowledge a negligent entrustment of a firearm cause of action.[201] Regardless of the court's reasons, there are four significant benefits to adopting the claim and extending it to handguns.[202] Recognizing the cause of action will (1) promote the Texas legislature's intent, (2) reflect existing Texas case law, (3) echo the sound decisions of other state courts in adopting the cause of action, and (4) advance public policy.[203]

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196. *See* GOV'T § 411.188 (setting out the minimum standards of proficiency to obtain a handgun license); 37 TEX. ADMIN. CODE §§ 6.11–6.92 (2012) (Tex. Dep't of Pub. Safety) (defining all regulations of the procedures to obtain a concealed handgun, ranging from the duties and role of the instructor to the required qualifying target scores); Mundy v. Pirie-Slaughter Motor Co., 206 S.W.2d 587, 590 (Tex. 1947); *see also* Brian J. Todd, *Negligent Entrustment of Firearms*, 6 HAMLINE L. REV. 467, 472 (1983) ("[Legislatures] seek to restrain people from providing firearms to persons *incompetent* to handle them." (emphasis added)).

197. *See* TEX. PENAL CODE ANN. § 46.02 (West 2011); *see also* Jack Skaggs, *Have Gun, Will Travel? The Hopelessly Confusing Journey of the Traveling Exception to the Unlawful Carrying Weapons Statute*, 57 BAYLOR L. REV. 507, 522 (2005). As of December 31, 2011, there were over 518,625 active concealed handgun license owners in the state of Texas. *See Active License/Certified Instructor Counts as of December 31, 2011*, TEX. DEP'T OF PUB. SAFETY (Apr. 13, 2012), http://www.txdps.state.tx.us/rsd/chl/reports/ActLicAndInstr/ActiveLicandInstr2011.pdf.

198. *See supra* Part IV.B.1–2.

199. *See* Morin v. Moore, 309 F.3d 316, 318 (5th Cir. 2002); Prather v. Brandt, 981 S.W.2d 801, 804 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); Kennedy v. Baird, 682 S.W.2d 377, 379 (Tex. App.—El Paso 1984, no writ).

200. *See infra* Part V.

201. *See Morin*, 309 F.3d at 324 ("The Texas Supreme Court has not yet spoken on the issue of negligent entrustment of a firearm.").

202. *See infra* Part V.A–D.

203. *See infra* Part V.A–D.

A. Promote the Intent of the Texas Legislature

Texas courts are required to give full effect to laws passed by the Texas legislature.[204] Thus, courts are obligated to follow the intent of the legislature.[205] As mentioned earlier, the Texas legislature has passed several statutes aimed at preventing the potential dangers caused by firearms.[206] These statutory provisions manifest the Texas legislature's intent that those desiring to carry a handgun in public exhibit a standard of competence and skill.[207] This requirement demonstrates the legislature's goal in protecting public safety by requiring citizens to meet this standard by passing a number of handgun proficiency tests in order to acquire a concealed carry license.[208] By the same token, one of the key principles behind the theory of negligent entrustment is the societal concern that entrusting an object to an inexperienced or incompetent operator engenders a threat to public safety.[209] Accordingly, recognizing a negligent entrustment of a firearm cause of action promotes the goals of the Texas legislature by providing a remedy to parties who are harmed by a gun owner who falls below prescribed standards.[210] Moreover, acknowledging the claim would reflect the existing Texas case law on the issue.[211]

B. Reflect Existing Texas Case Law

The El Paso Court of Appeals, the Houston (1st District) Court of Appeals, and the Fifth Circuit acknowledged the validity of a negligent entrustment of a firearm claim.[212] Likewise, each court recognized that the

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204. *See* St. Luke's Episcopal Hosp. v. Agbor, 952 S.W.2d 503, 505 (Tex. 1997) ("Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms." (quoting RepublicBank Dallas, N.A. v. Interkal, Inc., 691 S.W.2d 605, 607 (Tex. 1985)) (internal quotation marks omitted)); *see also* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 421 (2005) (providing an in-depth analysis into the principles of legislative intent in federal jurisprudence).

205. *See* TEX. GOV'T CODE ANN. § 311.023(1) (West 2011); *see also* McIntyre v. Ramirez, 109 S.W.3d 741, 745 (Tex. 2003) ("In construing a statute, 'our primary objective is to determine and give effect to the Legislature's intent.'" (quoting Tex. Dep't of Transp. v. Needham, 82 S.W.3d 314, 318 (Tex. 2002)) (internal quotation marks omitted)).

206. *See* TEX. PENAL CODE ANN. § 46.02 (West 2011); GOV'T § 411.172 (4) (West 2009); 37 TEX. ADMIN. CODE §§ 6.1–6.92 (2012) (Tex. Dep't of Pub. Safety); *supra* Part IV.B.2–3.

207. *See* 37 ADMIN. § 6.11 (Tex. Dep't Pub. Safety, Proficiency Requirements).

208. *See supra* text accompanying notes 194–96, 202; *see also* Nate G. Hummel, Comment, *Where Do I Put My Gun?: Understanding the Texas Concealed Handgun Law and the Licensed Owner's Right-to-Carry*, 6 TEX. TECH J. TEX. ADMIN. L. 139, 140 (2005) (providing an in-depth analysis of the Texas Concealed Handgun Law).

209. *See supra* Part II.C.

210. *See supra* note 207 and accompanying text.

211. *See infra* Part V.B.

212. *See* Morin v. Moore, 309 F.3d 316, 324 (5th Cir. 2002); Prather v. Brandt, 981 S.W.2d 801, 806 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); Kennedy v. Baird, 682 S.W.2d 377, 379 (Tex. App.—El Paso 1984, no writ).

"Texas Supreme Court has not yet spoken on the issue of negligent entrustment of a firearm."[213] Because of this absence, the Texas Supreme Court should use *Kennedy*, *Prather*, and *Morin* as a guide for recognizing the claim.[214] Using the Restatement (Second) of Torts § 390 for support, all three cases analogized negligent entrustment of an automobile to negligent entrustment of a firearm and reached the same conclusion: recognizing the cause of action is appropriate.[215] The chain of reasoning from *Kennedy* to *Prather* to *Morin* creates a logical and consistent model.[216] Though none of the cases dealt with a handgun, the courts' conclusions would presumably stand because extending the claim to encompass handguns would not alter the legal reasoning.[217] As previously mentioned, handguns have distinct similarities with automobiles in their use and nature; therefore, *Kennedy*, *Prather*, and *Morin* would also likely acknowledge a negligent entrustment of a handgun claim.[218] By following the sound holdings of these cases—especially given the precedential weight of the Fifth Circuit—the Texas Supreme Court's recognition of the cause of action will reflect and preserve good common law.[219]

C. Echo the Sound Decisions of Other State Courts

A large number of states recognize a negligent entrustment of a firearm cause of action.[220] These states' decisions should provide confidence to the Texas Supreme Court in its own determination to acknowledge the claim.[221]

Alabama forthrightly confirmed the cause of action of negligent entrustment of a handgun.[222] In recognizing the claim, the Supreme Court of Alabama pointed out that "[t]he elements of a cause of action for negligent entrustment of an automobile and negligent entrustment of a firearm . . . are the *same*."[223] New York has also recognized the cause of action.[224] The crux of

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213. *See Morin*, 309 F.3d at 324; *Prather*, 981 S.W.2d at 806 ("The only Texas case regarding negligent entrustment of a firearm is *Kennedy v. Baird*."); *Kennedy*, 682 S.W.2d at 378 ("[T]here is no prior precedent in Texas to establish a negligent entrustment of a firearm cause of action.").

214. *See Morin*, 309 F.3d at 324; *Prather*, 981 S.W.2d at 806; *Kennedy*, 682 S.W.2d at 378.

215. *See Morin*, 309 F.3d at 325; *Prather*, 981 S.W.2d at 807; *Kennedy*, 682 S.W.2d at 380; RESTATEMENT (SECOND) OF TORTS § 390 (1965).

216. *See Morin*, 309 F.3d at 325.

217. *See Morin*, 309 F.3d at 325 (entrustment of an assault rifle); *Prather*, 981 S.W.2d at 807 (entrustment of a shotgun); *Kennedy*, 682 S.W.2d at 380 (entrustment of a rifle).

218. *See supra* Part III.C.1–3.

219. *See Morin*, 309 F.3d at 324; *Prather*, 981 S.W.2d at 806; *Kennedy*, 682 S.W.2d at 379.

220. *See, e.g.*, Reeves v. King, 534 So. 2d 1107, 1108 (Ala. 1988); Williams v. Bumpass, 568 So. 2d 979, 981 (Fla. Dist. Ct. App. 1990); McCrink v. City of New York, 71 N.E.2d 419, 420 (N.Y. 1947); Byers v. Hubbard, 669 N.E.2d 320, 322 (Ohio Ct. App. 1995); Kingrey v. Hill, 425 S.E.2d 798, 799 (Va. 1993); Bernethy v. Walt Failor's, 653 P.2d 280, 283 (Wash. 1982).

221. *See infra* notes 222–32.

222. *See Reeves*, 534 So. 2d at 1108.

223. *Id.* (emphasis added). *But see Byers*, 669 N.E.2d at 322 (finding that negligent entrustment of a vehicle and of a firearm are not the same due to a firearm's inherently dangerous instrumentality).

224. *See* Splawnik v. DiCaprio, 540 N.Y.S.2d 615, 617 (N.Y. App. Div. 1989).

the inquiry, the court found, was whether a defendant "breached a general duty not to furnish a dangerous chattel to someone inexperienced or otherwise unable to understand or appreciate the danger or someone known to have dangerous or violent tendencies."[225] Likewise, Florida has acknowledged the claim.[226] Florida's case law regarding negligent entrustment of a firearm runs deep.[227] As far back as 1967, Florida has recognized a negligent entrustment of a firearm claim.[228] Under Florida case law, "the owner of a firearm is not liable for its negligent or intentional use by another, unless the owner knew, or should have known, that the other person was likely to use it in a manner involving an unreasonable risk of harm to others."[229]

Notably, the Supreme Courts of Alabama, Virginia, Florida, and Washington have all acknowledged the cause of action.[230] The history and holdings of these cases provide wide and smooth roads for the Texas Supreme Court to follow.[231] More importantly, the Texas Supreme Court should recognize a cause of action for negligent entrustment of a firearm because of the implications the claim places on public policy.[232]

D. Advance Public Policy

Negligent entrustment of a firearm—whether a handgun, rifle, or shotgun—reflects cultural concerns that an unfit wielder of a weapon poses a threat to the public.[233] But buried beneath this concern rests a deeper notion.[234] There lies "a strong public policy against entrusting irresponsible and undependable individuals with handguns and to safeguard the general public from incompetent, irresponsible or criminal use of such weapons."[235] One of the main goals of a negligent entrustment of a firearm claim is to provide

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225. *Byers*, 669 N.E.2d at 336 (citation omitted); *see also McCrink*, 71 N.E.2d at 419 (claiming negligent entrustment of a handgun when an unprovoked and drunken police officer used a revolver to seriously wound the plaintiff).

226. Williams v. Bumpass, 568 So. 2d 979, 981 (Fla. Dist. Ct. App. 1990).

227. *See id.*; Foster v. Arthur, 519 So. 2d 1092, 1094 (Fla. Dist. Ct. App. 1988); Jordan v. Lamar, 510 So. 2d 648, 649 (Fla. Dist. Ct. App. 1987); Mathis v. Am. Fire & Cas. Co., 505 So. 2d 652, 653 (Fla. Dist. Ct. App. 1987); Mercier v. Meade, 384 So. 2d 262, 263 (Fla. Dist. Ct. App. 1980); Horn v. I. B. I. Sec. Serv. of Fla., Inc., 317 So. 2d 444, 445 (Fla. Dist. Ct. App. 1975); Langill v. Columbia, 289 So. 2d 460, 462 (Fla. Dist. Ct. App. 1974); Acosta v. Daughtry, 268 So. 2d 416, 416 (Fla. Dist. Ct. App. 1972); Seabrook v. Taylor, 199 So. 2d 315, 318 (Fla. Dist. Ct. App. 1967).

228. *See Seabrook*, 199 So. 2d at 318.

229. *Foster*, 519 So. 2d at 1094 (relying on RESTATEMENT (SECOND) OF TORTS § 390 (1965)).

230. *See, e.g.*, Prill v. Marrone, 23 So. 3d 1, 10 (Ala. 2009); Kitchen v. K-Mart Corp., 697 So. 2d 1200, 1208 (Fla. 1997); Kingrey v. Hill, 425 S.E.2d 798, 799 (Va. 1993); Bernethy v. Walt Failor's, 653 P.2d 280, 283 (Wash. 1982).

231. *See infra* Part VI.

232. *See infra* Part V.D.

233. *See* Kennedy v. Baird, 682 S.W.2d 377, 378 (Tex. App.—El Paso 1984, no writ).

234. *See infra* text accompanying note 235.

235. *See* Johnson v. Patterson, 570 N.E.2d 93, 98 (Ind. Ct. App. 1991) (citing Rubin v. Johnson, 550 N.E.2d 324, 329–30 (Ind. Ct. App. 1990)); *see also supra* text accompanying note 63 (stating that the negligent entrustment of a firearm cause of action arises from common sense).

disincentives to those owners who do not exercise care in the use of their firearms.[236] The cause of action encourages owners to make conscientious decisions to use and operate firearms safely and responsibly—i.e., entrusting the weapon to a person competent to use it.[237]

By no means does this notion suggest that recognizing the cause of action will end all negligent entrustment by gun owners—indeed, some acts may be far from the control of the owner.[238] Rather, the claim promotes accountability.[239] Those owners who enjoy the autonomy to wield such weapons are also burdened with the responsibility of holding themselves accountable to possess, operate, and entrust their weapons with care.[240] Though, to be sure, such an ideal attracts a fair number of dissenters.[241]

Critics argue that recognizing a negligent entrustment of a firearm claim increases the liability of a gun owner and gives off a scent of pro-gun control.[242] At a closer sniff, however, such an enactment actually supports the positions of gun owners and anti-gun control organizations, including the National Rifle Association (NRA).[243] According to the NRA, a gun owner should "[s]tore guns so they are not accessible to unauthorized persons."[244] This recommendation follows the same line of reasoning that a negligent entrustment of a firearm claim seeks to promote; a more responsible use of firearms encourages a safer community, and in turn, a safer Texas.[245]

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236. *See Johnson*, 570 N.E.2d at 98; *supra* text accompanying note 65.

237. *See* Byers v. Hubbard, 669 N.E.2d 320, 323 (Ohio Ct. App. 1995) ("The inherently dangerous nature of the weapon imposes an obligation upon its owner to act responsibly when entrusting the gun to another."); *supra* text accompanying note 64.

238. *See* Pete Williams & Kari Huus, *Gunman's Mother Owned Weapons Used in Connecticut School Massacre*, NBC NEWS (Dec. 14, 2012, 6:48 PM), http://usnews.nbcnews.com/_news/2012/12/14/15913678-gunmans-mother-owned-weapons-used-in-connecticut-school-massacre?lite. The firearms used in the Sandy Hook Elementary School shooting in Newtown, Connecticut, were reportedly purchased by and registered to the mother of the gunman. *Id.*

239. *See supra* Parts II.C, III.C.3.

240. *See supra* Parts II.C, III.C.3.

241. *See infra* note 242 and accompanying text.

242. *See* Jason Barnes, *Gun Protection Bill Expected to Pass*, NEWSMAX.COM (Oct. 19, 2005) http://www.mail-archive.com/osint@yahoogroups.com/msg15806.html.

243. *See* Estate of Heck *ex rel.* Heck v. Stoffer, 786 N.E.2d 265, 271 (Ind. 2003) ("Guns are dangerous instrumentalities that in the wrong hands have the potential to cause serious injuries. It is a responsible gun owner's duty to exercise reasonable care . . . ."); Gallara v. Koskovich, 836 A.2d 840, 851 (N.J. Super. Ct. Law Div. 2003) ("All experts, including the NRA, agree that gun owners have a responsibility to safeguard firearms from unauthorized users." (quoting Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189, 1244 (2000) (internal quotation marks omitted))).

244. *NRA Gun Safety Rules*, NATIONAL RIFLE ASSOCIATION OF AMERICA, http://training.nra.org/nra-gun-safety-rules.aspx (last visited Jan. 10, 2013).

245. *See supra* text accompanying note 243.

VI. HOW THE TEXAS SUPREME COURT CAN FIRE IN THE RIGHT DIRECTION

A. Focusing on the Bull's-Eye: Apply the Cause of Action to All Firearms

The Texas Supreme Court should recognize a negligent entrustment claim for all firearms, including handguns. As illustrated in Part I, the holding of *Richardson v. Crawford* represents the uncertainty among the Texas courts of appeals in acknowledging a negligent entrustment of a firearm cause of action.[246] As the remainder of Part VI will reveal, the Texas Supreme Court can clear up the confusion by extending § 390 to all firearms.[247] Although handguns are distinct from other firearms because of their inherently dangerous instrumentality and properties, these distinctions are inapplicable for the purpose of recognizing a negligent entrustment claim.[248]

As mentioned earlier, handguns share distinct similarities with automobiles: each object (1) requires a license to show a minimum of competence and skill; (2) exhibits characteristics of a dangerous instrumentality; and (3) demands a duty to use the object responsibly.[249] The Texas Supreme Court already recognizes a negligent entrustment of an automobile cause of action.[250] Therefore, the court should find no significant difficulty in extending a negligent entrustment cause of action to firearms, including handguns. Nonetheless, the Texas Supreme Court has yet to speak on the claim.[251]

Despite the lack of guidance from the Texas Supreme Court, practitioners can still make a persuasive case for a negligent entrustment of a firearm claim on behalf of their clients because of the straightforward and uncomplicated means available to the court to recognize the tort.[252] There are two paths that the Texas Supreme Court may follow: it may (1) extend the Restatement (First) of Torts § 390 to firearms; or (2) adopt the Restatement (Second) of Torts § 390 and apply it to firearms.[253]

B. Shot One: Extend the Restatement (First) of Torts § 390 to Firearms

The Texas Supreme Court adopted the Restatement (First) of Torts § 390 in *Dee*.[254] In fact, this case is the only time at which the Texas Supreme Court

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246. *See* supra Part I.
247. *See infra* notes 248–61 and accompanying text.
248. *See supra* Parts III.C.2, IV.B.1–2.
249. *See supra* Part III.C.1–3.
250. *See* Mundy v. Pirie-Slaughter Motor Co., 206 S.W.2d 587, 589 (Tex. 1947); Russell Constr. Co. v. Ponder, 186 S.W.2d 233, 235 (Tex. 1945).
251. *See supra* text accompanying note 160.
252. *See infra* Part VI.B–C.
253. *See* RESTATEMENT (SECOND) OF TORTS § 390 (1965); RESTATEMENT (FIRST) OF TORTS § 390 (1934).
254. *See* Dee v. Parish, 327 S.W.2d 449, 452 (Tex. 1959); RESTATEMENT (FIRST) OF TORTS § 390; *supra* text accompanying note 82.

relied on § 390 from either Restatement of Torts.[255] The court used the rationale of § 390 in *Dee* to frame its reasoning: "[i]f respondent knew or should have known that petitioner, because of her youth and inexperience, was likely to use the horse in a manner involving unreasonable risk of bodily injury to herself, he is subject to liability for her injuries caused thereby."[256] By relying on the language of § 390 in its holding, the court accordingly adopted the provision as the suitable guide for negligent entrustment actions.[257]

Having already adopted the Restatement (First) of Torts § 390, the Texas Supreme Court could recognize a negligent entrustment of a firearm cause of action by simply extending the provision to apply to firearms, including handguns.[258] If the entrusted chattel in *Dee* were a gun, rather than a horse, the end result would arguably be the same—"because of her youth and inexperience, [she] was likely to use the [firearm] in a manner involving unreasonable risk."[259] Such an extension of § 390 provides a practical method to the court in acknowledging the cause of action.[260] This method, however, is not the only option for the Texas Supreme Court to select.[261]

C. Shot Two: Adopt the Restatement (Second) of Torts § 390 and Apply It to Firearms

If the Texas Supreme Court chooses not to use the Restatement (First) of Torts § 390 to recognize the cause of action, there is still another path: the Restatement (Second) of Torts § 390.[262] The drafters of the Restatement (Second) of Torts adopted the language of the Restatement (First) of Torts § 390 almost verbatim.[263] Adopting the Restatement (Second) of Torts § 390 would provide the same workable framework as an extension of the Restatement (First) of Torts § 390.[264] If the court chooses this path, it would

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255. *See Dee*, 327 S.W.2d at 452; *supra* text accompanying note 82.

256. *See Dee*, 327 S.W.2d at 452.

257. *See id.*; *see also* Lyshak v. City of Detroit, 88 N.W.2d 596, 606 (Mich. 1958) (The Michigan Supreme Court adopted the Restatement of the Law of Torts § 334 by concluding that the provision "well states the preferable and modern principle of law, with which we are impelled to agree."); RESTATEMENT (FIRST) OF TORTS § 390. In the same way, the Texas Supreme Court adopted the Restatement (First) of Torts § 390 by adapting the wording of § 390 to the facts of *Dee* and citing the provision as support in reaching its decision. *See supra* text accompanying notes 254–55.

258. RESTATEMENT (SECOND) OF TORTS § 390; *see infra* Part VI.C.

259. *See Dee*, 327 S.W.2d at 452. This quote illustrates the possible holding of the court, had it examined the negligent entrustment of a handgun. *See supra* text accompanying note 256.

260. RESTATEMENT (SECOND) OF TORTS § 390.

261. *See infra* Part VI.C.

262. *See supra* text accompanying note 253.

263. *See* McCall, *supra* note 44. The little difference between the provisions is in language, not substance. *See* RESTATEMENT (SECOND) OF TORTS § 390; RESTATEMENT (FIRST) OF TORTS § 390 (1934).

264. *See supra* Part VI.B.

only need to apply the provision to firearms.[265] Further, many states have already adopted the Restatement (Second) of Torts § 390.[266]

Alabama, Florida, and Maryland have all adopted the Restatement (Second) of Torts § 390.[267] To be sure, each of these states have found that the Restatement (Second) of Torts provision provides the proper guide for a negligent entrustment of a firearm cause of action.[268] On the other hand, not all states agree on the adoption of the Restatement (Second) of Torts—Texas being one of them.[269]

Unlike the Restatement (First) of Torts, the Restatement (Second) of Torts § 390 includes one additional sentence in its comments.[270] This commentary has been the source of much debate among courts in their determination of whether to apply the provision.[271] The disputed sentence of comment (a) states that "[t]he rule stated applies to anyone who supplies a chattel for the use of another. It applies to *sellers*, lessors, donors or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for a consideration."[272] Many courts find discomfort in this comment because of the use of the word "sellers."[273] Indeed, a number of courts have expressly refused to adopt the Restatement (Second) of Torts version of § 390 because of this word.[274]

Several Texas cases consistently point out the absence of Texas's adoption of the Restatement (Second) of Torts § 390 as support for their refusal to apply the provision to sellers.[275] However, the commentaries of the Restatements are just that—commentaries.[276] States are free to limit and expand the Restatement

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265. *See supra* Part VI.B.

266. *See, e.g.*, McGuiness v. Brink's Inc., 60 F. Supp. 2d 496, 500 (D. Md. 1999); Reeves v. King, 534 So. 2d 1107, 1108 (Ala. 1988); Williams v. Bumpass, 568 So. 2d 979, 981 (Fla. Dist. Ct. App. 1990).

267. *See* Prill v. Marrone, 23 So. 3d 1, 10 (Ala. 2009); *supra* Part V.C.

268. *See supra* text accompanying notes 223–27.

269. *See* Jaimes v. Fiesta Mart, Inc., 21 S.W.3d 301, 304 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

270. *See* RESTATEMENT (SECOND) OF TORTS § 390 (1965); RESTATEMENT (FIRST) OF TORTS § 390 (1934).

271. *See Jaimes*, 21 S.W.3d at 304; *see also* West v. E. Tenn. Pioneer Oil Co., 172 S.W.3d 545, 555 (Tenn. 2005) (debating whether or not the provision applies to sellers).

272. RESTATEMENT (SECOND) OF TORTS § 390 cmt. a (emphasis added).

273. *See* Arthur Cholodofsky, Note, *Torts: Does the Negligent Entrustment Doctrine Apply to Sellers?*, 39 U. Fla. L. Rev. 925, 935 (1987).

274. *See* Kirk v. Miller, 644 P.2d 486, 490 (Kan. Ct. App. 1982); Sansonetti v. City of St. Joseph, 976 S.W.2d 572, 579 (Mo. Ct. App. 1998); Cholodofsky, *supra* note 273, at 935; *see also* Andrew D. Holder, *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, 750 (2011) (noting the refusal of Texas and Missouri to extend negligent entrustment to sellers).

275. *See Jaimes*, 21 S.W.3d at 304; Nat'l Convenience Stores, Inc. v. T.T. Barge Cleaning Co., 883 S.W.2d 684, 686 (Tex. App.—Dallas 1994, writ denied) ("[W]ithout Texas adopting the revised section 390, . . . we find negligent entrustment does not apply in the sale of chattels."); Salinas v. Gen. Motors Corp., 857 S.W.2d 944, 948 (Tex. App.—Houston [1st Dist.] 1993, no writ).

276. *See* Michael Traynor, *The Restatement (Third) of Restitution & Unjust Enrichment: Some Introductory Suggestions*, 68 WASH. & LEE L. REV. 899, 901 (2011) (explaining the Restatement comments "not only explain the blackletter but also provide helpful guidance").

(Second) of Torts as they see fit.[277] After the Texas Supreme Court adopts the language of § 390, it may address the issues created from comment (a) at the appropriate time.[278] For example, if the Texas Supreme Court grants review of a negligent entrustment case involving the liability of a seller, the court could then find it apt to discuss and rule on the applicability of comment (a).

Ultimately, the commentary does not affect the actual language of § 390 and should not dissuade the Texas Supreme Court from adopting the provision for the limited purpose of negligent entrustment.[279]

D. No Matter the Method, Still Hits the Same Target

Regardless of the means by which the Texas Supreme Court recognizes a negligent entrustment of a firearm cause of action, the ultimate goal is to provide practitioners, courts, and citizens with three benefits: (1) clarity, (2) guidance, and (3) a valid claim for relief.

First, recognition of the cause of action provides clarity to practitioners filing a negligent entrustment of a firearm claim. This clarity would supply practitioners with a solid claim on which to frame pleadings, arguments, and briefs. By the same token, this clarity would also benefit courts by providing a guide.[280] Clarity in the elements and theory of the cause of action can guide courts when ruling on such claims.[281] Like the practitioner, courts also need guidance upon which to structure judgments and opinions. Finally, acknowledgment of a negligent entrustment of a firearm cause of action offers citizens a suitable claim for relief.[282] Claimants benefit from additional claims for relief because they provide avenues to recover damages and restore the claimants' losses.[283] In theory, the more claims for relief that the claimant has available, the more avenues the claimant has to recover damages otherwise unavailable.[284] By recognizing the cause of action, the Texas Supreme Court can solidify the spongy consequences of negligently entrusting a firearm, thereby supplying Texas practitioners, courts, and citizens with a workable and consistent framework.

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277. *See* Wilbanks v. Brazil, 425 So. 2d 1123, 1125 (Ala. 1983). The court declined to extend negligent entrustment to sports equipment—despite falling within the meaning of chattel—and limited § 390 to explosives, firearms, automobiles, and the like. *See id.*; RESTATEMENT (SECOND) OF TORTS § 390 cmt. (1965); *see also* Walther, *supra* note 59, at 549 ("Most states have adopted the doctrine, but many have imposed various limitations on its applicability.").

278. RESTATEMENT (SECOND) OF TORTS § 390 cmt. a.

279. *See id.*

280. *See Jaimes*, 21 S.W.3d at 304; *T.T. Barge*, 883 S.W.2d at 686 (absence of a guide); *Salinas*, 857 S.W.2d at 948.

281. *See Jaimes*, 21 S.W.3d at 304; *T.T. Barge*, 883 S.W.2d at 686; *Salinas*, 857 S.W.2d at 948.

282. *See* Whittlesey v. Miller, 572 S.W.2d 665, 669 (Tex. 1978).

283. *See id.* (stating that plaintiffs may recover "for losses peculiar to the injury sustained").

284. *See id.*

Furthermore, if the court chooses to adopt the Restatement (Second) of Torts, this action would resolve the split among the Texas courts of appeals.[285] Currently, the Texas courts of appeals are divided as to the application and effect of the Restatement (Second) of Torts § 390 to negligent entrustment claims on two issues: (1) whether a person can negligently entrust a firearm, and (2) whether negligent entrustment applies to sellers of chattels.[286] Adopting the Restatement (Second) of Torts § 390 would resolve the confusion as to both issues.[287] First, an adoption and extension of § 390 to firearms would quell the uncertainty in applying the cause of action, such as in *Richardson v. Crawford*.[288] Courts would then have a consistent framework to apply equally to all negligent entrustment of a firearm cases.

Secondly, assuming that the court also accepts § 390 comment (a), an adoption of § 390 would suppress any debate as to whether or not negligent entrustment liability can fall upon sellers.[289] Courts, such as in *National Convenience Stores, Inc. v. T.T. Barge Cleaning Co.*, would presumably come to their holdings without battling between theories of liability and the foreseeability of persons selling chattels to incompetent individuals and second-guessing the applicability of § 390.[290] By choosing to adopt the Restatement (Second) of Torts § 390, the Texas Supreme Court can provide the Texas courts of appeals with a steady hand of guidance and provide a clear target for future negligent entrustment cases.[291]

VII. LOOKING DOWN RANGE: SAFEGUARDING TEXAS CITIZENS

Richardson v. Crawford reflects the deep uncertainty amongst the Texas courts of appeals about the state of a negligent entrustment of a firearm cause of action in Texas.[292] Because such a claim promotes the intent of the Texas legislature, reflects the existing Texas case law on the issue, echoes the

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285. RESTATEMENT (SECOND) OF TORTS § 390 (1965); *see Jaimes*, 21 S.W.3d at 304; *T.T. Barge*, 883 S.W.2d at 686; *Salinas*, 857 S.W.2d at 948; *infra* text accompanying note 286.

286. *Compare supra* text accompanying note 214 (finding negligent entrustment of a firearm proper), *with* Richardson v. Crawford, No. 10–11–00089–CV, 2011 WL 4837849, at *7 (Tex. App.—Waco Oct. 12, 2011, pet. denied) (mem. op., not designated for publication) (declining to recognize a negligent entrustment of a handgun cause of action); *see also supra* text accompanying note 280 (noting the lack of guidance to apply negligent entrustment to sellers).

287. RESTATEMENT (SECOND) OF TORTS § 390.

288. *See Richardson*, No. 10–11–00089–CV, 2011 WL 4837849, at *7; RESTATEMENT (SECOND) OF TORTS § 390. The *Richardson* court noted that "this [c]ourt has not recognized a cause of action for negligent entrustment of a firearm. A few other Texas courts, however, have recognized a cause of action for negligent entrustment of a firearm." *Richardson*, No. 10–11–00089–CV, 2011 WL 4837849, at *4.

289. *See supra* text accompanying note 275 (discussing the inapplicability of negligent entrustment to sellers due to the Texas Supreme Court's silence on the matter).

290. Nat'l Convenience Stores, Inc. v. T.T. Barge Cleaning Co., 883 S.W.2d 684, 686 (Tex. App.—Dallas 1994, writ denied); *see* RESTATEMENT (SECOND) OF TORTS § 390; *supra* text accompanying notes 275–78.

291. RESTATEMENT (SECOND) OF TORTS § 390.

292. *See supra* Parts I, V.A.

decisions of other state court opinions, and supports public policy, the Texas Supreme Court should recognize the cause of action.[293]

Arguably, had the Texas Supreme Court recognized and provided a negligent entrustment of a firearm cause of action, the Waco court of appeals might have ruled differently in *Richardson*.[294] A clear negligent entrustment of a firearm cause of action might have provided the Richardson family with a claim for relief and held Michael—the person who made the preloaded .38 Smith & Wessen snub-nose, five-shot revolver available and accessible to a "walking time bomb"—accountable.[295] After all, Gretchen admitted she was incompetent to use a handgun.[296]

Recognizing negligent entrustment of a firearm as a cause of action holds firearm owners like Michael accountable to possess, operate, and entrust their weapons responsibly.[297] Whether the Texas Supreme Court extends the Restatement (First) of Torts § 390 to firearms or adopts the Restatement (Second) of Torts § 390 and applies it to firearms, the result is the same.[298] A negligent entrustment cause of action encourages responsible use of firearms and safeguards the citizens of Texas—citizens like the family of Gretchen's husband.[299]

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293. *See supra* Part V.
294. *See supra* Part I.
295. *See supra* notes 3–11 and accompanying text.
296. *See supra* text accompanying note 19.
297. *See supra* Part V.D.
298. *See supra* Part VI.D.
299. *See supra* Parts I, V.D.