Valentine v. On Target, Inc.: It is Time to Hold Gun Dealers Accountable for the Negligent Storage of Firearms

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VALENTINE v. ON TARGET, INC.: IT IS TIME TO HOLD GUN DEALERS ACCOUNTABLE FOR THE NEGLIGENT STORAGE OF FIREARMS

In Valentine v. On Target, Inc., the Court of Appeals of Maryland considered what duty, if any, a retail gun store owner owes to third parties to exercise reasonable care in the display and sale of handguns in order to prevent theft and subsequent criminal misuse of those handguns. Analyzing the doctrine of tort duty, the court concluded that the plaintiff had failed to allege any facts that showed that the defendant gun store could have foreseen that handguns from its inventory would be stolen and subsequently used in a criminal act. With the caveat that its holding should be confined to the well-pleaded facts of this case, the court held that a gun store owner does not owe a duty “to third parties to exercise reasonable care in the display and sale of handguns to prevent the theft and the illegal use of the handguns by others against third parties.” Although this holding is appropriate in the narrow context of this case, the majority provided dicta which incorrectly suggests that victims of handgun violence are barred from suing gun retailers for their negligent storage of handguns. In a time of escalating violence perpetrated with illegal firearms, public policy demands that the law recognize a duty on the part of handgun merchants to exercise reasonable care in conducting their business. Drawing on established common law principles, this Note will propose a framework for recognizing a duty on the part of

2. Id. at 546-47, 727 A.2d at 948.
3. Id. at 551, 727 A.2d at 950.
4. Id. at 547, 727 A.2d at 948.
5. Id. at 546-47, 727 A.2d at 948.
6. See id. at 558, 727 A.2d at 954 (Raker, J., concurring) (warning that the majority opinion may be “misunderstood as declaring victims of handgun violence in Maryland to be barred from suing retail handgun merchants for their negligent handling of their handgun inventory”). In particular, Judge Raker expressed concern regarding the majority’s statement that, “[i]f we would hold today that gun merchants owe an indefinite duty to the general public effectively we would be regulating the merchants.” Id. (quoting Valentine, 353 Md. at 556, 727 A.2d at 953).
7. See id. at 567, 727 A.2d at 958 (“I believe that the policy concerns cry out loudly in favor of recognizing a duty to the foreseeable plaintiff on the part of retail handgun sellers to exercise reasonable care in conducting their business so as to avoid the theft and subsequent criminal misuse of handguns.”); cf. 18 U.S.C. § 922(q)(1) (West 2000) (“The Congress finds and declares that—(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem . . . .”).
retail gun stores to safeguard dangerous instrumentalities, and for defining a cause of action for breaches of that duty.

I. THE CASE

In July 1993, Edward McLeod and an unidentified companion stole several handguns from On Target, Inc., a firearms retailer in Anne Arundel County, Maryland. There are no facts in the record which describe the circumstances of the theft, nor does the record provide any details about the precautions taken by On Target to prevent theft in general. Two months later, Joanne Valentine was fatally shot by an unknown assailant outside her Anne Arundel County home. The gun used to murder her was one of the guns that had been stolen from On Target in July. Vincent Valentine ("Plaintiff") brought a wrongful death suit against On Target in the Circuit Court for Anne Arundel County, on behalf of Joanne Valentine's estate, himself as surviving spouse, and their children. He sought damages for negligence, asserting that On Target owed a duty to "Joanne Valentine and to all other persons situate in or near Anne Arundel County, to exercise reasonable care in the display of handguns held out to the public for sale to prevent theft and illegal use of the handguns."

8. Valentine, 353 Md. at 547, 727 A.2d at 948.

9. See id. ("[T]he complaint does not describe how the handguns were displayed or what could have been done by [the defendant's] agents to prevent the theft."); Valentine v. On Target, Inc., 112 Md. App. 679, 682, 686 A.2d 636, 637 (1996) ("The complaint gives no details with respect to how McLeod and his confederate managed to steal the guns."). However, at oral argument on the defendant's motion to dismiss, On Target's counsel provided some additional information about the circumstances of the theft:

[T]wo young men came into the store . . . there were two guns in a display case that was under lock and key . . . [W]hile one of these particular gentlemen distracted the one attendant in the store the other one came, broke the lock on the display case, took two guns out, thereafter both left. The man . . . working at that time was not aware that anything had been taken. When he did become aware sometime thereafter he immediately notified the police.

Transcript of Hearing on Motion to Dismiss at 2, E39, Valentine (No. 95-22401.OC).

10. Valentine, 353 Md. at 547, 727 A.2d at 948.

11. Id.

12. Id.

13. Id. In the complaint, Plaintiff asserted that On Target had breached its alleged duty by failing to (1) properly train and supervise its employees to prevent theft of the handguns, (2) properly supervise customers at a time when the store was open to members of the general public for the sale of handguns, (3) adequately keep watch over the handguns and install adequate security devices to deter, or detect, the theft of handguns, (4) properly secure the handguns and store them in a display case to safeguard them from theft, (5) interrupt the theft of the handguns, (6) notice the theft of the handguns and notify law enforcement authorities
On Target filed a motion to dismiss based on Plaintiff's failure to state a claim upon which relief could be granted. The motion was granted, and Plaintiff noted a timely appeal to the Court of Special Appeals. The Court of Special Appeals affirmed the dismissal, holding that on the record before it, On Target did not owe a duty to the decedent, and even if On Target had breached some duty to prevent theft, it was not the proximate cause of Joanne Valentine's death. The Court of Appeals granted certiorari to consider "what, if any, tort duty a gun store owner owes to third parties to exercise reasonable care in the display and sale of handguns to prevent the theft and the illegal use of the handguns by others against third parties." 

II. LEGAL BACKGROUND

In Maryland, it is a well-established rule that to maintain a negligence action, the plaintiff must allege in the complaint four elements: that the defendant owed the plaintiff a duty, that the defendant breached that duty, that the plaintiff suffered actual injury or loss, and that the defendant's breach of duty was the proximate cause of the plaintiff's injury or loss.

A. Specificity in Maryland Pleading

Maryland rules of procedure require that a complaint "contain a clear statement of the facts necessary to constitute a cause of action." The complexity of the case will determine what facts are necessary—simple factual situations may require only minimal allegations, while complex factual situations will require substantially more. In particular, when the defendant's duty is not apparent, the plaintiff will be required to plead with specificity the basis for the alleged duty. A
plaintiff is not permitted to assert only conclusory allegations in a complaint for negligence.22

Maryland has a long tradition of favoring specificity in pleading. In the 1903 case Jeter v. Schwind Quarry Co.,23 the Court of Appeals explained that it is essential that pleadings contain sufficient facts to provide the court with a basis for legal conclusions, and to allow the opposing party to prepare a defense.24 In Jeter, a negligence case, the plaintiff failed to plead the specific duty neglected by the defendant, instead charging the defendant with general misconduct.25 The court sustained the defendant’s demurrer, finding that the plaintiff’s averments of the defendant’s tortious conduct were “‘too general and indefinite’” to state a claim for which the law would provide relief.26

Today, Maryland Rule 2-322(b)(2) permits defendants to present a motion to dismiss on the ground that the complaint does not state a claim upon which relief can be granted.27 An action will be dismissed when the complaint fails to state a valid legal claim even if the factual allegations in the complaint are proven to be true.28 In considering a motion to dismiss, the court must assume the truth of all well-pleaded facts and all inferences that can reasonably be drawn from those facts.29 The motion to dismiss must be denied when the facts, if proven, would entitle the plaintiff to relief.30 In reviewing a disposi-

22. Valentine, 353 Md. at 549, 727 A.2d at 949 (citing BG & E, 338 Md. at 43, 656 A.2d at 311).
23. 97 Md. 696, 55 A. 366 (1903).
24. Id. at 698, 55 A. at 367 (quoting JOHN PRENTISS POE, PLEADING AND PRACTICE IN COURTS OF COMMON LAW § 562 (3d ed. 1897)).
25. Id. at 699, 55 A. at 367.
26. Id. (quoting Gent v. Cole, 38 Md. 110, 113 (1873)).
27. Maryland Rule 2-322(b)(2) states in relevant part: “The following defenses may be made by motion to dismiss filed before the answer, if an answer is required: ... (2) failure to state a claim upon which relief can be granted . . . .” The motion to dismiss for failure to state a claim is the modern equivalent of the demurrer. Ungar v. State, 63 Md. App. 472, 479 & n.6, 492 A.2d 1336, 1340 & n.6 (1985) (finding that “[t]he trial court properly ruled on the . . . demurrer” because it would make “little practical difference” whether the trial court applied the demurrer or the motion to dismiss as the two rules function in the same manner).
30. Morris v. Osmose Wood Preserving, 99 Md. App. 646, 653, 639 A.2d 147, 150-51 (1994) (citing Stone v. Chicago Title Ins. Co., 330 Md. 329, 624 A.2d 496 (1993); MacGill v. Blue Cross of Md., Inc., 77 Md. App. 613, 551 A.2d 501 (1989)). However, “when a trial court grants a motion to dismiss for failure to state a claim upon which relief can be granted, the court has the discretionary authority to grant the plaintiff leave to amend the complaint to cure any defects.” Davis v. DiPino, 337 Md. 642, 648, 655 A.2d 401, 404
tion by motion to dismiss, an appellate court must be guided by the same standard as a lower court.\textsuperscript{31}

\textbf{B. The Negligence Cause of Action and the Concept of "Duty"}

Compared to age-old crimes like larceny and murder that are primarily concerned with punishing overt acts, negligence is a relatively young legal concept.\textsuperscript{32} It was barely recognized as a tort action prior to the early nineteenth century and was largely a product of the Industrial Revolution.\textsuperscript{33} Following the national trend in the late 1800s, Maryland law began to recognize a cause of action in tort for "wrongful acts, neglect or default."\textsuperscript{34} Today, Maryland law requires the typical elements to maintain an action in negligence—duty, breach, injury, and causation.\textsuperscript{35}

(1995) (citing Md. R. 2-322(c)); \textit{see also} G & H Clearing & Landscaping v. Whitworth, 66 Md. App. 348, 356 n.5, 503 A.2d 1379, 1383 n.5 (1986) ("Although Md. Rule 2-322 is not entirely clear on the point, it would seem that leave to amend may, and in some instances should, be extended even where a pure motion to dismiss is granted."); Md. R. 2-341(c) ("Amendments shall be freely allowed when justice so permits.").

31. See \textit{Baker, Watts & Co. v. Miles & Stockbridge}, 95 Md. App. 145, 186, 620 A.2d 348, 376 (1993) (applying the same appellate standard of review for dispositions by motion to dismiss as that which is used by trial courts—that is, the assumption of the truth of all well-pleaded facts and all inferences reasonably drawn from them (quoting \textit{Sharrow}, 306 Md. at 768, 511 A.2d at 500)).

32. Prosser and Keeton provide some insight into the history of negligence:

\begin{itemize}
  \item Since the early law found its hands full in dealing with the more serious forms of misbehavior, it was natural that the early cases should be concerned almost exclusively with positive acts, rather than with omissions to act . . . .
  \item During the first half of the nineteenth century, negligence began to gain recognition as a separate and independent basis of tort liability. Its rise coincided in a marked degree with the Industrial Revolution . . . .
\end{itemize}


33. \textit{Id.}

34. \textit{Balt. & Ohio R.R. v. State}, 29 Md. 460, 464 (1868). In \textit{Baltimore & Ohio Railroad}, the court relied on an 1860 statute, Article 65 of the Code of Public General Laws, which authorized actions based on neglect or default. \textit{Id.} The statute was repealed in 1973 as a part of Maryland's effort to streamline procedure, but it serves as a useful milestone by which to date the state's adoption of a negligence-based doctrine. Elaborating on the language of the statute, the court explained in \textit{Baltimore & Ohio Railroad} that "\[ p]ersons and corporations are accountable for all damage occasioned by any neglect where the other party is not in fault, or has not contributed to his own injury." \textit{Id.} The negligence cause of action quickly developed later in the nineteenth century. \textit{See}, e.g., \textit{Maenner v. Carroll}, 46 Md. 193, 212 (1877) ("To constitute a good cause of action, in a case of [negligence], there should be stated a right on the part of the plaintiff, a duty on the part of the defendants in respect to that right, and a breach of that duty by the defendants, whereby the plaintiff has suffered injury.").

35. \textit{See supra} text accompanying note 18 (stating the elements of a prima facie negligence case).
Determining the existence of a legal duty requires an analysis of "foreseeability." Judge Benjamin Cardozo's famous majority opinion in the 1928 case *Palsgraf v. Long Island Railroad Co.* is arguably the watershed opinion on the issue of foreseeability. Writing for the Court of Appeals of New York, Judge Cardozo explained that tort duty is defined by perceptible risk—a defendant will only owe a duty to other parties within "the range of apprehension." In other words, a defendant will only owe a duty to guard against foreseeable harm to foreseeable plaintiffs.

The Maryland doctrine governing tort duty mirrors Judge Cardozo's logic in *Palsgraf*. In *Rosenblatt v. Exxon Co.*, the Court of Appeals considered what duty a former occupier of land owes to a subsequent occupant to prevent the land from becoming contaminated with toxic chemicals. The court declared that it is not enough for the plaintiff to merely show that he was harmed by the defendant's conduct; rather, he must show that the defendant owed the plaintiff a duty to guard against that harm. To determine the existence of a duty, the court explained, the "foreseeability of harm" test is used. This test serves the important policy of limiting duty to avoid liability for unreasonably remote consequences, a policy which traces its roots to Judge Cardozo's *Palsgraf* opinion.

36. See Rosenblatt v. Exxon Co., 335 Md. 58, 77, 642 A.2d 180, 189 (1994). The Court of Special Appeals pointed out in its *Valentine* opinion that foreseeability is common to both duty and proximate cause, and that there is (often confusing) overlap between the two elements. *Valentine v. On Target, Inc.*, 112 Md. App. 679, 683-84, 686 A.2d 636, 638 (1996). The court explained that the issue of foreseeability affected both duty and proximate cause equally and should therefore be considered in both contexts. *Id.* at 684, 686 A.2d at 638; cf. Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189, 1226 (2000) (describing foreseeability as the "damnable, murky companion" of duty and proximate cause).

37. 162 N.E. 99 (N.Y. 1928).

38. *Id.* at 100.

39. See Henley v. Prince George's County, 305 Md. 320, 333-34, 503 A.2d 1333, 1340 (1986) (tracing the origin of Maryland's foreseeability doctrine to Judge Cardozo's opinion in *Palsgraf*).

40. 335 Md. 58, 642 A.2d 180 (1994).

41. *Id.* at 62-63, 642 A.2d at 182. In *Rosenblatt*, the plaintiff advanced four theories on which the defendant could be liable for allegedly contaminating the property—strict liability, negligence, trespass, and nuisance—but only the negligence theory is discussed as relevant here. See *id*.

42. *Id.* at 76, 642 A.2d at 188-89.

43. *Id.* at 77, 642 A.2d at 189.

44. See Henley, 305 Md. at 333-34, 503 A.2d at 1340 ("[A]t least since 1928 when Judge Cardozo wrote *Palsgraf v. Long Island R. Co.*, courts have given further effect to the social policy of limitation of liability for remote consequences . . . ." (citation omitted)).
The Rosenblatt court also explained that inherent in the foreseeability analysis is the concept of a relationship between the parties out of which a duty arises. While traditional privity—the direct connection between parties to a contract—is not required to establish that relationship, at the very least, the plaintiff must be related to the defendant in such a way that the defendant could reasonably foresee that his or her tortious conduct would likely harm the plaintiff. This relationship requirement has spawned the belief that a tort duty will only be found in favor of "identifiable plaintiffs." This is true inasmuch as there will be cases where the identification of persons exposed to increased risk of harm will be necessary in determining the existence of a duty.

However, the ability to precisely identify plaintiffs in advance will not always be an absolute requirement to satisfy the foreseeability of harm test. For example, in Henley v. Prince George's County, the Court of Appeals considered an employer's liability for retaining an employee as a security guard after the employee had expressed an intent to abuse suspected vandals. The court stated that employers have a duty to refrain from employing unfit employees, and that the duty is intended to protect all persons who might come in contact with the employee. The fact that those persons cannot be readily identified

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45. Rosenblatt, 335 Md. at 77, 642 A.2d at 189.
47. Henley, 305 Md. at 333-34, 503 A.2d at 1340.
48. See id. (explaining that "identifiable plaintiffs" are "those within a foreseeable zone of danger whose identities are known in advance").
49. Id. The Henley court illustrated this idea by contrasting Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976), with Thompson v. County of Alameda, 614 P.2d 728 (Cal. 1980). See Henley, 305 Md. at 334-36, 503 A.2d at 1340-41. In Tarasoff, a patient informed his psychologist of his intent to kill a particular person. Tarasoff, 551 P.2d at 339. In Thompson, a juvenile delinquent notified his custodians of his intent to kill a young child in his neighborhood. Thompson, 614 P.2d at 730. The existence of a duty in both cases turned on the feasibility of identifying the plaintiff. See Henley, 305 Md. at 334, 503 A.2d at 1340. In Tarasoff, where the patient identified his intended victim by name, the court held that the psychologist had a duty to warn the victim. Tarasoff, 551 P.2d at 345. However, in Thompson, the juvenile gave no specific details about the identity of his victim, and the court held that his custodians had no duty to warn the general public. Thompson, 614 P.2d at 735.
50. 305 Md. 320, 503 A.2d 1333 (1986).
51. Id. at 330, 503 A.2d at 1338.
52. Id. at 336, 503 A.2d at 1341. The Henley court relied on Evans v. Morsell, 284 Md. 160, 395 A.2d 480 (1978), and Cramer v. Housing Opportunities Commission, 304 Md. 705, 501 A.2d 35 (1985). In Evans, the Court of Appeals considered whether the owner of a tavern could be held liable for injuries sustained by a bar patron who had been shot by an employee. Evans, 284 Md. at 161-64, 395 A.2d at 481-82. The court explained that "[w]here
in advance does not mean that they are not included in the class protected by the employer’s duty.\textsuperscript{53}

There are several other factors that must be considered in addition to the foreseeability of harm and the relationship between the parties when deciding whether a defendant owes a plaintiff a legal duty. In \textit{Ashburn v. Anne Arundel County},\textsuperscript{54} the Court of Appeals approved the criteria and analysis employed by the California Supreme Court in \textit{Tarasoff v. Regents of the University of California}.

The California court had explained that, when analyzing the existence of a duty, it is necessary to consider the connection between the defendant’s conduct and the injury, the “moral blame” attached to the defendant’s conduct, the need to prevent future harm, the burden on the defendant created by the duty, the cost and availability of liability insurance, and the consequences to the community of imposing the duty.\textsuperscript{55} Ultimately, the court must decide whether to impose a duty on a party “by weighing the various policy considerations and reaching a conclusion that the plaintiff’s interests are, or are not, entitled to legal protection.”\textsuperscript{57}

\textbf{C. Duty to Control Third Persons}

Identifying an actionable duty is particularly problematic when the defendant is not the direct cause of the harm, but instead facilitates the wrongful conduct of a third person.\textsuperscript{58} In \textit{Scott v. Watson},\textsuperscript{59} the Court of Appeals held that an individual has no duty to protect another from the criminal acts of a third person, except where there

\begin{flushleft}
\textsuperscript{53} Henley, 305 Md. at 336, 503 A.2d at 1341.
\textsuperscript{54} 306 Md. 617, 510 A.2d 1078 (1986).
\textsuperscript{55} Id. at 627, 510 A.2d at 1083 (quoting \textit{Tarasoff}, 551 P.2d at 342). \textit{Ashburn’s} adoption of the \textit{Tarasoff} factors was later recognized in \textit{Village of Cross Keys v. United States Gypsum Co.}, 315 Md. 741, 752, 556 A.2d 1126, 1131 (1989).
\textsuperscript{56} Ashburn, 306 Md. at 627, 510 A.2d at 1083 (quoting \textit{Tarasoff}, 551 P.2d at 342).
\textsuperscript{59} 278 Md. 160, 359 A.2d 548 (1976).
\end{flushleft}
is a special relationship between the parties or where a statute creates such a duty. The Scott holding is consistent with the rule governing the duty to control third persons set forth in the Restatement (Second) of Torts.

The rationale for this doctrine is based on the proposition that, generally, individuals in society may proceed on the assumption that others will obey the criminal law. A duty to control third party wrongdoers will only be imposed where the defendant has a special duty to protect the plaintiff. Absent these special circumstances, a defendant will not be required to control the conduct of a third person, even if he could do so with trivial effort and without inconvenience.

D. Similar Negligence Cases in Other Jurisdictions

In 1994, the Ohio Court of Appeals decided Pavlides v. Niles Gun Show, Inc., a case in which firearms were stolen from a gun show by unsupervised minors who subsequently used the guns in an attempted murder. The victim brought suit against the operator of the gun show, asserting that the defendant owed the general public a duty to

60. Id. at 166, 359 A.2d at 552.
61. RESTATEMENT (SECOND) OF TORTS § 315 (1965) states:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id. In Lamb v. Hopkins, 303 Md. 236, 492 A.2d 1297 (1985), the Court of Appeals examined the provisions of Section 315 in detail, declaring that the Scott decision "implicitly approved the analytical framework embodied within that section." Id. at 245, 492 A.2d at 1302; see also Hartford Ins. Co. v. Manor Inn of Bethesda, Inc., 335 Md. 135, 150-51, 642 A.2d 219, 227 (1994) (finding that the state had no duty to prevent a patient who had escaped from a state mental facility from injuring another motorist in a car accident); Ashburn, 306 Md. at 628, 510 A.2d at 1083 (finding that a police officer had no duty to prevent an allegedly drunk driver from injuring a pedestrian); Furr v. Spring Grove State Hosp., 53 Md. App. 474, 486, 454 A.2d 414, 420 (1983) (finding that a psychiatrist owed no duty to the public to prevent harm caused by his failure to detain his patient).

62. KEETON ET AL., supra note 32, § 33, at 201.

63. Lamb, 303 Md. at 242, 492 A.2d at 1300. In Lamb, the court referred to sections 316-319 of the Restatement (Second) of Torts for examples of some situations that might give rise to such a duty: parent-child relationships, master-servant relationships, the relationship between a possessor of land and a licensee, and cases where one person is in charge of another person having dangerous propensities. Id. at 242-43, 492 A.2d at 1300-01.

64. Id. at 242 & n.4, 492 A.2d at 1300 & n.4.
66. Id. at 406-07.
prevent third parties from stealing firearms from gun show vendors. The trial court concluded that, as a matter of law, no such duty exists and granted summary judgment in favor of the defendant. The appellate court reversed and remanded, holding that the gun show operator could have reasonably foreseen the theft.

The Court of Appeals of Texas considered the duty to control third persons in *Berly v. D & L Security Services and Investigations, Inc.* In *Berly*, a store employee was shot and killed by a shoplifter who was being pursued by a security guard employed by the defendant. The plaintiff brought a wrongful death action against the security service, alleging that the guard had failed to protect store employees from the shoplifter and that the guard had used improper procedures in apprehending the shoplifter. The court found that "violent crime has become a significant and pervasive social problem," and that the common law must adapt to changing social conditions. The case was remanded so that the genuine issues of material fact regarding the security service's duty to protect store employees from armed shoplifters could be resolved.

In *Estate of Strever v. Cline*, a 1996 Montana case, four minors stole a gun from the defendant's unlocked truck. One of the minors accidentally shot and killed another with the gun. The Supreme Court of Montana held that the defendant not only owed a duty to store his gun in a safe and reasonable manner from the minor boys, but he also owed that duty "to the public in general." How-

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67. *Id.* at 407. In *Pavlides*, the plaintiffs asserted that the defendants, the operators and promoters of the gun show, "had a duty to protect the general public from unlawful acts of third parties who may steal guns from independent vendors and subsequently injure a member of the general public." *Id.* The plaintiffs further asserted that the defendants breached this duty by "allowing unsupervised minors into the gun show, allowing weapons to be displayed without properly securing same from theft, permitting the independent vendors to sell weapons and/or ammunition to minors, and in not establishing and enforcing strict safety and security measures." *Id.*

68. *Id.*

69. *Id.* at 410.

70. 876 S.W.2d 179 (Tex. Ct. App. 1994).

71. *Id.* at 180-81.

72. *Id.* at 181.

73. *Id.* at 188.

74. *Id.*

75. 924 P.2d 666 (Mont. 1996).

76. *Id.* at 668.

77. *Id.* The minor who was in possession of the gun at the time of the gun's discharge had been smoking marijuana prior to the incident. *Id.*

78. *Id.* at 669. Montana has imposed a statutory duty on each of its citizens to act with ordinary care for the benefit of every other member of the general public:
ever, despite the existence of that duty, the court held that the defendant's breach was not the proximate cause of the minor's death.\textsuperscript{79}

\section*{III. The Court's Reasoning}

In Valentine v. On Target, Inc., the Court of Appeals held that a gun store owner did not owe a duty "to third parties to exercise reasonable care in the display and sale of handguns to prevent the theft and the illegal use of the handguns by others against third parties."\textsuperscript{80} However, the court cautioned that its holding should not be interpreted to mean that a gun merchant may never be held liable for the negligent display and sale of handguns.\textsuperscript{81}

Writing for the majority, Judge Karwacki began the court's analysis by discussing the policy supporting the negligence cause of action.\textsuperscript{82} He explained that the cause of action is intended to discourage or encourage certain types of behavior by one party for the benefit of another party.\textsuperscript{83} However, before the law will recognize a party's duty to behave in a particular fashion, or to refrain from particular behavior, the duty must have a cognizable benefit to the plaintiff.\textsuperscript{84}

\begin{footnotes}
\item Except as otherwise provided by law, everyone is responsible not only for the results of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person except so far as the latter has willfully or by want of ordinary care brought the injury upon himself.
\item MONT. CODE ANN. § 27-1-701 (1999). "Every person is bound, without contract, to abstain from injuring the person or property of another or infringing upon any of his rights." \textit{Id.} § 28-1-201. Under these statutes, the determination of duty turns not on "the status of the injured party but [on] the exercise of ordinary care in the circumstances." Limberhand v. Big Ditch Co., 706 P.2d 491, 496 (Mont. 1985).
\item 79. Estate of Strever, 924 P.2d at 671-72.
\item 80. Valentine, 353 Md. at 546-47, 727 A.2d at 948. Judge Karwacki wrote the opinion for the majority and Judges Rodowsky, Chasanow, and Smith joined. See \textit{id.} at 544, 546, 727 A.2d at 947, 948.
\item 81. \textit{Id.} at 556, 727 A.2d at 953. The court explained:
\begin{quotation}
We caution that the holding in this case does not mean that a gun store owner may never be held liable to another party for negligence in the display and sale of guns when that other party is injured as a result of the negligence but rather that under the specific facts alleged in this particular case no duty was owed to this petitionor's decedent.
\end{quotation}
\item 82. \textit{Id.} at 550, 727 A.2d at 950.
\item 83. \textit{Id.} The majority explained that the purpose of negligence is embodied in the first element of the cause of action—"that the defendant had a duty to act to the benefit of the plaintiff." \textit{Id.}
\item 84. See \textit{id.} ("If the creation of a duty has no benefit to the plaintiff then the purpose is defeated."). In its examination of duty doctrine, the majority omitted any cost-benefit analysis, a factor which was considered by the Court of Special Appeals in its opinion in the
\end{footnotes}
The majority then analyzed whether On Target owed Joanne Valentine any such duty and evaluated the facts with respect to the foreseeability of harm and the relationship between the parties. Regarding the foreseeability of harm, the majority found that the Plaintiff failed to allege sufficient facts to show that On Target could have foreseen the theft of handguns from its store, or the murder of Joanne Valentine. The court concluded that Plaintiff’s argument would require imposing a duty on the defendant “based solely on an imprecise notion of a foreseeability of risk of harm to the public in general.”

Upon considering the relationship between the parties, the majority declared that “[o]ne cannot be expected to owe a duty to the world at large to protect it against the actions of third parties.” The court determined that, under these facts, the class of potential plaintiffs would be too large and indeterminate, and therefore it would be inappropriate to impose such a duty on the defendant.

The majority continued by distinguishing Valentine from several cases in other jurisdictions in which defendants were found to have had a duty to the general public. The first case considered was Pavlides v. Niles Gun Show, Inc. The Valentine majority found Pavlides factually distinguishable, pointing to the fact that the complaint in Pavlides alleged specific facts which showed that the defendant’s experience with thefts from prior gun shows made harm to the plaintiff foreseeable. The court then examined Berly v. D & L Security Services...
The majority found Berly "factually inapposite" because in that case the security guard's actions partially created the danger to which the decedent was exposed. The final case analyzed was Estate of Strever v. Cline. The majority in Valentine flatly rejected Montana's policy that a person may owe a duty to the general public, declaring that this kind of duty "is simply too foreign to [Maryland's] well-established jurisprudence to sufficiently advocate a different result."

In a separate opinion, Judge Raker, joined by Chief Judge Bell and Judge Eldridge, concurred in the majority's judgment that the trial court's dismissal of Plaintiff's complaint was appropriate. However, Judge Raker argued that portions of the majority opinion might be misread as implicitly declaring gun merchants to be immune from liability for negligent storage of their handgun inventory. She suggested instead that the dismissal of Plaintiff's complaint should have been affirmed solely on the basis that Plaintiff had failed to meet his pleading burden.

Rejecting the majority's conclusion that On Target could not foresee the theft and criminal misuse of its handguns, Judge Raker argued that the theft of an unsecured handgun, as well as the possibility that it will be used in a violent crime, is foreseeable. Citing several research studies about the use of stolen guns in the commission of violent crimes, as well as elaborate federal and state statutory schemes that regulate the transfer of firearms, Judge Raker concluded that "policy concerns cry out loudly in favor of recognizing a duty to the foreseeable plaintiff on the part of retail handgun sellers to exer-

"had knowledge that firearms had been stolen from previous gun shows at the Civic Center and comprehended the risks associated with allowing minors who are unaccompanied by an adult into a gun show." Pavlides, 637 N.E.2d at 409.

93. 876 S.W.2d 179 (Tex. Ct. App. 1994); see supra text accompanying notes 70-74 (providing a summary of Berly).

94. Valentine, 353 Md. at 554, 727 A.2d at 952. However, it is arguable that failing to prevent the theft of handguns partially creates the danger of a subsequent murder committed with one of those guns.

95. 924 P.2d 666 (Mont. 1996); see supra text accompanying notes 75-79 (providing a summary of Estate of Strever).

96. Valentine, 353 Md. at 555-56, 727 A.2d at 952.

97. Id. at 556, 727 A.2d at 953 (Raker, J., concurring).

98. Id. at 558, 727 A.2d at 954. Judge Raker described parts of the majority opinion as being "painted . . . with too broad a brush," particularly "those parts of the opinion which impliedly foreclose the possibility of a tort action based upon the negligence of a retail gun merchant in the keeping, display, storage, or sale of handguns." Id. at 558, 556, 727 A.2d at 954, 953.

99. Id. at 559, 727 A.2d at 954.

100. Id. at 561, 727 A.2d at 955.
cise reasonable care in conducting their business so as to avoid the theft and subsequent criminal misuse of handguns."  

IV. **Analysis**

Although the *Valentine* majority was correct in holding that Plaintiff had failed to plead the existence of a legal duty, the holding is overshadowed by misleading dicta that suggests that there can be no cognizable common law tort duty imposed upon gun merchants to guard their inventory against theft. In fact, Maryland's common law supports charging gun merchants with a duty to safeguard dangerous instrumentalities. Furthermore, it is feasible to allow a limited subset of foreseeable, but not identifiable, plaintiffs to bring an action for negligent storage when that duty is breached. The following Sections will provide a rationale for adopting such a doctrine in Maryland.

**A. The Issue in Valentine Was Essentially Procedural**

The real issue before the court in *Valentine* was a procedural one. The majority was correct to conclude that, in the face of factual and legal complexity, Plaintiff failed to plead sufficient facts in his

101. *Id.* at 567, 727 A.2d at 958. To support her position that "it is well known that stolen handguns are an important source of supply to the criminal population," Judge Raker pointed out that "at least four-tenths, and possibly as much as seven-tenths, of the most recent handguns possessed by [convicts] were stolen weapons." *Id.* at 562, 727 A.2d at 956 (quoting JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS 207 (expanded ed. 1994)).

102. See *Valentine*, 353 Md. at 553, 727 A.2d at 951 ("This Court does not discern in the common law the existence of a third party common law duty that would apply to these facts."). Since the core issue in *Valentine* is the absence of facts, it is arguable that the trial judge should have exercised his discretionary authority to dismiss the complaint *with leave to amend*. See *supra* note 30 (discussing the authority of a trial judge to grant a plaintiff leave to amend his complaint to cure any defects). In fact, the trial judge raised the issue of amendment at the hearing on the motion to dismiss, suggesting that Plaintiff may have wanted to amend his complaint. Transcript of Hearing on Motion to Dismiss at 23, E60, *Valentine* (No. 95-22401.OC). Defense counsel responded, somewhat inaccurately, that "if [the complaint] is dismissed, [Plaintiff] can't amend his pleading." *Id.* There is no further mention of amendment in the hearing transcript. Furthermore, it is unclear why neither appellate court was willing to remand the case with leave to amend.

103. See *infra* notes 115-122 and accompanying text (explaining the basis for a duty to safeguard dangerous instrumentalities).

104. See *infra* notes 115-122 and accompanying text (suggesting a method for defining a limited class of plaintiffs in negligent storage actions).

105. See *Valentine*, 353 Md. at 559, 727 A.2d at 954 (Raker, J., concurring) ("I would affirm the Court of Special Appeals on the very narrow ground that the complaint fails to state any facts, beyond bald and conclusory allegations, that Respondent breached a duty of due care to Petitioner in this case.").
complaint to identify a duty owed by On Target to Joanne Valentine.\(^{106}\)

*Valentine* involved both a complex fact pattern and a novel legal theory. The case was factually complex because of the high probability of intervening circumstances.\(^{107}\) The case also involved a novel legal theory in Maryland—whether a gun store owes the general public a duty to protect its inventory from theft and subsequent criminal misuse.\(^{108}\) Such complexity, both factual and legal, requires specificity in pleading.\(^{109}\)

In his complaint, Plaintiff merely asserted that On Target owed every resident of Anne Arundel County a duty to exercise reasonable care to protect its handgun inventory from theft and criminal misuse.\(^{110}\) However, Plaintiff failed to allege any facts that would have provided a basis for recognizing such a duty.\(^{111}\) The complaint provided no insight as to how On Target could have foreseen the theft of the handguns, or the subsequent death of Joanne Valentine.\(^{112}\) The lack of a relationship between the parties was not addressed in the complaint, nor were any additional factors described as set forth in *Ashburn*.\(^{113}\) Faced with such a complex case and only sparse factual allegations, the court was correct in concluding that Plaintiff failed to meet his burden of pleading.\(^{114}\)

\(^{106}\) See Valentine, 353 Md. at 551, 727 A.2d at 950.

\(^{107}\) Although it was clear that Joanne Valentine's killer was not Edward McLeod, the shooter was never identified. Valentine v. On Target, Inc., 112 Md. App. 679, 682, 686 A.2d 636, 637 (1996). Two months elapsed between the time of the robbery and the time Mrs. Valentine was shot, so it is possible that the stolen guns passed among several intervening parties. *Id.*

\(^{108}\) At oral argument on On Target's motion to dismiss, the trial judge stated, in response to Plaintiff's legal theory, "I think you may be creating law that's not here." Transcript of Hearing on Motion to Dismiss at 19, E56, Valentine (No. 95-22401.OC).

\(^{109}\) See supra notes 19-22 and accompanying text.

\(^{110}\) Plaintiff's Complaint at E3, Valentine (No. 95-22401.OC).

\(^{111}\) Valentine, 353 Md. at 551, 727 A.2d at 950.

\(^{112}\) *Id.*

\(^{113}\) See Ashburn v. Anne Arundel County, 306 Md. 617, 627, 510 A.2d 1078, 1083 (1986) (describing factors from *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), that should be considered in determining the existence of a tort duty); see also supra text accompanying note 56 (stating the factors discussed by the court in *Ashburn*).

\(^{114}\) See Valentine, 353 Md. at 551, 727 A.2d at 950 (stating that the plaintiff had not alleged any facts to support his claim that On Target knew or should have known of the risk that guns might be stolen from its establishment and used in a subsequent crime).
B. A Proper Characterization of the Duty in Valentine and a Proposed Framework for “Negligent Storage” Actions

Valentine is a problematic opinion because the majority strayed from the procedural question at issue and ventured into dangerous dicta that mischaracterized the real tort duty in the case. The majority was incorrect to frame the proposed duty as a duty to control the conduct of a third person. The problem in this case was not that On Target failed to control Mrs. Valentine’s murderer, a third person. Rather, the problem was that On Target failed to prevent that third person from obtaining the gun he used to commit a criminal act.

Put simply, unguarded guns present a major risk of harm to law-abiding citizens. The tort system is intended to manage risks, but the “duty to control third persons” method is doomed to failure in unguarded gun cases. What is needed instead is a tort duty that seeks to manage the real danger: the failure by a rightful possessor of a gun to take reasonable precautions to prevent it from being obtained by a criminal.

That duty would be described best as a duty to safeguard dangerous instrumentalities. Unlike the duty to control third persons, the pro-

115. See, e.g., id at 556, 727 A.2d at 953 (“[A]lthough the inherent nature of guns suggests that their use may likely result in serious personal injury or death to another this does not create a duty of gun dealers to all persons who may be subject of the harm.”).

116. See id. at 551-53, 727 A.2d at 950-51. In his analysis of Valentine, Professor McClurg suggests that the majority “misapprehended the nature and scope of the duty and correlative burden.” McClurg, supra note 36, at 1241. By framing the duty “as one to protect the ‘world at large’ from criminals,” he argues that the court created a “straw man easily knocked down.” Id. (quoting Valentine, 353 Md. at 553, 727 A.2d at 951).

117. See McClurg, supra note 36, at 1208-09 (providing statistical data indicating that stolen guns are frequently used by criminals and concluding that “unsafely stored firearms create a substantial, foreseeable risk that such guns will be stolen and used for criminal purposes”).

Professor McClurg’s article provides a comprehensive picture of the dangers presented by unsecured guns. See id. at 1190-1200 (supplying data from ten public health studies showing the prevalence of unsecured firearms in America). In particular, he identifies three major risks of harm: accidental shootings, adolescent suicides, and criminal misuse of stolen guns. Id. at 1202. He argues that among those risks, “criminal misuse of stolen guns is the largest risk created by negligent storage.” Id. at 1215.

118. See id. at 1241 (“Certainly, a duty to protect the world at large from criminal elements would be a tremendous burden with only a small chance of successfully being borne.”).

119. Even pro-gun organizations, such as the National Rifle Association, recognize that gun owners have a duty to store their firearms safely. Id. at 1190-91 (referring to information gathered from the NRA Headquarters, A Parent’s Guide to Gun Safety, available at http://www.nrahq.org/safety/education/guide.asp##parent (last visited Feb. 12, 2001)).

120. See Kimbler v. Stillwell, 717 P.2d 1223, 1227 (Or. Ct. App. 1986) (“A gun is a dangerous instrumentality. Presumably, because it is, it calls for a greater degree of care in its display than the display of clothing or boxes of cereal . . . .”). One potential counterargu-
posed duty would not require gun stores to control what is done with a gun after it leaves the premises. Instead, the merchant would be required to control whether a gun leaves the premises at all.121 Considered in this context, Valentine becomes a case of negligent storage.122

121 Under this rule, tort law would be operating in a substantially similar fashion as the federal statutory system, which requires licensed gun dealers to exercise control over whether firearms leave their establishment. See, e.g., 18 U.S.C.A. § 922(b)(1) (West 2000) (prohibiting licensed dealers from selling firearms to persons who are under certain age limits); id. § 922(d) (prohibiting licensed dealers from knowingly selling firearms to fugitives from justice, unlawful users of controlled substances, or persons who are under felony indictment); id. § 922(t) (prohibiting licensed dealers from transferring a firearm to a person before completing a satisfactory background check through the national instant criminal background check system established under the Brady Handgun Violence Protection Act, Pub. L. No. 103-159, § 103, 107 Stat. 1536, 1541 (1993)). Had On Target failed to comply with one of these statutes and sold Mrs. Valentine’s murderer the gun he used to kill her, it may have been liable on a negligence per se theory. See Pahanish v. Western Trails, Inc., 69 Md. App. 342, 362, 517 A.2d 1122, 1132 (1986) (explaining that the breach of a statutory duty may be considered evidence of negligence if the plaintiff is a member of the class of persons the statute is intended to protect, if the injury is of the type that the statute was intended to prevent, and if the plaintiff presents sufficient evidence to show that the breach of the statutory duty was the proximate cause of the injury).

122 While the scope of this Note is limited to the Valentine case and arguments in favor of imposing some tort liability on negligent gun merchants in Maryland, Professor McClurg’s article provides a more thorough discussion of the “duty to safeguard dangerous instrumentalities,” and the corresponding “negligent storage” action. Additionally, his article is national in scope, examining negligent storage cases in several jurisdictions.

One case analyzed by McClurg bears a particular similarity to Valentine. See id. at 1242 (discussing Kimbler v. Stillwell, 717 P.2d 1223 (Or. Ct. App. 1986)). In Kimbler, the Oregon Court of Appeals permitted the plaintiff to maintain a wrongful death action against a retail gun store. Kimbler, 717 P.2d at 1227. The case began when a thief broke into a gun store, stole a shotgun and shells, and used the gun to murder the plaintiff’s son. Id. at 1224. The trial court dismissed the plaintiff’s second amended complaint for failure to state a claim for which relief could be granted. Id. The Court of Appeals of Oregon reversed and remanded, finding that “[p]laintiff’s pleadings alleges facts sufficient to state a claim that defendant did not meet the standard of care commensurate with a merchant’s duty to display merchandise in a safe manner.” Id. at 1227 (emphasis added). Admittedly, the legal theory in Kimbler is more akin to premises liability than it is to pure negligence. However, Kimbler suggests that it is not unreasonable to impose liability on gun merchants who fail to properly guard their inventory. “Liability would arise, not from the fact that guns are displayed, but rather from proof that it was unreasonable for defendant to display guns and ammunition in the manner in which it did.” Id. But see Buchler v. Or. Corr. Div., 853 P.2d 798, 804-06 (Or. 1993) (criticizing the Kimbler opinion for suggesting that anyone who facilitates the commission of a crime may be civilly liable).
C. Risk-Utility Analysis as a Basis for the Duty, and Why the Valentine Majority Got the Risk-Utility Analysis Wrong

Negligence doctrine exists to manage situations involving unreasonable risk. Consequently, when an action in negligence is proposed as a remedy for particular conduct, the necessary first step is examining whether the risk involved in that conduct is "unreasonable." A commonly accepted benchmark for measuring unreasonable risk is the risk-utility test set out in Judge Learned Hand's opinion in United States v. Carroll Towing Co.

In Carroll Towing, the United States Court of Appeals for the Second Circuit considered a barge owner's duty to post an attendant on a barge to ensure that it did not drift from its moorings and damage other vessels. Judge Hand explained that the barge owner's duty was a function of three variables: the probability of harm, the gravity of the resulting injury, and the burden of adequate precautions. Under this rubric, often called the "Learned Hand Formula," the gravity of the resulting injury is multiplied by the probability of harm and compared with the burden of precautions. Liability will be imposed when the burden of precaution is less than the probability of serious harm.

Valentine is very similar to Carroll Towing. In both cases, the imposition of a legal duty on the defendant rests, in part, on an analysis of the benefits and corresponding burdens of the proposed duty. Extending Judge Hand's formula to Valentine, the risk-utility question becomes: Does the burden of preventing handgun theft outweigh the benefit of preventing fatal crimes committed with stolen handguns?

When the facts of Valentine are examined under this new negligent-storage risk-utility model, the flaws in the majority's benefit-bur-
den analysis are exposed.\textsuperscript{131} Considering the “benefit” side of the equation, the \textit{Valentine} majority intimates that placing such a duty on gun store owners would have no benefit to the prospective plaintiff.\textsuperscript{132} However, if the tort system functions as intended, the prospect of serious financial liability will deter gun dealers from carelessly storing their inventory.\textsuperscript{133} Threatened by financial liability, On Target may have taken additional precautions to prevent Edward McLeod and his companion from stealing handguns from the store. Although it is impossible to state with certainty that On Target could have prevented Joanne Valentine’s murder, she surely would have enjoyed better odds had On Target taken greater care to prevent the theft of the weapon that ultimately killed her.\textsuperscript{134} There is no doubt that improved chances of staying alive would have constituted a substantial benefit to Joanne Valentine.

Suggesting that such a benefit is outweighed by its corresponding burden, the \textit{Valentine} majority claimed that the proposed duty would place a “tremendous burden on [gun] shop owners,” but the court did not provide any real analysis of the burden and did not explain

\begin{itemize}
  \item \textsuperscript{131} The \textit{Valentine} majority makes only passing references to “burdens” and “benefits,” but, in fact, these are critical components in a duty analysis. In the Court of Special Appeals’s \textit{Valentine} decision, Judge Wilner explained that when ascertaining the existence of a legal duty, “there is . . . a cost/benefit ratio to consider—the burden to both the defendant and the community of imposing the duty weighed against the social benefit of imposing the duty as a means of preventing future harm.” \textit{Valentine v. On Target, Inc.}, 112 Md. App. 679, 685, 686 A.2d 636, 639 (1996). Not only did the Court of Appeals’s majority opinion provide an insufficient cost-benefit analysis, it also failed to address any of the other issues that the court had declared as necessary criteria in \textit{Ashburn v. Anne Arundel County}, 306 Md. 617, 627, 510 A.2d 1078, 1083 (1986). See supra notes 54-57 and accompanying text. The \textit{Valentine} majority did not address “‘the moral blame attached to the defendant’s conduct,’” nor did it consider “‘the availability, cost and prevalence of insurance for the risk involved.’” \textit{Ashburn}, 306 Md. at 627, 510 A.2d at 1083 (quoting Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976)). However, these factors do appear in Judge Raker’s concurring opinion in \textit{Valentine}. \textit{Valentine}, 353 Md. at 563, 727 A.2d at 956 (Raker, J., concurring).
  \item \textsuperscript{132} \textit{Valentine}, 353 Md. at 553, 727 A.2d at 951 (claiming that the proposed duty would provide “only a hypothetical benefit to the public at best”).
  \item \textsuperscript{133} See id. at 565, 727 A.2d at 957 (Raker, J., concurring) (“[Gun] dealers faced with the prospect of liability in tort for negligent storage of handguns will be more careful in the storage of those guns held out for sale to the general public.”); see also McClurg, supra note 36, at 1233 (“With the imposition of liability for harm inflicted by stolen guns, one can predict insurance companies would step into the picture with restrictions that would enhance the deterrent impact of liability on unsafe storage practices.”).
  \item \textsuperscript{134} See infra notes 151-152 and accompanying text (describing data gathered by the Bureau of Alcohol, Tobacco & Firearms, indicating the prevalence of use of stolen handguns in criminal activities).
\end{itemize}
why the burden would be "tremendous." In fact, when examined logically, the burden is quite minimal.

In his article, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, Professor Andrew McClurg provides a three-pronged framework for analyzing the burden of safe firearms storage. First, it is necessary to consider the financial investment required to store firearms safely. Second, the inconvenience of having to unlock guns for use must be examined. Finally, one must consider whether safety procedures will impair the firearm's utility as a self-defense tool. The burden of safe storage is the sum of these three components.

The inconvenience of safety measures, as Professor McClurg points out, is too minor to justify serious consideration in any "negligent storage" analysis. The self-defense component is basically irrelevant in the context of retail gun sales because firearms displayed for retail sale are not intended for use by store employees in self-defense—they are stored for the purpose of sale. Gun store employees, like those who were working at On Target on the day of the theft, may carry their own sidearms for personal protection.

The majority of the burden on gun merchants derives from the financial investment required to store firearms in a safe manner. Gun storage requires essentially the same security measures as employed by other retail establishments—alarms, locked display cases, barred windows, and so on. The cost of these measures is no

135. Valentine, 353 Md. at 553, 727 A.2d at 951.
137. Id. at 1209-11.
138. Id. at 1211-12.
139. Id. at 1212-14.
140. Id. at 1209.
141. Id. at 1212.

142. Generally, carrying a firearm is prohibited in Maryland. See Md. Ann. Code art. 27, § 36B(b) (1996). However, Maryland law expressly permits certain employees to carry firearms within the confines of their workplaces. See id. § 36B(c)(4) ("Nothing in this section shall prevent a supervisory employee from wearing, carrying, or transporting a handgun within the confines of a business establishment in which he is employed during such time as he is acting in the course of his employment . . . ."); see also Transcript of Hearing on Motion to Dismiss at 10, E47, Valentine (No. 95-22401.OC) ("[E]mployees of the Defendant who are engaged in the sale of these handguns on a daily basis arm themselves with loaded handguns strapped to their person because of the fear of thefts . . . .").
143. See McClurg, supra note 36, at 1210 n.164 ("The required financial investment for safe storage will increase . . . proportionately to the number of guns being stored. . . . Those responsible for safeguarding large stockpiles of weapons, such as gun dealers . . . obviously would be expected to invest much more in safety . . . .").
144. Cf. id. at 1229 (explaining that guns are "small, inanimate, easily securable items that can be controlled efficiently and effectively").
greater for gun merchants than it is for the seller of any other retail good.145 Moreover, gun stores can certainly afford these costs. According to firearms industry data, revenues from new handgun sales in the United States are roughly a half billion dollars per year.146

Imposing a duty on gun stores to take reasonable, financially viable steps to protect their inventory from theft hardly creates the tremendous burden that the Valentine majority suggests,147 especially when one considers the economic strength of the industry. In the context of Judge Hand's cost-benefit formula, the burden of preventing handgun theft is minimal in comparison to the probability that a stolen handgun will be used to commit a violent crime.

D. The Valentine Majority's Foreseeability Analysis Is Faulty

The Valentine majority asserted that the proposed duty is inappropriate because it is "based solely on an imprecise notion of a foreseeability of risk of harm to the public in general."148 However, there is nothing imprecise about the risk of theft and subsequent criminal misuse in the sale of handguns.149

Empirical evidence shows that stolen firearms are frequently used in violent crimes.150 For example, the Bureau of Alcohol, Tobacco & Firearms (ATF) reported that during 1996 and 1997, entities holding federal firearms licenses reported 5041 gun thefts involving 24,697 guns.151 In 1999, after three years of analysis, the ATF released a report indicating that one out of every three guns used in violent crimes


147. See Valentine, 353 Md. at 553, 727 A.2d at 951.

148. Id. at 551, 727 A.2d at 950.

149. Cf McClurg, supra note 36, at 1236 (explaining that when judges conclude that the theft and criminal misuse of guns is not foreseeable, it is often because they feel "it is undesirable to impose liability in such cases").

150. See id. at 1207-09 (providing statistics regarding the prevalence of gun theft and the criminal misuse of stolen guns).

151. Id. at 1207 (citing U.S. Dept. of Treasury, 1997 ATF Annual Rep. 19 (1997)).
in selected cities had been stolen from private residences or gun dealers.\textsuperscript{152} There is even evidence in this case that On Target may have known that guns from its inventory were used in a disproportionate number of homicides in the Baltimore area.\textsuperscript{153}

This evidence compels the conclusion that the risk of criminal misuse of stolen handguns is foreseeable. However, this conclusion holds only that the harm itself is foreseeable. Under the traditional "foreseeability of harm" analysis, there must also be some relationship between the parties that gives rise to the duty.\textsuperscript{154} The Valentine majority clearly saw this issue as a major hurdle to holding On Target liable for Joanne Valentine's murder.\textsuperscript{155} The court's own reasoning in \textit{Henley v. Prince George's County}\textsuperscript{156} provides a way to clear the hurdle. In \textit{Henley}, the court declared that an employer had a duty to refrain from employing an unfit worker.\textsuperscript{157} In that case, the court reasoned that the duty was intended to protect all members of the public who might reasonably come into contact with the unfit employee.\textsuperscript{158} Therefore, the fact that plaintiffs could not be readily identified in advance did not bar those plaintiffs from maintaining an action against the employer, so long as they were within the class of persons who might reasonably come in contact with the unfit employee.\textsuperscript{159}

The facts of Valentine are analogous to Henley. On Target's proposed duty, as re-characterized in this Note, is a duty to safeguard dangerous instrumentalities. The purpose of imposing that duty is to prevent criminals from easily obtaining handguns, and thus to protect the public from the potential violent acts of those criminals. Both Valentine and Henley involve a duty that is intended to protect the pub-

\begin{itemize}
\item \textsuperscript{152} \textit{Id.} at 1208 (citing Debbi Wilgoren, \textit{Report Traces Guns Used in Crimes; D.C. Offenders Increasingly Getting Weapons from Beyond Area}, \textit{Wash. Post}, Feb. 22, 1999, at B1). To this point, Judge Raker stated in her concurring opinion that "the theft of a handgun, left unsecured and easily accessible, is foreseeable, as is the definitive possibility that a stolen handgun will be used in violent crime." \textit{Valentine}, 353 Md. at 561, 727 A.2d at 955 (Raker, J., concurring).
\item \textsuperscript{153} \textit{See Transcript of Hearing on Motion to Dismiss at 14-15, E51-E52, Valentine} (No. 95-22401.OC) ("[On Target] was identified as the sixth largest distributor of guns used in homicides in Baltimore, Maryland in an A.T.F. examination of all the guns stores in the greater metropolitan Washington/Baltimore area . . .").
\item \textsuperscript{154} \textit{See supra} notes 45-47 and accompanying text.
\item \textsuperscript{155} \textit{See Valentine}, 353 Md. at 553, 727 A.2d at 951 ("The class of persons to whom a duty would be owed under these bare facts would encompass an indeterminate class of people, known and unknown.").
\item \textsuperscript{156} 305 Md. 320, 503 A.2d 1333 (1986).
\item \textsuperscript{157} \textit{Id.} at 336, 503 A.2d at 1341 (citing Cramer v. Hous. Opportunities Comm'n, 304 Md. 705, 501 A.2d 35 (1985); Evans v. Morsell, 284 Md. 160, 395 A.2d 480 (1978)).
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id.}
\end{itemize}
lic. Therefore, following the court's own logic from Henley, members of the public who might reasonably come in contact with guns stolen from a retail gun merchant should be able to maintain a negligence action against that merchant. As in Henley, the fact that those plaintiffs are not identifiable in advance is irrelevant. 160

In this regard, the Henley opinion provides a strong rebuttal to the Valentine majority's concern that gun merchants would owe a duty to the "world at large." 161 Applying the logic from Henley, the duty owed by gun merchants is limited to persons who might reasonably come into contact with one of the stolen guns. 162 Defining that class of potential plaintiffs cannot be achieved with a bright-line rule, but instead requires case-by-case examination. 163 However, when the victim and gun store are both located in the same county, as in Valentine, 164 it is a fair conclusion that the victim might reasonably come in contact with the stolen gun.

Viewed in light of both statistical evidence showing that the criminal misuse of stolen handguns is foreseeable, and existing Maryland case law allowing tort duties to expand beyond "identifiable plaintiffs," the Valentine majority's conclusion that the criminal misuse of a stolen handgun is not foreseeable as a matter of law is patently incorrect. 165

160. See id.

161. Valentine, 353 Md. at 553, 727 A.2d at 951.

162. See Henley, 305 Md. at 336, 503 A.2d at 1341. Admittedly, not all "contact" with the stolen gun gives rise to an actionable negligence case. For example, Joanne Valentine might have come in contact with the stolen gun if she had discovered it abandoned in the gutter near her house.

163. In Rosenblatt v. Exxon Co., the court pointed out that determining the existence of a legal duty is a question of law for the trial judge. 335 Md. 58, 76, 642 A.2d 180, 189 (1994). In cases involving the negligent storage of firearms, the question of whether the victim might reasonably come in contact with the stolen gun will simply become one criterion of many that the trial judge will have to evaluate in determining the existence of a legal duty. Answering that question can be no more difficult than wading through the existing web of foreseeability doctrine.

164. On Target is located in Severn, Maryland, a community in Anne Arundel County. Joanne Valentine was murdered outside her home in Anne Arundel County.

165. See Valentine, 353 Md. at 561, 727 A.2d at 955 (Raker, J., concurring) ("I . . . disagree with the majority's conclusion that, as a matter of law, neither the theft nor the criminal misuse of the firearm was foreseeable."). One potential counterargument to this conclusion is that, generally, the intervening acts of third parties sever the chain of causation necessary for a finding of negligence. Id. at 566, 727 A.2d at 957. However, if the intervening act was foreseeable, it will not negate the original negligent actor's liability. Id. (citing Matthews v. Amberwood, 351 Md. 544, 578-79, 719 A.2d 119, 135-36 (1998)). As it is necessary to prove the foreseeability of subsequent criminal misuse to establish the prima facie case for negligence, that foreseeability will also serve to negate an "intervening third party" defense. See id.
V. Conclusion

Valentine could have been resolved on a relatively simple procedural basis—that Plaintiff's complaint failed to state a claim upon which relief could be granted.\textsuperscript{166} Although the majority's holding on that core procedural issue was correct, it was overshadowed by dicta that provided a flawed risk-utility analysis. The opinion also ignored important precedent and generally runs contrary to modern public policy.

As the Court of Special Appeals observed, extending a gun store's liability to the general public on the well-pleaded facts of Valentine would have inappropriately created a doctrine of absolute liability.\textsuperscript{167} However, it would be equally inappropriate to create a doctrine of absolute immunity for gun dealers. In a world where gun violence is an increasing threat, no community is safe if its gun merchants make weapons available to criminals.

The time has come for Maryland to recognize a common law action for negligent storage of firearms.\textsuperscript{168} A negligent storage action which requires gun merchants to exercise reasonable care for the benefit of their community is adequately supported by both cost-benefit and foreseeability arguments.\textsuperscript{169} Moreover, as Judge Raker stated in her concurring opinion in Valentine, "policy concerns cry out loudly in favor" of requiring gun stores to exercise reasonable care to protect the members of their communities.\textsuperscript{170}

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\textsuperscript{166} See id. at 559, 727 A.2d at 954 (disagreeing with the majority's broad holding and explaining that the case could have been decided "on the very narrow ground that the complaint fails to state any facts . . . that Respondent breached a duty of care to Petitioner").

\textsuperscript{167} Valentine v. On Target, Inc., 112 Md. App. 679, 691, 686 A.2d 636, 641 (1996). But see supra note 102 (arguing that the plaintiff should have been granted leave to amend the complaint).

\textsuperscript{168} But see Valentine, 353 Md. at 556, 727 A.2d at 953 ("If we would hold today that gun merchants owe an indefinite duty to the general public effectively we would be regulating the merchants. This type of regulation is the realm of the legislature and is not appropriate as a judicial enactment."). Judge Karwacki is correct inasmuch as the imposition of an "indefinite duty" would be an inappropriate regulatory act. However, when Valentine is viewed in the much narrower context of negligent firearms storage proposed in this Note, it is a case in which the tort system can function effectively and appropriately.

\textsuperscript{169} See supra notes 123-165 and accompanying text (providing risk-utility and foreseeability rationales for a negligent storage doctrine).

\textsuperscript{170} 353 Md. at 567, 727 A.2d at 958 (1999) (Raker, J., concurring).