Torts: Pied Piper Doctrine--Right of Recovery of Children Attracted into Street by Vendors for Injury by Another Vehicle

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NOTES AND COMMENTS

TORTS: PIED PIPER DOCTRINE—RIGHT OF RECOVERY OF
CHILDREN ATTRACTED INTO STREET BY VENDORS FOR
INJURY BY ANOTHER VEHICLE

What could be more musical and appealing to a child on a hot, sum-
mer day than the sound of bells of an approaching ice cream wagon? What could be more refreshing than a few chips of ice from an un-
guarded ice truck? How can any person help but recognize the strong
attraction upon children that these things exert? Realizing this attraction,
one wonders what duty, if any, vendors owe infants they have attracted. In
particular, is the vendor liable if attracted children are injured by another
vehicle? In answering this question, courts have considered several views
of negligence and have arrived at many different results. One of the first
facets raised is violation of a statute or ordinance.

VIOLATION OF STATUTE OR ORDINANCE

The standard of conduct demanded of a reasonable man may be
determined by legislative enactment. 1 Legislation often demands that
citizens do or refrain from doing certain acts. The weight given to the
negligence resulting from noncompliance varies from one jurisdiction to
another. 2 Some courts hold that since most of these statutes or ordinances
are penal in nature, no civil liability will arise solely from their violation. 3
The opposite is true in the majority of jurisdictions and violation can give
rise to a civil cause of action. 4

That an ordinance, as opposed to a statute, is violated has significance
in some jurisdictions. Some courts hold that violation of an ordinance is
less evidence of negligence than is violation of a statute. 5 Several courts
hold that only when the ordinance is a codification of a common law
duty can the violation be negligence as a matter of law. 6 A few jurisdic-
tions refuse to predicate defendant's liability upon violation of an ordi-
nance enacted for the protection of the city, as opposed to one for the

1 RESTATEMENT (SECOND), TORTS § 285(a) (1965).
3 Barboza v. Decas, 311 Mass. 10, 40 N.E.2d 10 (1942); Samuel D. Wass-
erman, Inc. v. Klahre, 24 N.J. Super. 143, 93 A.2d 628 (1952); Behler v. Daniels,
19 R.I. 49, 31 Atl. 582 (1895).
4 38 AM. JUR. NEGLIGENCE § 158, at 827 n.20 (1941).
5 Carlock v. Westchester Lighting Co., 268 N.Y. 345, 197 N.E. 306 (1935);
Weeks v. McNulty, 101 Tenn. 495, 48 S.W. 809 (1898).
6 AM. JUR. NEGLIGENCE § 168, at 842 & n.10 (1941).

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protection of the lives and property of the citizens. On the basis that only the state has this power, some courts hold that violation of a municipal ordinance cannot create civil liability against the defendant. However, the majority and more modern view is that there is very little difference between a statute and an ordinance as far as defendant's liability in negligence for its violation.

Before a defendant's violation of an ordinance or statute is considered negligence as a matter of law, the plaintiff must show that he was within the class of persons the law intended to protect; that the injury suffered was one that the statute attempted to prevent; and that the violation was proximate cause of his injury. In determining if the plaintiff is within the class the statute was aimed at protecting, the court will look to the purpose, language, and legislative history of the statute. Another criterion is to determine the nature of the duty imposed; thus, a broad duty towards citizens at large ordinarily will cover all persons injured by violation. The plaintiff must do more than show that if the defendant had not violated the statute, no injury would have resulted. He must show that the injury was the particular hazard the statute attempted to prevent. Finally, the plaintiff must prove that defendant's violation was a proximate cause of the injury. Defendant is not liable for violating a statute if the injury would have occurred without the violation.

In most jurisdictions once the court has determined that the statute is applicable, it directs the jury that the unexcused violation is conclusive on the issue of negligence. This is negligence per se. Some courts, how-

9 38 AM. JUR. Negligence § 168, at 842 n.17 (1941); PROSSER, TORTS § 35, at 203 n.81 (3d ed. 1964).
10 PROSSER, TORTS § 35 (3d ed. 1964); RESTATEMENT (SECOND), TORTS § 286 (1965).
14 38 AM. JUR. Negligence § 166, at 837 n.16 (1941).
16 38 AM. JUR. Negligence § 158, at 827 & n.20 (1941); PROSSER, TORTS § 35, at 202 & n.73 (3d ed. 1964); RESTATEMENT (SECOND), TORTS § 288B (1965).
ever, hold that the violation raises a rebuttable presumption of negligence, which demands a binding instruction if not countered.\textsuperscript{17} A third view considers the violation as only evidence of negligence to be accepted or rejected by the jury.\textsuperscript{18} Some courts in the majority follow the third view when the violation is of an ordinance or traffic law and not a statute.\textsuperscript{18}

In \textit{Mead v. Parker},\textsuperscript{20} the court held that the ordinance against parking on the wrong side of the street was for the control of vehicular traffic and not for the protection of pedestrians. Thus, the pedestrian plaintiff was not within the class of persons the ordinance intended to protect.

In cases of double parking in violation of statute, the plaintiff's biggest difficulty lies in proving the violation was a proximate cause of the injury. In \textit{McKay v. Hedger},\textsuperscript{24} the court held that the statute against double parking was enacted to provide both pedestrians and vehicular traffic with unobstructed use of the highway. In that case a child ran from behind a parked truck and was struck by another auto. The court agreed with the finding of the jury that defendant's double parking was the proximate cause of the accident.\textsuperscript{22}

In \textit{Landers v. French's Ice Cream Co.},\textsuperscript{23} the defendant was parked four feet from the curb in violation of a city ordinance forbidding the parking of vehicles at a distance more than six inches from the curb. The plaintiff, standing across the street from defendant's truck, was hurt when the driver of one of two racing automobiles swerved to avoid hitting the truck, slammed on his brakes upon seeing plaintiff, and skidded across the street. The court held the violation of the ordinance raised a jury question whether the manner of parking was a concurring proximate cause of the event. In \textit{Saulibury v. Williams},\textsuperscript{24} and \textit{Vought v. Jones},\textsuperscript{25} the Virginia court held it a jury question whether parking at the side of a road so obstructed the highway as to render use of the highway danger-

\textsuperscript{17} 38 AM. JUR. Negligence § 158, at 829 nn.1 & 2 (1941); PROSSER, TORTS § 35, at 202 n.79 (3d ed. 1964).
\textsuperscript{18} 38 AM. JUR. Negligence § 158, at 829 nn.3 & 4 (1941); PROSSER, TORTS § 35, at 202 n.80 (3d ed. 1964).
\textsuperscript{20} 340 F.2d 157 (6th Cir. 1965).
\textsuperscript{21} 139 Cal. App. 266, 34 P.2d 221 (1934).
\textsuperscript{24} 205 Va. 727, 139 S.E.2d 816 (1964).
\textsuperscript{25} 205 Va. 719, 139 S.E.2d 810 (1965).
ous within the meaning of the statute. Further, the juries were correct in finding that the negligence of the defendants were proximate causes of the accidents, and the negligence of other motorists involved were at most concurring causes.

It should be noted that in the above cases, where the defendants violated an applicable statute, the courts did not base liability solely upon the violation. However, as will be shown shortly, these violations were considered important factors in finding defendants liable.

ATTRACTIVE NUISANCE

Those jurisdictions which accept this doctrine hold:

That one who maintains upon his premises a condition, instrumentality, machine, or other agency which is dangerous to children of tender years by reason of their inability to appreciate the peril therein, and which may reasonably be expected to attract children of tender years to the premises, is under a duty to exercise reasonable care to protect them against the dangers of the attraction. 26

On the theory that an owner can expect the presence of children, this doctrine is extended in many cases to dangerous instrumentalities on the highways. 27 One of the important conditions of liability under this doctrine is that the injury be caused either by the instrumentality itself or by something with which the instrumentality has brought the infant in contact. 28

While courts uniformly have rejected the application of this doctrine to vendors or hucksters, their reasons have been anything but consistent. One of the first cases to reject the doctrine was Baker-Evans Ice Cream Co. v. Tedesco. 29 Here the plaintiff and other children gathered around the parked ice truck of the defendant while the driver was making a delivery. When he returned, he yelled at them and the plaintiff ran into the road where she was hit by an automobile. Without explaining their reasons, the court held the doctrine did not apply to the facts and circumstances. The absence of an explanation can be understood from Ohio's dislike and almost complete rejection of the doctrine. 30 In another ice-truck case, Ice Delivery Co. v. Thomas, 31 the Kentucky court, in holding that an ice truck is not an attractive nuisance, pointed out that the tendency of more recent cases is to restrict, rather than broaden, the appli-

27 38 Am. JUR. Negligence § 154, at 823 & n.11 (1941).
28 38 Am. JUR. Negligence § 151, at 818 n.14 (1941).
29 114 Ohio St. 170, 150 N.E. 745 (1926).
31 290 Ky. 230, 160 S.W.2d 605 (1942).
cation of the doctrine. In a third case, Coffey v. Oscar Mayer Co.,33 the Wisconsin court bottomed its refusal to treat an ice truck as an attractive nuisance on the basis that it is not an inherently dangerous instrumentality. It also pointed to the trend limiting the doctrine. While not mentioning the attractive nuisance doctrine, the court in McKay34 arrived at virtually the same result.

Although rejecting the doctrine, courts are presented with a closer question when the defendant does affirmative acts to attract children to his vehicle. In Sidders v. Mobile Softee, Inc.,4 the defendant was charged with operating at night a brightly lighted ice cream vending truck with bell and loud speaker and inducing the infant plaintiff to cross the street. This, allegedly, resulted in her being injured by an automobile when she attempted to re-cross the street to her home. In affirming the trial court's dismissal for failure to state a cause of action on grounds of negligence or attractive nuisance, the appellate court said:

The defendant is accused of being a sort of modern Pied Piper and as such responsible for any and all mishaps to its young customers. It is not an insurer of the safety of its patrons. Nor is it charged with a violation of law. The operation of an ice cream vending truck attractive to children is admittedly not a nuisance.35

This view was not very surprising in light of Ohio's restricted view of the doctrine. In reversing the trial court's finding that defendant's truck, which was selling crabs along the highway, was an attractive nuisance, the Louisiana court in Molliere v. American Ins. Group,36 relied upon Coffey and Baker-Evans. This reliance could be questioned because the later cases concerned ice trucks and the defendants committed no affirmative acts to encourage the plaintiff's presence. Whereas in the former case the whole method of conducting the vending encouraged customers to come to the truck. The court was, in no small part, basing its decision on public policy when it said:

To so hold [defendant's truck an attractive nuisance] would bring every peddler's truck traveling our highways within the realm of the doctrine, and would cause the owners or operators thereof to take unusual precautionary measures to prevent accidents to young children who might cross the highway to come to the truck.37

After examining Tennessee's law on the attractive nuisance doc-

33 252 Wis. 473, 32 N.W.2d 235 (1948).
34 McKay v. Hedger, supra note 21.
36 Id. at 446, 184 N.E.2d at 117.
38 Id. at 283.
trine, the Sixth Circuit in Mead held that it did not apply to defendant’s ice cream vending truck. Noting that the recent Tennessee cases were limiting the application of the doctrine, the court quoted with approval the public policy argument of the district court. This essentially was that to impose upon defendants the duty of warning young customers of obvious dangers from passing vehicles would totally destroy the vending truck’s usefulness.

Both Molliere and Mead are in accord with the view taken by some authorities. However, a somewhat more realistic approach was adopted by Kentucky in Mackey v. Spradlin. There the court pointed out that while these situations are not within the attractive nuisance doctrine, they contain much of the same policy considerations that led to its adoption. On the basis that one who creates a hazard is in a less defensible position than one who maintains one, it was felt that the former should be held more responsible. The court said:

In this particular type of situation the danger is enhanced by the sense of haste that is purposely aroused in the children of a neighborhood by the tinkling of bells and flashing of lights heralding the imminent arrival of an attraction that will stay but a moment and be gone unless they come at once. The responsibility of one who knowingly provokes into action the natural recklessness of irresponsible children ought surely be proportionate to the degree of danger he thereby creates.

The courts are obviously correct when they hold that the attractive nuisance doctrine does not apply in these situations. It would be different if the ice trucks and ice cream vending trucks were inherently dangerous. But there is no valid reason for the courts refusing to recognize the attraction that these vehicles exert upon children and the hazards that they may be subjected to by the presence of the vehicles. The public policy arguments are not acceptable when children may be injured while the defendant profits by means of a business that creates the hazard.

Furthermore, the reason commonly asserted for rejecting the application of the doctrine, that the owner had no reason to anticipate the presence of children, is not present when he solicits their patronage. The approach of the court in Mackey suggests a more reasonable alternative than the flat rejection of the doctrine and its policy.

DUTY

Assuming that liability has not been predicated upon the violation

38 Mead v. Parker, supra note 20.
41 379 S.W.2d 33 (Ky. 1965).
42 Id. at 37.
of a statute or the attractive nuisance doctrine, the plaintiff must rely upon the principles of negligence. In order to recover the plaintiff will first have to show that the defendant owed him a legal duty to conduct himself (defendant) in such a manner as not to expose the plaintiff to any unreasonable risks. If under the circumstances a person of ordinary intelligence would realize that failure to exercise ordinary care in his actions will place another in danger, a duty arises which demands that he use care to avoid the danger. Since he need not foresee the particular injury, it is sufficient that the actor foresee, or in exercise of ordinary care he would have foreseen, that some kind of injury will probably occur to some person through failure to observe this duty. Because young children lack ability to appreciate peril, the defendant must observe more care toward them than toward adults. When a person for his own benefit invites another upon his property by express or implied invitation, the former owes the latter a duty not to injure the visitor by negligent activities, to inspect the property for dangerous conditions, and to exercise reasonable care to protect the visitor from foreseeable dangers in the use or condition of the land. However, this duty does not extend to those perils that are obvious to the visitor unless it is foreseeable that he might still be harmed. When the invitees are children, special consideration is given to their impulsiveness and attraction to certain dangerous conditions.

In the vendor-huckster situations the courts have considered the question of duty in several different ways. In Baker-Evans the court felt the only duty owed to the children by the defendant was to warn them away from his ice truck before he started it.

That children might be frightened by the manner of warning and run into the street was not considered. The court was concerned only with the possible liability of the defendant if he injured the children by moving the truck without giving warning. This narrow limitation of duty to injuries concerning the instrumentality itself was slightly broadened in Bloom v. Good Humor Ice Cream Co. There the court implied that

43 38 AM. JUR. Negligence § 12 (1941); PROSSER, TORTS § 30 (3d ed. 1964); RESTATEMENT (SECOND), TORTS § 281 (1965).
46 38 AM. JUR., Negligence § 40 nn.14 & 15 (1941).
47 38 AM. JUR. Negligence § 96 (1941); PROSSER, TORTS § 61 (3d ed. 1964); RESTATEMENT (SECOND), TORTS § 343 (1965).
48 38 AM. JUR. Negligence § 97 (1941); PROSSER, TORTS § 61 (3d ed. 1964); RESTATEMENT (SECOND), TORTS § 343A (1965).
49 38 AM. JUR. Negligence § 157 nn.18 & 19 (1941).
50 Baker Evans Ice Cream Co. v. Tedesco, supra note 29.
51 179 Md. 384, 18 A.2d 592 (1941).
the duty of the defendant to the child only applies when the child is approaching or near the truck. The court in *Molliere*52, relying upon the *Baker-Evans* and *Coffey*58 cases, felt that the defendant owed his customers a duty of ordinary care while around his crab-vending truck. The majority undoubtedly was influenced by lack of evidence that the defendant was aware of the presence of the infant plaintiff. The dissent discounted this fact and felt that defendant’s knowledge of the propensities of crabs to attempt to escape when handled in a careless manner demanded that he take extra precautions. The negligence occurred, according to the dissent, through defendant’s careless handling which allowed a crab to drop on the plaintiff’s feet, resulting in the frightened child dashing into the road. The dissent further stated:

In my opinion the agent of the vendor of the crabs—having invited prospective purchasers to a dangerous position, a main highway—was under an obligation to foresee the possibility of just such an accident as occurred here.54

In *Mead*55 the court held that the defendant did not owe the plaintiff any duty in relation to other vehicles on the grounds that such peril was obvious, and to impose a duty would destroy the usefulness of the ice cream vending truck.

As would be expected, those cases finding defendant vendor or huckster liable look at the defendant’s duty to the plaintiff in a different light than the above cases. It was held in *McKay*56 that the defendant should not have left the rear doors to the ice truck open and the ice exposed to view. This duty was raised because the court felt that a reasonably prudent person would foresee that children would be attracted to the truck for pieces of ice, would continue to play around it, and some of them might run into the road and be hit by a motorist whose view was obstructed by the truck. Thus, the defendant was held to have foreseen the exact accident that occurred. In *Vought*57 the court said:

Under elementary principles it was the duty of the defendant operator of the truck to exercise ordinary care to provide a reasonably safe place for this child [plaintiff] who was his business invitee. To that end, he was required to exercise ordinary care to select a position on the road where he could stop his vehicle and dispense his merchandise to the plaintiff without exposing him to danger.58

The jury would have to consider whether defendant exercised ordinary care in inducing plaintiff to cross a road on which vehicles traveled at 35 miles per hour. Or whether the defendant should have turned his

58 *Id.* at ______, 139 S.E.2d at 815.
vehicle around and parked on plaintiff's side of road to fulfill this duty to the plaintiff business invitee. The court in Mackey was applying the policy of the attractive nuisance doctrine when it demanded that defendant's responsibility be proportionate to the danger he creates when he incites the natural recklessness of irresponsible children. Having intentionally attracted children to where they are in danger of being hit by passing traffic, the defendant had a duty to watch for such traffic and either to warn the children whenever any vehicle came close enough to create a hazard or to use whatever other reasonable efforts necessary to prevent injury.

The view taken by the court in Baker-Evans is too restrictive in that it recognizes only duty owed to the children gathered around the ice truck. Granted that the driver should warn the children to stand clear before he moves the truck, it seems reasonable that because of passing traffic he should have a duty to be careful in his manner of warning to prevent frightening the children into running into the road. Likewise, the court's view in Bloom, that the defendant owes a duty only when the children are approaching and around the truck is too restrictive. It would require only slightly more effort on the part of the vendor to extend this duty to the child while he is leaving the truck and re-crossing the street. The reasoning of the courts in Vought and Mackey are more consistent with this approach in light of the fact that the children are business invitees whose presence in a dangerous area has been solicited by the defendants. It is hard to see how such an extension of the defendant's duty would destroy the usefulness of the vending trucks as the Mead case argues. While the latter case says that the perils of passing vehicles are obvious to children, it can be argued that a vendor, knowing the irresponsibility and recklessness of excited children, should not be allowed to rely on their cognizance of the hazards in observing his duty of care.

CAUSATION

Once having established that the defendant owes the plaintiff a duty, it is vital to the plaintiff's action for negligence that he show a reasonable connection between his injuries and the defendant's acts or omissions. Since every act or omission by a person has an effect on someone else, it would seem that the actor would always be liable. For example, if the defendant frightened the plaintiff, and while running down the street to escape, she is hit on the head by a brick that is jarred loose from a building hit by a crashing airplane, he has, in a sense, caused her injury. If he had not frightened her, she would not have run down the street and would not have arrived at the particular spot of her injury in time to

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59 Mackey v. Spradlin, supra note 41.
60 E.g., Brewer v. Johnson, 247 Iowa 483, 72 N.W.2d 556 (1955); Estes v. Gibson, 237 S.W.2d 604 (Ky. 1951); Sunray Oil Corp v. Burge, 269 P.2d 782 (Okla. 1954).
be hit by the brick. To find liability in such a situation would impose absolute liability for all wrongful acts. Thus the law as a matter of policy limits liability to those causes that are closely related to the plaintiff's injuries. 61

In attempting to limit the liability of the defendant, many jurisdictions have adopted the "but for" or "sine qua non" rule. 62 This rule is that the defendant's acts will not be considered the cause of the plaintiff's injuries if the injuries would have occurred without the defendant having acted. It is apparent from this rule that it operates only to exclude the defendant from liability. As will be discussed in the following sections, merely because the plaintiff shows that he would not have been injured if the defendant had not acted, the liability will not necessarily be established. Another test that has found wide acceptance is the "substantial factor" test. 63 The defendant will be held responsible for an event if his actions were a substantial factor in bringing about the event. The necessity of this broader test is apparent when there are two, independent, concurring causes of the plaintiff's harm. For example, if A shoots X in the head and B shoots him in the heart, under the "substantial factor" test both are liable since each defendant played a material part in killing X. However, under the "but for" test, neither would be liable since, as far as each defendant is concerned, the plaintiff would have died in any event.

Since the existence of the causal relation is vital to the plaintiff's cause of action, he has the burden of proof. 64 To satisfy this burden he must convince the jury that it is more probable than not that the defendant's actions were a substantial factor in causing the injuries. 65 Thus, if it is merely possible that the defendant caused the event or that it is equally likely that he did not, then the court must direct the verdict for the defendant. 66

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62 38 Am. Jur. Negligence § 56 n.19 (1941); Prosser, Torts § 41 n.17 (3d ed. 1964); Restatement (Second), Torts § 432 (1) (1965).

63 Prosser, Torts § 41 nn.23 & 26 (3d ed. 1964); Restatement (Second), Torts § 431 (1965).


Since the courts in the vendor-huckster situations do not make any distinction between causation and proximate cause, the discussion of the application of the above principles will be presented in the following section in conjunction with the application of the principles of proximate cause.

**Proximate Cause**

Having shown that the defendant's actions were one of the causes of the event, the issue becomes one of ascertaining whether he should be held liable. This issue is called proximate cause and is an essential element for the plaintiff to prove.\(^\text{67}\) The basic rule applied is that there will be no negligence if it could not be foreseen that *any* injury would result from the defendant's conduct, or if his actions were reasonable in view of those consequences he could foresee.\(^\text{68}\) The use of this rule, however, has led to a split in the courts: one view holds the defendant liable for only those consequences that are foreseeable by a reasonably prudent person; the other view finds him liable for all the natural and proximate consequences of his negligent acts.\(^\text{69}\)

Thus the first view uses the test of foreseeability to determine if the defendant's act was negligent, then applies it again to determine if he will be held liable. Many of the courts that follow this rule also require that the event be the "natural and probable consequence of the defendant's conduct."\(^\text{70}\) This means that not only must the event be such as ordinarily happens upon such conduct, but it must be more likely that it will happen than not. An additional limitation that has been accepted generally is that the plaintiff must be within a foreseeable class of persons who might be injured by the defendant's conduct.\(^\text{71}\)

The second view applies the foreseeability test only to determine if the defendant's conduct was negligent. Once it is decided that he was, he is liable for all consequences that follow in unbroken sequence without an intervening, efficient cause.\(^\text{72}\) The theory behind this rule is that if one of the parties must suffer, it is better that it be the negligent defendant than the innocent plaintiff.

In vendor-huckster situations, since the plaintiff was actually injured by another party, the courts have to consider concurring and intervening causes in determining if the conduct of the defendant was the proximate cause.

\(^{67}\) 38 Am. Jur. Negligence § 51, at 697 n.7 (1941).


\(^{69}\) Prosser, Torts § 50 (3d ed. 1964).


cause of the plaintiff's injuries. When the negligence of the defendant is shown to be the cause of the plaintiff's injuries, liability is not avoided merely because the negligence of a third party also contributed to the event.\(^{73}\) Thus, when the concurrent negligence of two defendants cause an event, which could not have happened unless both were negligent, they are each considered to have proximately caused the injury even though having acted independently.\(^{74}\) However, in order to find the defendant liable when his conduct must concur with that of another person, the defendant must foresee, or in exercise of reasonable diligence would have foreseen, the concurring actions of the other party.\(^{75}\)

The negligence of the defendant will not result in his liability when the plaintiff's injuries are caused by the intervention of a new, independent and efficient cause. The new cause must not be foreseeable by the defendant, a result of his earlier negligence, or controlled by him.\(^{76}\) The fact that the intervening act is by the infant plaintiff, who, as a matter of law because of age, cannot be guilty of contributory negligence, does not affect the case, unless the conduct of the infant was foreseeable.\(^{77}\) When the defendant causes a situation which reasonable efforts by the plaintiff in attempting to escape are not considered intervening causes exempting the defendant from liability.\(^{78}\)

The courts that have held the defendant not liable have generally done so on the basis of either duty\(^{79}\) or proximate cause. In Bloom\(^{80}\) the Maryland court ruled that the acts of the defendant would not be the proximate cause of the event if the negligence of the defendant was merely passive and the negligence of another was the moving and effective cause of the injury. The court held that even assuming that the defendant was negligent, any connection between the negligence and the injury was broken by the intervening causes of the child leaving the truck, walking behind it into the road, and the sudden appearance of an oncoming automobile. In Molliere\(^{81}\) it was implied that since there was no evidence the defendant knew of the presence of the plaintiff, the dropping of the crab could not be negligence proximately causing the injury, the plaintiff not being within the foreseeable class of persons to be harmed. To this court the cause of the injury was the intervening acts of the child running into the road and being struck by another vehicle. In Mead\(^{82}\) the court in quoting from the district court, said: "... [T]he attractive presence of the vending truck at the time and place of this accident merely

\(^{73}\) 38 Am. Jur. Negligence § 64, at 717 n.18 (1941).
\(^{77}\) 38 Am. Jur. Negligence § 74 nn.8, 13, 15, § 76 nn.2 & 3 (1941).
\(^{79}\) See notes 50-55 supra and accompanying text.
\(^{80}\) Bloom v. Good Humor Ice Cream Co., supra note 51.
\(^{81}\) Molliere v. American Ins. Group, supra note 36.
\(^{82}\) Mead v. Parker, 340 F.2d 157 (6th Cir. 1965).
created the occasion which afforded opportunity for another event to produce the minor plaintiff's injuries ...." 83

In those cases where the court has found the vendor liable, a more liberal attitude toward proximate cause is held. In McKay 84 the court ruled that the negligence of the defendant was the proximate cause of the event since he should have foreseen the exact accident that happened. Although an independent act intervened between his negligence and the injury, the defendant was liable as he should have foreseen the happening of the intervening act. Whether the violation of the statute in Landers 85 was a concurring proximate cause of the injuries of the plaintiff was held to be a question for the jury. As the concurring opinion pointed out, the purpose of the statute was to prevent accidents from streets being rendered too narrow from vehicles parking too far from the curb. It was immaterial that the defendant did not foresee that his obstruction of the street would lead to the plaintiff being injured by one of two racing automobiles. On the basis of the defendant's negligence in obstructions, the court in Vought 86 held that the defendant, at the very least, concurrently caused the injury to the plaintiff who was crossing the street from behind the truck. The negligence of the defendant was considered to have continued until the time of the injury and was not superseded by the other motorist's possible negligence. In Mackey 87 the defendant was held to have been negligent as a matter of law in attracting children to a hazardous place, failing to keep a lookout for approaching traffic, and not warning the children of this traffic. Regardless of whether the approaching driver was negligent, the defendant should have foreseen that one of his customers would be hit while running from behind the parked truck. Thus, the defendant proximately caused the injuries to the plaintiff.

In light of Vought where the defendant was parked at the side of the road, the court in Bloom where the defendant was parked near the center of the road appears to have adopted an unrealistic attitude toward proximate cause. It is hard to understand why such an obstruction of the view of oncoming motorists is held to be a remote cause, especially when the court considers the plaintiff's walking from behind the truck and the sudden appearance of the motorist as intervening causes. Rather than ruling as a matter of law, as the court did in Molliere that the actions of the plaintiff were intervening causes, it seems that the argument by the dissent 88 should have been sufficient to remand the case for the jury to consider.

83 Id. at 159-60.
87 Mackey v. Spradlin, supra note 41.
88 See note 54 supra and accompanying text.