



2018

## Through the Smoke: Do Current Civil Liability Laws Address the Unique Issues Presented by the Recreational Marijuana Industry?

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### Recommended Citation

Stufano, Thomas (2018) "Through the Smoke: Do Current Civil Liability Laws Address the Unique Issues Presented by the Recreational Marijuana Industry?," *Touro Law Review*. Vol. 34 : No. 4 , Article 22.  
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol34/iss4/22>

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## THROUGH THE SMOKE: DO CURRENT CIVIL LIABILITY LAWS ADDRESS THE UNIQUE ISSUES PRESENTED BY THE RECREATIONAL MARIJUANA INDUSTRY?

*Thomas Stufano\**

### I. INTRODUCTION

In 2012, voters from Colorado and Washington State passed an initiative that legalized the sale and use of marijuana recreationally.<sup>1</sup> These initiatives marked the beginning of the acceptance of recreational marijuana use.<sup>2</sup> By 2017, six more states, as well as the District of Columbia, had joined Colorado and Washington in legalizing the recreational sale and use of marijuana.<sup>3</sup> The recreational use of marijuana has gained traction, and the marijuana industry has seen a tremendous economic upturn. In 2016 alone, revenue for the North American marijuana market was \$6.7 billion.<sup>4</sup> That number is expected to rise to \$20.2 billion by 2021.<sup>5</sup> Not only has the marijuana industry significantly impacted the economy in states that have

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<sup>1</sup> Maia Szalavitz, *Two U.S. States Become First to Legalize Marijuana*, TIME (Nov. 7, 2012), <http://healthland.time.com/2012/11/07/two-u-s-states-become-first-to-legalize-marijuana/>. In 2012, marijuana could legally be used for medicinal purposes in eighteen states and the District of Columbia. *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> Melia Robinson, *It's 2017: Here's Where You Can Legally Smoke Weed Now*, BUS. INSIDER (Jan. 8, 2017), <http://www.businessinsider.com/where-can-you-legally-smoke-weed-2017-1>. The states that legalized marijuana by 2017 were Colorado, Washington, Alaska, California, Maine, Massachusetts, Nevada, and Oregon. *Id.*

<sup>4</sup> Melia Robinson, *The Legal Weed Market Is Growing As Fast As Broadband Internet in the 2000s*, BUS. INSIDER (Jan. 3, 2017, 3:20 PM), <http://www.businessinsider.com/arcview-north-america-marijuana-industry-revenue-2016-2017-1>.

<sup>5</sup> *Id.*

legalized marijuana, but it also has stirred up a debate about whether marijuana should be decriminalized at the federal level.<sup>6</sup> Although some states have legalized the recreational sale and use of marijuana, it is still illegal under federal law.<sup>7</sup> While various legal scholars have discussed the conflict between federal and state law on the fundamental legality of marijuana, few have considered the issue of personal injury.<sup>8</sup>

Current civil liability laws do not address the unique issues presented by the recreational marijuana industry. Much of the

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<sup>6</sup> See 21 U.S.C. § 812 (2018). Currently, there are only state laws that legalize recreational marijuana. Robinson, *supra* note 3.

<sup>7</sup> See 21 U.S.C. § 812. Under the Obama administration, Deputy Attorney General James M. Cole issued a memorandum stating that a state's marijuana policy would largely be left alone so long as persons or organizations did not interfere with the government's enforcement priorities. James M. Cole, *Guidance Regarding Marijuana Enforcement*, U.S. DEP'T JUST., Aug. 29, 2013, <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. These priorities were:

Preventing the distribution of marijuana to minors; [p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; [p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states; [p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; [p]reventing violence and the use of firearms in the cultivation and distribution of marijuana; [p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; [p]reventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and [p]reventing marijuana possession or use on federal property.

*Id.* Under the Trump administration, Attorney General Jeff Sessions announced that his position is to leave it up to the federal prosecutors in each state to decide which marijuana activities to prosecute. Jefferson B. Sessions, III, *Marijuana Enforcement*, U.S. DEP'T JUST., Jan. 4, 2018, <https://www.justice.gov/opa/press-release/file/1022196/download>. The conflict between federal and state law creates many other issues, but those issues will not be discussed in this Note. For a detailed discussion of some of the issues presented by the conflict between state and federal law, see Luke Scheuer, *The "Legal" Marijuana Industry's Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. 511 (2015) (discussing the conflict between state and federal marijuana laws from a business entity law perspective); Adrian A. Ohmer, *Investing in Cannabis: Inconsistent Government Regulation and Constraints on Capital*, 3 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 97 (2013) (discussing the difficulty in accessing capital in the marijuana industry and the investment risk that exists in the industry); Katherine Curl Reitz, *An Environmental Argument For a Consistent Federal Policy on Marijuana*, 57 ARIZ. L. REV. 1085 (2015) (discussing the environmental issues caused by the conflict between state and federal law); Luke Scheuer, *Are "Legal" Marijuana Contracts "Illegal"?*, 16 U.C. DAVIS BUS. L.J. 31 (2015) (discussing the enforceability of contracts related to marijuana).

<sup>8</sup> See Scheuer, *The "Legal" Marijuana Industry's Challenge*, *supra* note 7; Ohmer, *supra* note 7; Reitz, *supra* note 7; Scheuer, *Are "Legal" Marijuana Contracts "Illegal"?*, *supra* note 7.

discussion around the growing recreational marijuana industry has focused on the legality of the product itself. Largely ignored are the ramifications resulting from injury from marijuana use.

This Note will be divided into six sections. Section II will give a brief history of the evolution of personal injury and tort law. Section III will discuss the evolution of products liability law as well as litigation involving the recreational use of marijuana and similar products. Section IV will discuss third-party liability and, more specifically, Dram Shop Statutes. Section V will propose solutions to the issues that are unique to the recreational marijuana industry within products liability and third-party liability law. While some laws, such as products liability laws, are adequate to impose liability on tortfeasors, others are not. The current civil liability laws addressing third-party liability are inadequate to protect citizens who are injured by somebody else's use of marijuana. This Note will discuss two types of nonexclusive liability theories that address the issues presented by the recreational marijuana industry: products liability and dram/gram shop liability.

## II. PERSONAL INJURY

In ancient times, clan vengeance was the mechanism used as compensation for an injury.<sup>9</sup> Today, clan vengeance has been replaced with the “payment of damages through a centralized institution.”<sup>10</sup> Dating as far back as 2000 B.C.E., the Code of Hammurabi and the Roman Twelve Tables allowed compensation for injuries.<sup>11</sup> In

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<sup>9</sup> John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative FirstParty Insurance Movement*, 114 HARV. L. REV. 690, 701 (2001). Clan vengeance has been defined as “punishment inflicted in retaliation for an injury or offense.” *Vengeance*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/vengeance>.

<sup>10</sup> Witt, *supra* note 9, at 700.

<sup>11</sup> *Id.* at 701. For example, The Code of Hammurabi provided, *inter alia*,

If a man put out the eye of another man, his eye shall be put out. [An eye for an eye] . . . If during a quarrel one man strike another and wound him, then he shall swear, “I did not injure him wittingly,” and pay the physicians . . . If a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death.

*The Code of Hammurabi*, translated by L.W. King, YALE L. SCH., <http://avalon.law.yale.edu/ancient/hamframe.asp> (last visited Oct. 24, 2018) (first alteration in original). Similarly, The Roman Twelve Tables provided, *inter alia*,

Aristotle's account in the *Nicomachean Ethics* and Hugo Grotius's interpretation of "the collection of Roman law rules governing private wrongs," we find evidence of compensation for injuries.<sup>12</sup> Although the principle of compensation for an injury had a longstanding history, "compensation for accidental human injury" was still "new to Western legal systems in the mid-to late nineteenth century."<sup>13</sup>

Even in 1881, the future Justice Holmes struggled to address the special problems raised for the law of torts by a society that was sure to face accidental injury.<sup>14</sup> Aristotle was focused on intentional acts, and Justice Holmes was focused on "those who could foresee the possibility of injury and yet still chose to go ahead with the injury-creating activity."<sup>15</sup> Holmes would use the case of *Brown v. Kendall*,<sup>16</sup> "in which one man accidentally struck another with a stick while striking a dog," as a model to formulate his early theory of torts.<sup>17</sup>

The Industrial Revolution and the rise of the railroads made tort law a central problem in the United States.<sup>18</sup> The high rate of injuries to passengers and workers on railroads spurred personal injury litigation, and these railroad injuries were very expensive based on the injuries involved.<sup>19</sup> A new field known as "tort law" developed, and treatises and law school classes were being exclusively devoted to this new area of law.<sup>20</sup> Tort law is a broad field of law, but this Note will

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If a person breaks a bone of a freeman with hand or by club, he shall undergo a penalty of 300 asses or of 150 asses, if of a slave. . . . If a weapon has sped accidentally from one's hand, rather than if one has aimed and hurled it, to atone for the deed a ram is substituted as a peace offering to prevent blood revenge.

*The Twelve Tables*, YALE L. SCH., [http://avalon.law.yale.edu/ancient/twelve\\_tables.asp](http://avalon.law.yale.edu/ancient/twelve_tables.asp) (last visited Oct. 24, 2018).

<sup>12</sup> Witt, *supra* note 9, at 701.

<sup>13</sup> Witt, *supra* note 9, at 701.

<sup>14</sup> Witt, *supra* note 9, at 701.

<sup>15</sup> Witt, *supra* note 9, at 701.

<sup>16</sup> 60 Mass. (6 Cush.) 292 (1850). In *Brown*, the defendant was using a stick to stop a fight between his dog and the plaintiff's dog. *Id.* at 296. In the process of separating the dogs with the stick, the defendant accidentally struck the plaintiff in the eye. *Id.* at 297. The court held that if the defendant accidentally struck the plaintiff while he was using ordinary care and all proper precautions, then it was merely an unavoidable accident and the plaintiff could not recover. *Id.* at 298.

<sup>17</sup> Witt, *supra* note 9, at 702.

<sup>18</sup> Witt, *supra* note 9, at 702.

<sup>19</sup> Witt, *supra* note 9, at 703.

<sup>20</sup> Witt, *supra* note 9, at 703.

focus on the field of products liability and third-party liability within tort law.

### III. PRODUCTS LIABILITY

Products liability is a hybrid of tort law and contract law. Originally, American courts adopted the doctrine of *caveat emptor* from English courts.<sup>21</sup> *Caveat emptor* is Latin for “let the buyer beware,” which means that the buyer assumes the risk in the transaction.<sup>22</sup> In the late 1800s, some, but not all, United States courts began recognizing implied warranties of merchantability, which limited the doctrine of *caveat emptor*.<sup>23</sup>

The implied warranty of merchantability is codified in the Uniform Commercial Code (hereinafter “UCC”) § 2-314, which states “a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”<sup>24</sup>

By the 1900s, enough American state courts had recognized the implied warranty of merchantability to justify its inclusion in the Uniform Sales Act of 1906, the predecessor to Article 2 of the Uniform Commercial Code.<sup>25</sup> Although the implied warranty of merchantability afforded buyers that lacked an express warranty more protection, manufacturers still found a way to insulate themselves from liability.

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<sup>21</sup> David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 961 (2007).

<sup>22</sup> *Caveat emptor*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/caveat%20emptor> (last visited Oct. 24, 2018).

<sup>23</sup> Owen, *supra* note 21.

<sup>24</sup> U.C.C. § 2-314 (West 2018). The definition of merchant is found in U.C.C. § 2-104, which provides:

[A] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

U.C.C. § 2-104 (West 2018). Essentially, a merchant is somebody who regularly deals with the goods involved in the transaction and, thus, is more knowledgeable about the goods than an ordinary layperson.

<sup>25</sup> Owen, *supra* note 21, at 962.

A plaintiff bringing an implied warranty of merchantability suit was required to have privity of contract with the manufacturer.<sup>26</sup> Privity of contract is “[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so.”<sup>27</sup> The privity requirement was detrimental to many plaintiffs’ recovery because manufacturers conducted most of their business through retailers.<sup>28</sup> Manufacturers and retailers were the parties to the contract; the plaintiff who purchased from the retailer was a third party who lacked privity of contract with the manufacturer, and, thus, could not recover under an implied warranty of merchantability theory.

Plaintiffs also brought products liability suits sounding in tort on the theory of negligence. Originally, American courts followed English courts’ requirements when it came to recovery in negligence for products liability.<sup>29</sup> In *Winterbottom v. Wright*,<sup>30</sup> the historical landmark case for products liability, the English Court of Exchequer held that “recovery in negligence against a manufacturer, wholesaler, or retailer for injuries associated with a defective product” required privity of contract between the plaintiff and the defendant, similar to the privity requirement for claims under the implied warranty of merchantability.<sup>31</sup> American courts followed this rule for about ten years before carving out an exception.<sup>32</sup>

In *Thomas v. Winchester*,<sup>33</sup> the New York Court of Appeals acknowledged the rule from *Winterbottom* but held that there need not be privity of contract “where the product involved ‘was imminently dangerous to human life.’”<sup>34</sup> Several other American courts adopted similar exceptions, though phrasing them in different ways.<sup>35</sup>

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<sup>26</sup> Gary E. Sullivan & Braxton Thrash, *Purchasers Lacking Privity Overcoming “The Rule” for Express Warranty Claims: Expanding Judicial Application of Common Law Theories and Liberal Interpretation of U.C.C. Section 2-318*, 5 DREXEL L. REV. 49 (2012).

<sup>27</sup> *Id.* at 50 (quoting BLACK’S LAW DICTIONARY 1320 (9th ed. 2009)).

<sup>28</sup> Sullivan & Thrash, *supra* note 26, at 51.

<sup>29</sup> Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 MARQ. L. REV. 555, 563 (2014).

<sup>30</sup> (1842) 152 Eng. Rep. 402, 10 M&W 109.

<sup>31</sup> Graham, *supra* note 29, at 561.

<sup>32</sup> Graham, *supra* note 29, at 563.

<sup>33</sup> 6 N.Y. 397 (1852).

<sup>34</sup> Graham, *supra* note 29, at 564 (quoting *Winchester*, 6 N.Y. at 408).

<sup>35</sup> Graham, *supra* note 29, at 564.

In 1916, the New York Court of Appeals, in *MacPherson v. Buick Motor Company*,<sup>36</sup> eliminated the privity requirement “where ‘the nature of [the product] is such that it is reasonably certain to place life and limb in peril when negligently made.’”<sup>37</sup> The opinion, written by Judge Benjamin Cardozo, has been summarized as follows:

[T]he imminent danger exception to privity was not limited to poisons, explosives, and other products which “in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected.” If the manufacturer of such a foreseeably dangerous product knows that it “will be used by persons other than the purchaser, and used without new tests then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.” Explaining the liberation of tort law from the law of contracts, Judge Cardozo proclaimed: “We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.”<sup>38</sup>

Not all courts followed *MacPherson* right away, but by 1982 the privity requirement had been all but abolished.<sup>39</sup>

There has been a myriad of unique products liability cases since *MacPherson*. Products liability suits have been brought against Applebees for failure to warn that a “sizzling skillet” with steak fajitas was hot,<sup>40</sup> against Subway for advertising sandwiches as foot longs when they were only eleven to eleven and a half inches,<sup>41</sup> against Arm

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<sup>36</sup> 111 N.E. 1050 (N.Y. 1916).

<sup>37</sup> Graham, *supra* note 29, at 565 (alteration in original) (quoting *MacPherson*, 111 N.E. at 1053).

<sup>38</sup> Owen, *supra* note 21, at 965 (citations omitted).

<sup>39</sup> Owen, *supra* note 21, at 966.

<sup>40</sup> Jimenez v. Applebee’s Neighborhood Grill & Bar, No. A-2247-13T2, 2015 N.J. Super. Unpub. LEXIS 430 (App. Div. Mar. 4, 2015).

<sup>41</sup> *In re Subway Footlong Sandwich Marketing and Sales Practices Litigation*, No. 13-02439, 2016 WL 755640 (E.D. Wis. Feb. 25, 2016).

& Hammer for having too much scent in its unscented deodorant,<sup>42</sup> and against McDonalds for serving coffee that was too hot.<sup>43</sup>

Today, there are three major types of product liability claims: manufacturing defect, design defect, and failure to warn.<sup>44</sup> A product “contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.”<sup>45</sup> A design defect occurs when the product’s “foreseeable risks of harm . . . could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe.”<sup>46</sup> A failure to warn claim arises when a product’s foreseeable risks “could have been reduced or avoided by the provision of reasonable instructions or warning by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warning renders the product not reasonably safe.”<sup>47</sup> The next section will discuss the application of these causes of action to plaintiffs injured by marijuana use.

#### A. Ingestion of a Product Causing Psychotic Behavior

Very few cases have dealt with claims based upon the ingestion of marijuana causing psychotic behavior because of the novelty of the product. However, there has been some litigation in states which have legalized marijuana. These cases give some insight into the types of injuries that a person can sustain from marijuana use as well as the causes of action that plaintiffs may bring if they are injured because of marijuana use.

*Kirk v. Nutritional Elements*<sup>48</sup> was a wrongful death suit alleging, *inter alia*, negligence for failure to warn, strict liability, and

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<sup>42</sup> Fogarty v. Church & Dwight Inc., No. 3:14-cv-07086 (D.N.J. 2014).

<sup>43</sup> Sindhu Sundar, *No Joke: 5 Strange But True Cases For April Fools*, LAW 360 (Mar. 31, 2016), <https://www.law360.com/articles/778132>; Liebeck v. McDonald’s Rests., P.T.S., Inc., No. CV-93-02419, 1995 WL 360309 (D.N.M. August 18, 1994).

<sup>44</sup> RESTATEMENT (THIRD) OF TORTS § 2 (AM. LAW INST. 1998).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Complaint for Damages and Jury Demand, *Kirk v. Nutritional Elements*, No. 2016CV31310 (Colo. Dist. Ct., Denver Cty. Apr. 13, 2016).

misrepresentation.<sup>49</sup> In *Kirk*, three minor children brought the wrongful death suit against an edible marijuana manufacturer, a retailer who sold the edible marijuana candy, and their father because the father shot and killed his wife, Kristine Kirk, after he ingested an edible marijuana candy manufactured by the defendant manufacturer, Gaia's Garden.<sup>50</sup> The Kirk children alleged that their father displayed psychotic behavior after ingesting the candy, which caused him to kill their mother.<sup>51</sup> The lawsuit was stayed for some time, pending the resolution of the father's criminal charges, but he eventually pled guilty to second-degree murder.<sup>52</sup> After the father pled guilty, the children reached a settlement with the marijuana retailer, Nutritional Elements.<sup>53</sup>

On its face, *Kirk* seems to be neoteric; however, examining the overarching issue of the case reveals that it may be a garden-variety products liability case. Although marijuana-related products liability lawsuits are new, the products liability claim is not novel. Lawsuits alleging that the ingestion of a product caused psychotic behavior date back at least twenty years.

In *Grundberg v. Upjohn Co.*,<sup>54</sup> the plaintiff sued the manufacturer of a legal prescription drug, Halcion, made to treat insomnia.<sup>55</sup> The plaintiff alleged that ingesting the drug caused her to shoot and kill her mother.<sup>56</sup> The plaintiff claimed that the manufacturer failed to adequately warn her of the adverse side effects of Halcion and that the drug was defectively designed.<sup>57</sup> In a similar claim against the manufacturer of Halcion, the plaintiff, in *Upjohn Co. v. Freeman*,<sup>58</sup>

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<sup>49</sup> *Id.* at 3-7.

<sup>50</sup> *Id.* at 2-4. Though the typical method for consuming marijuana is by smoking it, eating marijuana is quickly becoming a popular choice for many users. For a detailed discussion on marijuana edibles, from how they are made, to how they are regulated, to the challenges they present, see Daniel G. Barrus et al., *Tasty THC: Promises and Challenges of Cannabis Edibles*, NCBI, Nov. 2016, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5260817/>.

<sup>51</sup> Complaint for Damages and Jury Demand, *supra* note 48, at 2-4.

<sup>52</sup> Complaint for Declaratory Judgment, *United Specialty Ins. v. Gaia's Garden, LLC*, No. 1:17-cv-01113-NYW (D. Colo. May 4, 2017).

<sup>53</sup> *Id.*

<sup>54</sup> 813 P.2d 89 (Utah 1991).

<sup>55</sup> *Id.* at 90.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 885 S.W.2d 538 (Tex. App. 1994).

alleged that his use of defendant's sleeping pill caused him to be psychotic, paranoid, and delusional and to kill his friend.<sup>59</sup>

*Estate of John Anthony Sdao v. Makki & Abdallah Investments*<sup>60</sup> and *Tuck v. Wixom Smokers Shop*<sup>61</sup> were recent cases that involved the ingestion of "K2" or "spice," known as synthetic marijuana, and legal in many states.<sup>62</sup> In both cases, the plaintiffs sued the seller of the product, and alleged breach of warranty and negligence.<sup>63</sup> In *Estate of John Anthony Sdao*, the plaintiff's estate claimed that the decedent smoked K2 that he purchased from the defendants.<sup>64</sup> The plaintiff's estate argued that smoking K2 caused the decedent to become withdrawn, depressed, and to commit suicide.<sup>65</sup> In *Tuck*, the plaintiff, as guardian for his son, said that his son ingested K2 that he purchased from defendant's smoke shop.<sup>66</sup> The plaintiff alleged that after ingesting the K2, the plaintiff's son "started acting erratically, experienced hallucinations, and displayed severe episodes of paranoia."<sup>67</sup> Plaintiff stated that after smoking the K2, his son threatened to shoot a mailman and a newspaper carrier for coming to their home.<sup>68</sup> Finally, plaintiff argued that his son's ingestion of K2 caused the son to burn down the family home five days later.<sup>69</sup>

The above-mentioned cases share more similarities to each other than the allegation of psychotic behavior as the result of ingesting a mind-altering substance. None of these cases resulted in the plaintiff being awarded damages after a decision on the merits. Two cases, *Grundberg* and *Kirk*, were settled for undisclosed amounts. Two other cases, *Estate of John Anthony* and *Tuck*, resulted in the courts granting summary judgment to the defendants because the plaintiff could not establish causation. In *Freeman*, the jury found that the company was grossly negligent in dispensing the drug with a marketing defect, but

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<sup>59</sup> *Id.* at 540.

<sup>60</sup> No. 322646, 2016 WL 279635 (Mich. Ct. App. Jan. 21, 2016).

<sup>61</sup> No. 330784, 2017 WL 1034551 (Mich. Ct. App. Mar. 16, 2017).

<sup>62</sup> For a more detailed discussion on what K2 is and the dangers it presents, as well as the legality of the product, see Rachel Rettner, *Why Synthetic Marijuana Like K2 or Spice Can Cause "Really Bizarre" Symptoms*, CBS NEWS (Feb. 3, 2017, 1:35 PM), <https://www.cbsnews.com/news/why-synthetic-marijuana-k2-spice-weed-isnt-safe/>.

<sup>63</sup> See *Sdao*, 2016 WL 279635; *Tuck*, 2017 WL 1034551.

<sup>64</sup> *Sdao*, 2016 WL 279635, at \*1.

<sup>65</sup> *Id.* at \*2.

<sup>66</sup> *Tuck*, 2017 WL 1034551, at \*1-2.

<sup>67</sup> *Id.* at \*1.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

awarded no damages to the plaintiff because it did not find that the drug contributed to the plaintiff's injury.<sup>70</sup>

The major issue plaintiffs will likely face when bringing lawsuits related to marijuana is causation. First, the court in *Tuck* noted that the plaintiff could not point to the specific K2 product he purchased.<sup>71</sup> Second, the plaintiff also purchased K2 from other locations, so it was not apparent if the K2 that allegedly caused plaintiff's psychotic behavior even came from the defendant.<sup>72</sup> Third, the plaintiff smoked the K2 with others who shared their own K2 with the plaintiff, so again, it is unknown if it was the defendant's K2 that caused the plaintiff to exhibit psychotic behavior.<sup>73</sup> Moreover, none of the others who smoked the K2 with the plaintiff experienced any adverse effects, and the plaintiff used other drugs such as Xanax, Vicodin, and alcohol.<sup>74</sup> The plaintiff could not prove that his psychotic behavior was not caused by his combined drug and alcohol use.<sup>75</sup> Finally, there was a five-day gap between the plaintiff's ingestion of the K2 and his ultimate act of burning down his home.<sup>76</sup>

It is not hard to imagine that a plaintiff bringing a lawsuit against a manufacturer or retailer of marijuana would face similar causation issues. Marijuana is very similar to K2. It is possible that marijuana users will purchase several types of marijuana produced by different manufacturers but sold at the same dispensary. This would make it difficult for a plaintiff to prove which manufacturer's marijuana caused his injury. The same issue is exacerbated if plaintiffs visit several different dispensaries. Furthermore, marijuana is commonly smoked with others, making it difficult to establish causation because a plaintiff would be hard pressed to prove that the marijuana he purchased directly led to his injury as opposed to a third party's marijuana that he smoked.

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<sup>70</sup> *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 540-41 (Tex. App. 1994).

<sup>71</sup> *Tuck*, 2017 WL 1034551, at \*7.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at \*7-8.

<sup>75</sup> *Id.* at \*8.

<sup>76</sup> *Tuck*, 2017 WL 1034551, at \*8.

## B. Pesticide Cases

Another recent case, *Flores v. LivWell, Inc.*,<sup>77</sup> offers more insight into the variety of products liability claims that plaintiffs could bring and ways that marijuana can injure somebody. *Flores* was a class action suit against a company that grows and sells marijuana.<sup>78</sup> The plaintiffs in *Flores* alleged that defendant LivWell treated the marijuana plants with a dangerous fungicide, Eagle 20.<sup>79</sup> The plaintiffs claimed that Eagle 20 was harmful because it “ultimately breaks down into hydrogen cyanide, a well-known poison, when it is heated with a standard cigarette lighter,” and LivWell did not warn customers about this dangerous effect.<sup>80</sup> When people smoke marijuana treated with Eagle 20, they inhale this poisonous gas.<sup>81</sup> The plaintiffs claimed that they would not have paid as much for the marijuana, nor would they have inhaled it, if they had known that it had been treated with Eagle 20.<sup>82</sup> The court ultimately dismissed the case because it found that the plaintiffs had not alleged that they suffered physical or emotional injury.<sup>83</sup>

Like *Kirk*, *Flores* seems to be neoteric on its face, but again, taking a step back and looking at the overarching issue in the case

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<sup>77</sup> Plaintiff’s Class Action Complaint for Damages and Injunctive Relief, *Flores v. LivWell, Inc.*, No. 2015CV33528 (Colo. Dist. Ct., Denver Cty. Oct. 5, 2015).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* The conflict between state and federal law requires states to determine which pesticides are acceptable for use on marijuana. Jay Feldman, *Pesticide Use In Marijuana Production: Safety Issues And Sustainable Options*, 34 PESTICIDES & YOU 14 (2015), <https://www.beyondpesticides.org/assets/media/documents/watchdog/documents/PesticideUseCannabisProduction.pdf>. States are essentially “in the dark” on acceptable pesticides, because the Environmental Protection Agency (EPA), the federal agency tasked with regulating pesticides, will not take a position on what pesticides are acceptable for use on marijuana because the EPA considers marijuana to be a controlled substance. *Id.* at 14. Note that this presents an extreme danger to marijuana users, because unlike cigarettes, which are usually smoked with a filter, marijuana typically is not smoked with a filter and thus a higher percentage of the pesticides is inhaled. *Id.* at 15. For a detailed discussion of this issue, see generally *id.*

<sup>80</sup> Plaintiff’s Class Action Complaint for Damages and Injunctive Relief, *Flores v. LivWell, Inc.*, *supra* note 77.

<sup>81</sup> Plaintiff’s Class Action Complaint for Damages and Injunctive Relief, *Flores v. LivWell, Inc.*, *supra* note 77.

<sup>82</sup> Plaintiff’s Class Action Complaint for Damages and Injunctive Relief, *Flores v. LivWell, Inc.*, *supra* note 77.

<sup>83</sup> Order on Defendant LivWell’s Motion to Dismiss, *Flores v. LivWell, Inc.*, No. 2015CV33528 (Colo. Dist. Ct., Denver Cty. Feb. 11, 2016), <http://www.ettdefenseinsight.com/wp-content/uploads/2016/04/ORDER-ON-DEFENDANT-LIVWELLS-MOTION-TO-DISMISS.pdf>.

reveal that it is not so novel. The alleged harmful nature of smoking a product treated with a dangerous pesticide is an issue that has been litigated for at least the past twenty years.<sup>84</sup> Marijuana is not the first plant claimed to be dangerous after it is treated with a pesticide and smoked.<sup>85</sup> Products liability plaintiffs have previously alleged the danger of smoking a plant that has been treated with pesticides.

In *Green v. R.J. Reynolds Tobacco Co.*,<sup>86</sup> the plaintiffs, decedent's heirs, sued tobacco manufacturers for wrongful death.<sup>87</sup> The complaint alleged that after smoking cigarettes for almost forty-nine years, decedent died of cardiac arrest and chronic obstructive pulmonary disease.<sup>88</sup> The plaintiff asserted "various state law theories of recovery related to the dangerous and addictive nature of cigarettes and the cigarette manufacturers' failure to warn of that danger."<sup>89</sup> Plaintiff claimed, *inter alia*, that the cigarettes contained harmful pesticide residue.<sup>90</sup> The court dismissed the complaint because it found that a state statute barred the claims.<sup>91</sup>

In *Kotler v. American Tobacco Co.*,<sup>92</sup> the plaintiff sued a cigarette manufacturer when her husband died of lung cancer, allegedly caused by smoking the defendant manufacturer's cigarettes.<sup>93</sup> The plaintiff claimed that the cigarettes were defectively manufactured because the cigarette tobacco was dusted with a dangerous pesticide called Dimethyl Dichloro-Vinyl Phosphate, commonly referred to as DDVP.<sup>94</sup> The court summarily dismissed some of the claims because the plaintiff's experts could not "ascribe any causal connection between the use of DDVP (or any other identified additive) and the death of" the plaintiff.<sup>95</sup> The Federal

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<sup>84</sup> *Kotler v. American Tobacco Co.*, 731 F. Supp. 50 (D. Mass. 1990).

<sup>85</sup> *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263 (5th Cir. 2001).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 264.

<sup>88</sup> *Id.* at 265.

<sup>89</sup> *Id.*

<sup>90</sup> *Green*, 274 F.3d at 268.

<sup>91</sup> *Id.* at 268 (dismissing plaintiff's claims because the court found that the Texas Products Liability Act precluded "all state law claims against tobacco manufacturers excepting manufacturing defect and express warranty claims"). The court characterized the plaintiff's claims as design defects rather than manufacturing defects. *Id.* at 269.

<sup>92</sup> 731 F. Supp. 50 (D. Mass. 1990).

<sup>93</sup> *Id.* at 51.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

Cigarette Labeling Act preempted the other claims.<sup>96</sup> The failure to warn claim resulted in a directed verdict for the defendant and the jury returned a defendant's verdict on the negligence count.<sup>97</sup>

The set of cases alleging the harmful nature of smoking a plant treated with pesticides is similar to the set of cases alleging that the ingestion of a product caused psychotic behavior. Both sets of cases had similar outcomes: none of the cases resulted in a damages award by a jury.

The plaintiffs in the pesticide cases were not victorious for several reasons; one was causation, but the major reason was the preemption of claims against cigarette manufacturers and retailers. Although causation may be an issue in pesticide cases, preemption by statutory provisions constitutes a larger hurdle. Plaintiffs bringing cases similar to *Flores* will not have the same issue as the plaintiffs in *Kotler* and *Green* because there are not yet any statutes that preempt claims against marijuana manufacturers and retailers.

Not all plaintiffs will be injured by their own use of marijuana. In some instances, a party may be injured by a third-party's use of marijuana. The next section will discuss remedies for people injured because of a third-party's use of marijuana.

#### IV. THIRD-PARTY INJURY

This section will address a remedy that is currently available to plaintiffs injured by a person who was impaired due to excessive or underage alcohol consumption, and will suggest that this remedy should be available to a person injured by an individual who was impaired due to excessive or underage marijuana consumption.

##### A. Dram Shop Statutes

Dram shop statutes impose liability on a retailer that provides alcohol to an obviously intoxicated patron or a minor, who in turn

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<sup>96</sup> *Id.* The Federal Cigarette Labeling Act states that “[n]o requirement or prohibition based on smoking or health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.” 15 U.S.C. § 1334 (2018).

<sup>97</sup> *Kotler*, TOBACCO ON TRIAL, [http://www.tobaccoontrial.org/?page\\_id=584](http://www.tobaccoontrial.org/?page_id=584) (last visited Oct. 25, 2018).

injures a third-party due to their intoxication.<sup>98</sup> The term “dram,” which originated in eighteenth century England, refers to the measurement that liquor was sold, which was one-eighth of a liquid ounce or approximately one teaspoon. Dram shop liability, which was first introduced as a legal principle in the nineteenth century,<sup>99</sup> arises out of tort liability and can be established through statutory codification by the legislature or can be created by the courts through the common law.<sup>100</sup> The first dram shop statutes were enacted in the mid-nineteenth century, but went into disuse after the Eighteenth Amendment was ratified and Prohibition went into effect.<sup>101</sup> After the ratification of the Twenty-first Amendment, which ended Prohibition, the dram shop statutes were repealed or disregarded.<sup>102</sup> At that time, courts generally held that “the drinker causing the injury was a ‘superseding’ or ‘intervening cause’ of the injury and was considered entirely responsible for any resulting harm, overriding any negligent behavior by the server.”<sup>103</sup>

By the 1960s, state courts began to impose liability on both the patron and retailer for any harm to third parties that resulted from excessive alcohol consumption. This judicial action prompted many state legislatures to enact laws that enforced the same liability.<sup>104</sup> In fact, the Supreme Court of New Jersey was the first court to impose liability upon a tavern keeper.<sup>105</sup>

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<sup>98</sup> James F Mosher et al., *Commercial Host (Dram Shop) Liability Current Status and Trends*, 45 AM. J. PREVENTIVE MED. 347 (2013). For example, New York’s Dram Shop statute states, in part, that:

[a]ny person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2018).

<sup>99</sup> Mosher et al., *supra* note 98.

<sup>100</sup> Mosher et al., *supra* note 98.

<sup>101</sup> Mosher et al., *supra* note 98; U.S. CONST. amend. XVIII.

<sup>102</sup> Mosher et al., *supra* note 98. U.S. CONST. amend. XXI.

<sup>103</sup> Mosher et al., *supra* note 98.

<sup>104</sup> Mosher et al., *supra* note 98.

<sup>105</sup> 156 A.2d 1 (N.J. 1959).

In *Rappaport v. Nichols*,<sup>106</sup> defendant Robert Nichols, who was 18-years-old, was served alcohol at the second defendant's tavern.<sup>107</sup> Nichols was a minor who could not lawfully be sold alcohol.<sup>108</sup> Nichols eventually left the bar, intoxicated, and got behind the wheel of his mother's car.<sup>109</sup> About fifteen to twenty minutes after leaving defendant's tavern, Nichols was operating his mother's vehicle in a careless manner and collided with a car operated by the plaintiff's son, who was killed in the collision.<sup>110</sup> The trial court granted the defendants' summary judgment for failure to state a claim because New Jersey law did not hold a person "responsible for the actions of another to whom he has served intoxicating liquors."<sup>111</sup> The plaintiff appealed to the Appellate Division, but the Supreme Court of New Jersey certified the matter on its own motion.<sup>112</sup>

The Supreme Court of New Jersey reversed and reasoned that "[w]hen alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen."<sup>113</sup> Furthermore, the court held:

If the patron is a minor or is intoxicated when served, the tavern keeper's sale to him is unlawful; and if the circumstances are such that the tavern keeper knows or should know that the patron is a minor or is intoxicated, his service to him may also constitute common law negligence.<sup>114</sup>

By 1991, thirty-nine states and the District of Columbia recognized some form of dram shop liability: thirty-five states by way of statute, and four states plus the District of Columbia as a matter of common law.<sup>115</sup> In states that recognize dram shop liability as a matter

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<sup>106</sup> *Id.* at 1.

<sup>107</sup> *Id.* at 3.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Rappaport*, 156 A.2d at 3.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 8.

<sup>114</sup> *Id.* at 9.

<sup>115</sup> Frank A. Sloan, *Tort Liability Versus Other Approaches for Deterring Careless Driving*, 14 INT'L REV. L. & ECON. 53 (1994).

of common law, a plaintiff will generally have to satisfy the elements of negligence.<sup>116</sup> The plaintiff would have to prove that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty of care; (3) the breach of the duty caused the injury; and (4) the plaintiff suffered damages.<sup>117</sup>

Today, about two-thirds of states have enacted dram shop statutes.<sup>118</sup> The statutes vary significantly from state to state, though essentially all dram shop statutes require that “the service must contribute to intoxication, and the intoxication must cause the injury that is the basis of the complaint.”<sup>119</sup> States vary on the interpretation of service (i.e., whether service means only a sale of an intoxicating beverage or includes a gift of an intoxicating beverage).<sup>120</sup> States also vary on the potential defendants that can be held liable in a dram shop statute lawsuit.<sup>121</sup> Many states limit potential defendants to commercial vendors of alcoholic beverages, but some states have extended liability to social hosts.<sup>122</sup> Moreover, states differ on the standard of intoxication needed to satisfy the statute.<sup>123</sup> Some states prohibit the service of an alcoholic beverage to a person who is intoxicated, while other states prohibit service to the “visibly intoxicated” or some other variation.<sup>124</sup>

## B. Gram Shop Statutes

Although alcohol is similar to marijuana in many ways, states that have legalized marijuana recreationally are not required to extend their current dram shop laws, if they have enacted them, to include marijuana consumption. Thus far, no state has passed or proposed a “gram shop statute” that would be the marijuana-equivalent to a “dram shop statute.” This does not mean, however, that liability could not be imposed upon a dispensary that sold marijuana to an already impaired

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<sup>116</sup> 4 PREMISES LIABILITY—LAW AND PRACTICE § 19.02 (2018).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> 1 LIQUOR LIABILITY LAW § 2.02 (2017).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* The term “social host” has been defined as “a person who furnishes another with alcohol in a social setting and not as a licensed vendor.” *Social Host*, FINDLAW, <http://dictionary.findlaw.com/definition/social-host.html> (last visited Oct. 25, 2018).

<sup>123</sup> 1 LIQUOR LIABILITY LAW, *supra* note 119.

<sup>124</sup> 1 LIQUOR LIABILITY LAW, *supra* note 119.

or underage customer. Some anti-marijuana organizations are attending listening sessions conducted by the committees responsible for regulating the marijuana industry with the hope of swaying the committees toward imposing liability on marijuana vendors by extending current dram shop laws or enacting new, more inclusive dram shop laws.<sup>125</sup> Even without any future legislation, either by extension of current statutes or the enactment of new ones, courts may be inclined to hold marijuana vendors liable through common law negligence, as they have done with alcohol vendors in the past.<sup>126</sup>

Plaintiffs may have a problem establishing liability even if legislatures or courts decide to extend dram shop type liability to marijuana vendors. Currently, no state that has legalized marijuana for recreational purposes allows customers to smoke marijuana in public or at a dispensary where it is purchased.<sup>127</sup> Voters in Denver, Colorado

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<sup>125</sup> Colin A. Young, *Legal Pot Opponents Urge Cannabis Commission To 'Protect The People'*, METROWEST DAILY NEWS (Oct. 12, 2017), <http://www.metrowestdailynews.com/news/20171012/legal-pot-opponents-urge-cannabis-commission-to-protect-people>.

<sup>126</sup> See *supra* Section IV.A and accompanying text.

<sup>127</sup> See Angela Brown, *Where You Can And Can't Smoke Pot In Washington State*, TRIPSAVVY (Aug. 27, 2018), <https://www.tripsavvy.com/washington-marijuana-smoking-regulations-4134899> (discussing Washington State's smoking regulations). Washington allows the use of marijuana on private property but requires the user to be outside the view or smell of the general public. *Id.* Legislation regarding marijuana social clubs is under review, but unlikely to be enacted. *Id.* See also *Washington DC*, TWOTENTWICE, <http://twotentwice.com/washington-dc/> (last visited Oct. 25, 2018) (discussing Washington DC marijuana regulations); Gillian Graham, *Recreational Marijuana Is Now Legal In Maine. Here's What You Need To Know*, PRESS HERALD, <http://www.pressherald.com/2017/01/30/recreational-marijuana-is-now-legal-in-maine-heres-what-you-need-to-know/> (last updated Sept. 13, 2017) (discussing Maine's marijuana regulations). As of now, a person may only use marijuana on private property. *Id.* The initial voter approved referendum included marijuana social clubs, but lawmakers have since eliminated the social club license aspect. *Id.*; *Marijuana Initiative FAQs*, ALASKA DEP'T HEALTH & SOC. SERVICES, <http://dhss.alaska.gov/dph/Director/Pages/marijuana/law.aspx> (last visited Oct. 25, 2018) (explaining Alaska's law that bans all public use of marijuana); Melina Delkic, *L.A. Approves Marijuana Rules For Recreational Dispensaries*, NEWSWEEK (Sept. 26, 2017), <http://www.newsweek.com/marijuana-los-angeles-california-legalization-weed-671171> (discussing California's marijuana regulations); Gerry Tuoti, *5 Things to Know About Marijuana in Massachusetts*, METROWEST DAILY NEWS (Nov. 10, 2017), <http://www.metrowestdailynews.com/news/20171110/5-things-to-know-about-marijuana-in-massachusetts> (explaining Massachusetts' marijuana regulations); *FAQs: Personal Use*, OREGON.GOV, <http://www.oregon.gov/olcc/marijuana/Pages/FAQs-Personal-Use.aspx> (last visited Oct. 25, 2018) (discussing Oregon's marijuana regulations); *Tourists Buying Marijuana in Las Vegas Have Nowhere to Smoke It in Las Vegas*, NPR (July 31, 2017, 4:40PM), <https://www.npr.org/2017/07/31/540652545/tourists-buying-marijuana-in-las-vegas-have-nowhere-to-smoke-it-in-las-vegas> (discussing Nevada's marijuana regulations); Daniel Shortt, *Social Cannabis Consumption: Will Denver Lead Us?*, CANNA L. BLOG (Nov.

approved the Limited Social Marijuana Consumption Initiative, which allows businesses to apply for permits for social consumption.<sup>128</sup> This initiative is a pilot program that Denver’s City Council will review in 2020.<sup>129</sup> The program’s rules are very restrictive, and mandate “a 1,000-foot buffer between a social-consumption area and any school, child-care establishment, drug or treatment facility, city park, pool or recreation center.”<sup>130</sup> Furthermore, businesses with marijuana sale licenses, such as marijuana dispensaries, cannot apply for a social consumption permit; patrons of these marijuana social clubs will have to provide their own marijuana.<sup>131</sup> Business owners that are granted a permit through the Limited Social Marijuana Consumption Initiative must also follow the state’s ban on indoor smoking, though indoor vaping and outdoor smoking are allowed.<sup>132</sup>

Plaintiffs would have an increasingly difficult time establishing liability on the part of the “server” in states that have legalized marijuana but have restricted its use to private places or “social clubs” where patrons can consume but not purchase marijuana. In states which limit marijuana use to private places, a plaintiff may purchase marijuana at a dispensary but not consume it there, making it difficult to establish that the dispensary “over served” the customer. At a bar, the bartender serves a customer drinks, and, therefore, should know approximately how many drinks the patron receives. A bartender also has the opportunity to see a change in the patron’s behavior, which makes it easier for the bartender to notice when a patron is approaching or exceeding the point of intoxication. However, an employee at a marijuana dispensary does not have the same opportunity. At a dispensary, an employee would have to determine whether a customer

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28, 2016), <https://www.cannalawblog.com/consuming-cannabis-in-public-will-denver-lead-us/> (discussing Colorado’s marijuana regulations).

<sup>128</sup> Thomas Mitchell, *Denver Businesses Can Now Apply For Social Consumption Permits*, WESTWORD (Aug. 24, 2017, 2:22 PM), <http://www.westword.com/marijuana/denver-businesses-can-start-applying-for-social-consumption-spaces-9407330>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Jon Murray, *Denver’s First Application For a Social Marijuana Use License Aims To Allow Pot In a Coffee Shop*, DENVER POST, <https://www.denverpost.com/2017/12/11/denvers-social-marijuana-use-license-application/> (last updated Dec. 16, 2017, 6:36 PM).

<sup>132</sup> *Id.* Vaping is “the act of inhaling and exhaling the aerosol, often referred to as vapor, which is produced by an e-cigarette or similar device.” Linda Richter, *What is Vaping?*, CTR. ON ADDICTION (Oct. 2018), <https://www.centeronaddiction.org/e-cigarettes/recreational-vaping/what-vaping>.

who enters a dispensary is impaired, by alcohol or marijuana, in order to decide if he or she can lawfully sell this person marijuana.

Unlike impairment by alcohol, determining whether a patron is impaired by marijuana can create challenges for the employee because it will not always be evident whether a patron, indeed, is under the influence of marijuana upon entry to the dispensary. Furthermore, an employee does not know when the customer plans on consuming the marijuana; the patron might not wish to consume the marijuana immediately. Many different factual scenarios can impede a plaintiff's ability to establish liability on the part of a marijuana dispensary or server. For example, an impaired person enters a dispensary to purchase marijuana that he intends to consume at some later time. This customer could be impaired because he consumed marijuana that he purchased when he was not impaired. The employee then sells this impaired customer marijuana and the customer leaves the store and injures somebody. The dispensary that sold this person marijuana when he was not impaired surely cannot be held liable for this accident because he was not impaired when he bought it. It would also not be just to hold the dispensary liable for selling this customer marijuana because the marijuana it just sold to him did not contribute to his impairment that caused the injury—the customer has not yet used the marijuana that he just purchased.

Another plausible, yet problematic, scenario occurs when a sober customer enters a marijuana dispensary and legally buys marijuana. This customer goes a short distance from the dispensary while still on its property, consumes the marijuana, and becomes impaired. The customer then drives away from the location and injures somebody. Again, it would be unjust to impose liability on the dispensary because the customer was sober when he purchased the marijuana, and the dispensary was unaware of the customer's intent to consume the marijuana on the premises. States that do not allow the consumption of marijuana at the dispensary where it was purchased should take these issues into account in order to protect people injured by a person impaired from marijuana use.

Plaintiffs may also have difficulty establishing liability for social clubs that allow marijuana consumption. Unlike bars serving alcohol and dispensaries selling marijuana, social clubs will not be providing patrons with marijuana. This presents an issue for plaintiffs, as many dram shop statutes require service of an intoxicating beverage. A gram shop statute requiring the service of marijuana would not apply

if somebody who consumed marijuana at a social club injures another. Because the social club did not furnish the marijuana to the customer, a plaintiff would not be able to establish the “service” requirement. Thus, gram shop laws will not protect people injured by a person impaired from marijuana use at a social club if states do not take the absence of “service” at social clubs into account when drafting the statute.

Another potential issue arises when testing the level of marijuana impairment. In Colorado, drivers “with five nanograms of active tetrahydrocannabinol (THC) in their whole blood can be prosecuted for driving under the influence.”<sup>133</sup> When a blood test indicates that a person has more than five nanograms of THC in his blood, he is presumed impaired.<sup>134</sup> One of the major problems with the test is that THC can sometimes stay in the blood for a long period of time.<sup>135</sup>

Ethanol, the chemical in alcoholic drinks, dissolves in water, and “[b]ecause humans are mostly water, it gets distributed fairly quickly and easily throughout the body and is usually cleared within a matter of hours.”<sup>136</sup> THC, on the other hand, dissolves in fat.<sup>137</sup> The length of time THC stays in the body differs from person to person, and is “influenced by things like gender, amount of body fat, frequency of use, and the method and type of cannabis product consumed.”<sup>138</sup> One study showed that THC could stay in the blood for up to a month.<sup>139</sup> According to the study, people who frequently smoke large amounts of marijuana can test “above the 5-nanogram level for several days after they had stopped smoking.”<sup>140</sup> Another study indicated that a person who infrequently smokes marijuana could smoke marijuana,

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<sup>133</sup> *FAQs: Cannabis And Driving*, COLO. DEP’T TRANSP., <https://www.codot.gov/safety/alcohol-and-impaired-driving/druggeddriving/marijuana-and-driving> (last visited Oct. 25, 2018). THC is “[t]he main psychoactive (mind-altering) chemical in marijuana, responsible for most of the intoxicating effects that people seek.” *Marijuana*, NAT’L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/research-reports/marijuana/what-marijuana> (last updated June 2018).

<sup>134</sup> Rae Ellen Bichell, *Scientists Still Seek A Reliable DUI Test For Marijuana*, NPR (July 30, 2017, 7:14 AM), <https://www.npr.org/sections/health-shots/2017/07/30/523004450/scientists-still-seek-a-reliable-dui-test-for-marijuana>.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Bichell, *supra* note 134.

<sup>140</sup> Bichell, *supra* note 134.

then submit to a blood test, and not have any THC register in the blood test.<sup>141</sup> These studies show how unworkable a test measuring THC in the blood is, and, consequently, how hard it is to establish that a person is impaired by marijuana use.

## V. SUGGESTED SOLUTIONS

### A. Suggestions for Products Liability Plaintiffs

Despite scenarios that will make proving causation extremely difficult, solutions exist for those harmed by psychotic behavior caused by marijuana consumption.<sup>142</sup> There will be no way around the causation issue if a plaintiff cannot point to the specific marijuana that caused the psychotic behavior. Fortunately, this will not always be an issue, as was demonstrated in the *Kirk* case.<sup>143</sup> Although a judge or a jury never heard that case and it is often difficult to draw conclusions from settlement agreements, the settlement itself indicates that the plaintiffs might have been able to prove causation at trial.<sup>144</sup>

Several pieces of evidence would have helped the plaintiffs in *Kirk* prove causation at trial.<sup>145</sup> First, the plaintiffs were able to point to the exact product that allegedly caused their father's psychotic behavior.<sup>146</sup> A receipt in the plaintiffs' home and surveillance cameras in the dispensary revealed that the plaintiffs' father purchased "Karma Kandy Orange Ginger," an edible marijuana candy.<sup>147</sup> These pieces of evidence identified not only the product the plaintiffs' father purchased, but also the retailer (Defendant Nutritional Elements) and manufacturer (Defendant Gaia's Garden). Furthermore, the alleged psychotic behavior took place on the same day that the plaintiffs' father ingested the marijuana edible.<sup>148</sup>

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<sup>141</sup> Bichell, *supra* note 134.

<sup>142</sup> See *supra* Section III.A and accompanying text.

<sup>143</sup> Complaint for Damages and Jury Demand, *Kirk v. Nutritional Elements*, No. 2016CV31310 (Colo. Dist. Ct., Denver Cty. Apr. 13, 2016).

<sup>144</sup> Emma Gannon, *Insurer Refuses To Cover Marijuana Candy Murder*, COURTHOUSE NEWS SERV. (May 8, 2017), <https://www.courthousenews.com/insurer-refuses-cover-marijuana-candy-murder/>.

<sup>145</sup> Stephanie Slifer, *Pot Shop Pulls Edibles From Shelves Following Deadly Shooting*, CBS NEWS (Apr. 18, 2014, 4:03 PM), <https://www.cbsnews.com/news/pot-shop-pulls-edibles-from-shelves-following-deadly-shooting/>.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

The plaintiffs in the *Kirk* case also could have used the recorded 911 phone-call to prove causation. During the call, the children's mother reported to the operator that her husband had ingested a marijuana edible and shortly after began acting erratically and hallucinating.<sup>149</sup> The police also found a partially consumed marijuana edible at the crime scene.<sup>150</sup> Lastly, a toxicology test from the night of the incident showed that the plaintiffs' father's blood contained 2.3 nanograms of THC per milliliter.<sup>151</sup>

As noted above, the court in *Tuck* held that the plaintiff could not establish causation, in part, because he could not establish exactly which product caused his psychotic behavior because he purchased K2 at several stores and simultaneously used his friends' K2.<sup>152</sup> The court also held that the plaintiff failed to establish causation because of the gap in time between his use of the K2 and the actual incident that took place five days later.<sup>153</sup> The evidence that the plaintiffs had in *Kirk* was much more convincing and would have placed the plaintiff in *Tuck* in a better position to establish causation.<sup>154</sup> Looking forward, causation in these cases will be very fact sensitive, and the plaintiff's ability to establish causation will vary depending on the circumstances.

Alternatively, it is difficult to make suggestions at this time for plaintiffs alleging that marijuana was sprayed with dangerous pesticides. Plaintiffs will not have difficulty bringing successful lawsuits if they are injured from the use of marijuana that has been treated with a dangerous pesticide as long as statutes that preempt these types of claims are not enacted.<sup>155</sup>

## B. Suggestions for Gram Shop Statutes

When drafting a gram shop statute, legislators should consider the unique issues that the marijuana industry presents. Furthermore,

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<sup>149</sup> *Id.*

<sup>150</sup> Kirk Mitchell & Jesse Paul, *Richard Kirk, Accused In Observatory Park Slaying Of His Wife, Pleads Guilty To Second-Degree Murder*, DENVER POST (Feb. 3, 2017, 9:52 AM), <https://www.denverpost.com/2017/02/03/richard-kirk-observatory-park-murder/>.

<sup>151</sup> *Id.*

<sup>152</sup> *Tuck v. Wixom Smokers Shop*, No. 330784, 2017 WL 1034551 (Mich. Ct. App. Mar. 16, 2017).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> See *supra* Section III and accompanying text.

additional legislation that lawmakers enact, aside from an actual gram shop statute, can make these statutes more effective.

Plaintiffs will have to establish the “service requirement” if they are injured by somebody who consumed marijuana at a social club where patrons are required to provide their own marijuana.<sup>156</sup> This is similar to a “bring your own booze” (hereinafter “BYOB”) establishment. Some states, such as Colorado, have addressed the BYOB establishment issue by extending dram shop liability to a person who knowingly provides a place to drink to a person under the age of twenty-one.<sup>157</sup> Although this law does not extend dram shop liability to a person who knowingly provides a place to drink to anybody regardless of their age, a gram shop statute should eliminate the age requirement. In order to protect people who are injured by somebody who used marijuana at a social club, a gram shop statute should provide that a social club is liable when it knowingly allows a patron to become impaired, leading to an injury of a third-party.<sup>158</sup>

In addition, a person can go into a dispensary while he is impaired and purchase marijuana.<sup>159</sup> In this case, the patron injures somebody after leaving the dispensary, but he has not yet consumed the newly purchased marijuana. To address this issue, a statute should be in place that forbids the sale of marijuana to an impaired person. Some states, such as New York, have dealt with this problem by making it a crime to sell alcohol to somebody who is visibly intoxicated.<sup>160</sup> States that legalize recreational marijuana should enact similar legislation that would make it a crime to sell marijuana to somebody who is visibly impaired. The State Liquor Authority in New York also recommends that all employees who serve or sell alcoholic

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<sup>156</sup> See *supra* Section IV and accompanying text.

<sup>157</sup> See COLO. REV. STAT. § 44-3-801 (2018). The Colorado statute states:

[n]o social host who furnishes any alcohol beverage is civilly liable to any injured individual . . . for any injury to such individual . . . because of the intoxication of any person due to the consumption of such alcohol beverages, except when. . . [i]t is proven that the social host knowingly served any alcohol beverage to such person who was under the age of twenty-one years or knowingly provided the person under the age of twenty-one a place to consume an alcoholic beverage . . . .

*Id.* § 44-3-801(4)(a).

<sup>158</sup> See *supra* Section IV and accompanying text.

<sup>159</sup> See *supra* Section IV and accompanying text.

<sup>160</sup> Andrew M. Cuomo, *State Liquor Authority Handbook For Retail Licensees*, N.Y. ST. LIQUOR AUTHORITY, Sept. 6, 2013, <https://www.sla.ny.gov/system/files/StateLiquorAuthority-RetailLicenseesHandbook.pdf>.

beverages take an “Alcohol Training Awareness Program” to help identify intoxicated patrons.<sup>161</sup> States legalizing recreational marijuana should also have some type of training program to help employees identify impaired patrons, which addresses the issue of the difficulty in assessing whether somebody is under the influence of marijuana.

Finally, a sober customer can purchase marijuana and subsequently go into the parking lot of the dispensary and consume that marijuana.<sup>162</sup> States legalizing recreational marijuana use should consider this possibility and require dispensaries to take reasonable security measures to police their premises to stop this foreseeable misuse of their property.

## VI. CONCLUSION

Current civil liability laws do not address the unique issues presented by the recreational marijuana industry. While some laws, such as product liability laws, are adequate to impose liability on tortfeasors, others are not. The absence of gram shop laws makes the current civil scheme inadequate to protect citizens who are injured by somebody else’s use of marijuana. Though courts may in essence “save the day” by imposing liability through the common law, state legislators should be proactive in protecting their citizens, as they are in a better position to do so than the judiciary branch. State legislators should thoroughly investigate the liability scheme in their respective states to protect innocent bystanders from injury caused by recreational marijuana use.

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<sup>161</sup> *Id.*

<sup>162</sup> *See supra* Section IV and accompanying text.