Ruminations on Dixie Drive It Yourself Versus American Beverage Company

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THE DILEMMA

Of all the substantive torts problems with which a judge must contend it seems to me that the most exasperating and elusive is that of determining how far legal protection should extend. The nastiness of this job becomes fully apparent only when the trier must face it at a time when he is saddled with the responsibility of deciding a specific controversy. Until then the permissible extent to which law can afford protection is regarded merely as something that is determinable through recourse to an assortment of generalities that parade in the law books under the banner of "proximate cause."

The wholly inept character of all proximate causation language has been emphasized so many time that only a brief reference is appropriate here.1 Fourteen years ago Louisiana attorney Jesse McDonald, then a third year law student, pointed out in this Review the amazing variety of nonsense phrases that make up the world of proximate cause, and he sampled the mass of inconsistent banalities which Louisiana courts—along with courts everywhere—have solemnly pronounced in their decisions over past years.2 It has sometimes been said that conduct is the proximate cause of only those consequences that "might have been anticipated by ordinary forecast and not [of] those consequences arising from a combination of his fault with circumstances of an extraordinary nature."3 But a court on another occasion could observe with equal assurance that it is no defense "that the particular injurious consequence was unforeseen, improbable, and not to have reasonably expected so long as it was the natural consequence of the negligence." (Emphasis added.)4 The "cause" that leads to liability may thus be iden-

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1. Among the best discussions are L. Green, The Rationale of Proximate Cause (1927); Lewis, Proximate Cause in Law, 7 Fla. B.A.J. 109, 138, 158 (1933); Morris, On the Teaching of Legal Cause, 39 Col. L. Rev. 1087 (1939); Campbell, Duty, Fault and Legal Cause, 1938 Wis. L. Rev. 402.
tified as "natural," or, as in another decision, "efficient," or, again, it may be said that the proximate cause is the one that is "inextricably interwoven with the subsequent occurrences." But, enough of this. Few judges of today would seriously question the observation that the phrases of proximate cause are little more than gaudy ribbons with which the package of liability may be decorated once its contents have already been fixed by the court through resort to some other mystique.

But even though a judge is satisfied that causation language fails to afford any dependable answer to the question as to how far liability can be extended in a concrete piece of litigation, he cannot enjoy the luxury of allowing the inquiry to lie idle and unanswered. He is obliged to reach some conclusion in each specific instance and to pronounce judgment accordingly. How does he do this? What impels him to answer as he does, and, equally important, how can he articulate the conclusion he has reached in language which will be acceptable to law men and that will afford at the same time at least some suggestion as to what prompted the judge's decision? Even though the answer to this inquiry must be halting and modest, let it at least be honest and free of drivel.

The burden of the pages that follow is to suggest that in the writer's opinion the Louisiana Supreme Court decision, *Dixie Drive It Yourself System v. American Beverage Company,*\(^7\) appears to afford the most direct and constructive approach that has yet been made in this state to the problem with which we are here concerned. This decision, now in its eighth year, has been discussed, applied, distinguished, or at least recognized as authority in nearly sixty subsequent Louisiana opinions. During this period there has thus accumulated enough judicial accretion to make possible a fair appraisal of the decision's role in Louisiana jurisprudence. I beg the reader's indulgence if, for the sake of brevity (and without regional or political implications), I refer to the decision hereafter simply as *Dixie.*

**The Background**

The facts of the *Dixie* controversy are not complicated. Plaintiff was a commercial lessor of motor vehicles and it had

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7. 242 La. 471, 137 So.2d 298 (1962).
leased the truck in question to L, who was operating it for his own purposes at the time with which we are concerned. Defendant's employee was driving a tractor-trailer type beverage truck, and he was proceeding from Baton Rouge to New Orleans on U.S. Highway 61 when he experienced trouble with his engine, which brought his truck to a halt on one of the two southbound lanes of that thoroughfare. The driver failed to put out flags or signals as required by statute, although a period of eight or ten minutes elapsed during which this could have been done before the ensuing collision that gave rise to the lawsuit. L was also proceeding southward in plaintiff's truck when he saw defendant's truck ahead at about 200 feet, at which time it appeared to be moving. Momentarily thereafter, L found that his own truck was being overtaken by another southbound vehicle which moved into the left lane. When, therefore, L became aware that defendant's truck was in fact stationary, he was trapped in any effort to move into the left lane and thus avoid a rear-end collision. In the ensuing mishap, apparently only the rented truck driven by L and belonging to plaintiff was damaged.

It was agreed by all judges in both the court of appeal and in the Supreme Court that L must be regarded as negligent in failing to recognize earlier that defendant's truck was stationary. Proper alertness would have enabled him to reduce his speed below the 45 miles per hour at which he was in fact proceeding, and this should have been done at a time when the predicament could have been avoided. However, it will become important to our discussion later to recall that L's admitted misconduct was a mere shortcoming in his alertness and responsiveness. He was not chargeable with excessive speed, or with operating faulty equipment, or with conscious chance-taking of any kind.

In denying the lessor recovery for the loss of his vehicle, the Court of Appeal for the Fourth Circuit recognized that the defendant was negligent in failing to put out the signal required by statute both fore and aft of the vehicle. It further conceded that the negligence of L, the lessee, could not be imputed to plaintiff, the lessor. Hence contributory negligence was not at issue. Nevertheless the court first announced that

the negligence of defendant had become passive, and from this it concluded that the "sole proximate cause . . . was the negligence of the driver of the plaintiff truck." 10 The opinion did not explain why this must, or even should, be so. One may suspect that the court was influenced by some assumed rule that would arbitrarily place the legal responsibility upon the last culpable human actor in point of time, and exempt all those antecedent to him. There was a time in the past when such a rule enjoyed some small following in the courts. 11 It is possibly an outgrowth of another even older and less defensible argument that in the event that there are successive wrongdoers, the injured party should have recourse against only one of them—which, most dramatically, is the latest one. 12 Obviously, current modern conceptions of joint or solidary tort liability and the ensuing adjustment that can be made between the defendants themselves through contribution or indemnity have put to rout any notion that one wrongdoer must be selected for liability to the exclusion of all others.

The conferring of immunity upon the unlawfully parked motorist by merely holding that the intervening negligence of the later oncoming driver operates to break the chain of causation is not tenable as an arbitrary unqualified proposition even when expressed in the current rubric of proximate cause. As long ago as 1869 in the first textbook to appear on negligence, the authors, Shearman and Redfield, observed that the mere fact that intervening negligence of another was the nearest cause in the order of time would not of itself prevent the defendant's wrong from being regarded as proximate cause. 13 A later edition of this same well-known textbook in 1880 elaborated this proposition by observing that whenever the intervening negligent conduct was of a character that could be anticipated to follow the original act, the latter could still be regarded as the proximate cause of the ultimate damage. 14 Again, when the same matter came up for consideration during the preparation of the Restatement of Torts, the views expressed earlier by Shearman and Redfield were made even more explicit by the Reporter

10. Id. at 843.
12. The origin of this idea has been attributed to the classic case, Vicars v. Wilcocks, 8 East. 1 (1806). See the discussion in Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233, 237 (1908).
and his Advisors. Section 447 of the Restatement of Torts provides in substance that the intervening negligent act of another does not serve as a superseding cause unless a reasonable man, knowing the situation, would regard it as "highly extraordinary" that such other should have behaved as he did.\textsuperscript{16} Unless these observations are to be rejected, the conclusion of the court of appeal was erroneous. Certainly it would not be regarded as beyond reasonable foresight that a driver of a vehicle approaching the defendant's unlighted obstruction from the rear would fail to discover that the defendant's vehicle was stationary quite as promptly as the mythical reasonable man would have made such discovery; above all, such a shortcoming in his power of observation cannot be regarded as something "highly extraordinary." Accordingly, the decided course of decision (not without exception)\textsuperscript{16} has been toward the position that mere inadvertence on the part of the later oncoming driver does not prevent recovery against the obstructor through resort to any acceptable proximate cause rationale.\textsuperscript{17}

We have observed that the court of appeal also stressed the fact that the defendant's negligence had become merely passive. Such an observation by the court could serve only to confuse the inquiry even further. The term passive negligence probably stems from the once important common law distinction between a cause of action sounding in trespass and one sounding in trespass on the case. The old action of trespass could not be maintained unless the defendant could be charged with setting into motion some force that directly inflicted injury on the plaintiff. If he had created only a static, even though highly dangerous, state of affairs, the victim, if he was to recover, must choose

\textsuperscript{15} \textit{Restatement (Second) of Torts} § 447 (1965).
\textsuperscript{16} \textit{i.e.}, Medved v. Doolittle, 220 Minn. 352, 19 N.W.2d 788 (1945), criticized in Morris, \textit{Proximate Cause in Minnesota}, 34 MINN. L. REV. 185, 199 (1950); Godwin v. Nixon, 236 N.C. 232, 74 S.E.2d 24 (1953).
trespass on the case as his form of action. But the difference between active and passive wrongdoing was important only as it affected the propriety of the form of action, and liability could be forthcoming with equal ease in either event if the correct form were chosen. Since the abolition of the old forms of action, there remains no reason for distinguishing the two types of wrongdoing. Certainly the villain who places poison in his victim's soup before the latter has eaten it is entitled to no more sympathy than the culprit who stabs his victim in the back. Furthermore, whenever an intervening act of negligence on the part of a third party is discoverable, it necessarily follows that the defendant's earlier wrongdoing must be regarded as having become passive. This is inescapable because if the original wrongdoer were still in action, his misconduct and that of the third party must necessarily be regarded as concurrent, and there would be no intervening wrong. Hence the active-passive distinction adds nothing to the discussion.

We have already suggested that without difficulty the Supreme Court could have reversed the court of appeal and imposed liability upon the owner of the unlawfully parked truck merely by observing that intervening negligence would not preclude liability on the part of the original wrongdoer provided that the inadvertence of the motorist following was not something that was unforeseeable. As a matter of fact, courts of appeal on several earlier occasions had adopted a position opposed to that of the Fourth Circuit Court of Appeal in the Dixie controversy. But instead of adopting this narrow proximate cause approach the Supreme Court, speaking through Sanders, J., succeeded in using the occasion to suggest a more realistic attack upon the entire phenomenon of negligence liability. Justice Sanders disposed of the proximate cause and intervening negligence argument by countering,

"The thrust of this formulation of law is toward relieving all but the last wrongdoer of liability to an innocent victim in torts involving intervening negligence. This restrictive doctrine finds little support in legal theory. We do not

subscribe to the proposition as applied in this case.”
(Emphasis added.)\(^{20}\)

The italicized qualification in the concluding sentence is important. The opinion carefully avoids espousing the opposed and equally arbitrary position that intervening negligence can never serve to immunize the original wrongdoer. Whether it should or should not have such effect is a matter to be left open and determined by other considerations in each instance. An appreciation of this need for plasticity is essential to a sympathetic understanding of the Dixie decision. On several subsequent occasions our courts have indicated clearly their awareness of the supreme court's intention in this respect:

“We believe the cited case authority for the proposition that mere chronology of events cannot be relied upon by the passively negligent defendant who seeks escape from liability on the ground that subsequent actions of a third party caused the injury. Though one's negligence may be passive and have come to rest, it nevertheless subjects one to liability for all resulting injury within the protective scope of the duty or burden of care that has been violated, when the subsequent negligence of another in combination therewith produces injury to an innocent third party.”
(Emphasis added.)\(^{21}\)

Similarly, the Court of Appeal for the Third Circuit observed, “It (Dixie) does not stand for the proposition that once the defendant is found negligent all subsequent or concurrent actions on the part of the plaintiff must be disregarded in determining whether or not a plea of contributory negligence will bar recovery of the plaintiff.”\(^{22}\)

The opinion then proceeds to the serious business of pointing out that the term, legal cause, or proximate cause, embraces


\(^{22}\) Clingman v. Millerville Mud Sales, Inc., 146 So.2d 240, 242 (La. App. 3d Cir. 1962). It must be noted, however, that occasional intimations to the effect that the passive negligence rule has been abolished have appeared: Steagall v. Houston Fire & Cas. Ins. Co., 138 So.2d 433, 436 (La. App. 3d Cir. 1962); Lamed v. Wallace, 146 So.2d 434, 439 (La. App. 3d Cir. 1962). On one occasion the Court of Appeal for the Fourth Circuit felt itself so constrained by its interpretation of Dixie as an arbitrary rule that it felt obliged to distinguish the case. Pierre v. Allstate Ins. Co., 221 So.2d 846 (La. App. 4th Cir. 1969) (on rehearing).
two entirely different inquiries. In the instant case it must be determined, first, whether the negligence of the obstructing driver was a cause-in-fact of the collision, and, only when this inquiry of fact has been answered favorably to the plaintiff, can the court proceed to the second aspect—a policy determination as to whether the defendant should be relieved of liability because of the intervening negligence of the driver of the Dixie truck. This suggested bifurcation of the inquiry is basic. The first question involves a determination of fact, while the second is a matter of fixing policy. The distinction is between "what happened?" on the one hand, and "what should law do about it?" on the other. The two inquiries cannot be blended under any single cabalistic phrase of "proximate cause."

CAUSE IN FACT

The determination of cause-in-fact is launched by fixing as precisely as possible the piece of conduct—the exact act or omission—with which the defendant is charged. This item of behavior must be regarded as a cause-in-fact of the harm suffered by the victim whenever the trier concludes that the same harm would probably not have occurred if the defendant had not engaged in the conduct with which he is charged. A cause-in-fact can thus be defined as a necessary antecedent, and the process of determining the existence or non-existence of cause is essentially one in which the trier speculates as to what would have happened if the conduct in question had not taken place. Since this assumed state of affairs represents a negation of the situation as it actually existed, we can only engage in surmise. The permissible degrees of likelihood are many, and our conjecture may lead us to conclude that the same harmful consequence would have come into being as a certainty, a probability, or a possibility, even if defendant had behaved otherwise than as he actually did behave. It is at this point that the usual and accepted requirement that facts be established by probabilities comes into play. If the victim would probably not have encountered the harm but for the defendant's conduct, it can be concluded that such conduct was a cause in fact and that the victim has sustained the required burden of proof on that issue.

Several matters deserve to be emphasized at this point. First, the relationship of cause and effect envisioned here in-
volves one assumed fact which can be treated as cause and another assumed fact which can be regarded as consequence. The process becomes utterly meaningless if we attempt to pervert it to other uses. We can inquire meaningfully whether defendant’s failure to blow his horn was a cause of plaintiff-pedestrian’s being struck, for two facts are involved—horn blowing, and impact. But an inquiry as to whether defendant’s negligence or the unlawful quality of his conduct was a cause of harm is meaningless. Such terms as negligent and unlawful can serve only the functions of qualitative descriptive or policy evaluations. They are useful to assist in passing a judgment condemning or approving specific acts or omissions, but they are not acts or omissions themselves, and hence they cannot serve as causes. Much difficulty can be avoided if it is borne in mind that cause is exclusively a fact inquiry in which we are interested only in what happened, or what might have happened. This by no means suggests that the trier is invited to ignore policy limitations when he eventually passes judgment. It does mean, however, that policy and fact should be kept separate and that causation should be maintained utterly devoid of any policy overtones.

Second, the version of a cause as an indispensable factual antecedent obliges us to conclude that every consequence has innumerable causes. The failure of the defendant driver to blow his horn was a cause of the striking of plaintiff-pedestrian since we can conclude that if the horn had been blown the pedestrian would probably have avoided being struck. But it may also be equally true that if plaintiff had not enjoyed a good night’s rest before the accident, he probably would have remained in bed and thus would not have encountered the defendant when he did. Therefore, the good rest was also an indispensable antecedent and serves equally as a cause. For this reason it is inaccurate to refer to any single antecedent as the cause. Although it may be entirely appropriate to conclude ultimately that a single selected antecedent should be regarded as the cause-for-which-liability-should-be-imposed, this conclusion follows from a resort to independent policy considerations that are brought to bear on the claim after causation has already been determined.

With this approach in mind, Justice Sanders succeeded in concluding that the defendant’s neglect in installing the signals
on the highway required by statute was a cause-in-fact of the ensuing collision. In order to reach this conclusion a speculation on the facts was required: Let it be assumed that the beverage truck had installed red signal flags 100 feet behind and in front of the vehicle (as the statute required), is it nevertheless more probable than not that L would have failed to observe that the vehicle was stationary at a time when he could have brought his truck to a halt effectively from the speed of 45 miles per hour at which he was then proceeding? This is the only causation issue involved. Numerous factual observations must be brought into play before the trier can reach his answer: the fact that L was not very alert, the fact that the highway was wet and that it was drizzling or misting at the time, the fact that L's lights were on and his windshield wipers were going. With these matters in mind, can the trier conclude that a signal 100 feet to the rear of the truck would probably have alerted L and thus have saved the day? It is important to bear in mind that L did not fail to make a timely observation as to the presence of the truck. He delayed only in interpreting what he saw ahead as a truck in motion, rather than as a stationary truck. This is important to the conjecture, because a red signal on the highway warns the oncoming driver that he faces a stationary object—an obstruction—ahead. Although the question was admittedly not free from difficulty, the court was satisfied on the probabilities and it observed that, "the mere possibility that the accident would have occurred despite the required precautions does not break the chain of causation."23

The supreme court’s version of causality as an inquiry that is based solely upon fact and that should be divorced from the ultimate determination as to whether defendant ought to be held liable is a major contribution to a clear analysis of negligence cases. The reader is reminded by Dixie that the ultimate fixing of the boundaries of policy does indeed lie ahead in every difficult case, but that it does not lie here—in causation.

One feature of that portion of the Dixie opinion dealing with cause does introduce a small measure of confusion: the court identifies cause-in-fact with the term, substantial factor.24

24. "Negligent conduct is a cause in fact of harm to another if it was a substantial factor in bringing about that harm." Dixie Drive It Yourself System v. American Beverage Co., 242 La. 471, 482, 137 So.2d 298, 302 (1962).
The difficulty here lies in the term "substantial," which might appear to suggest that the factor should not be regarded as a cause-in-fact unless it is important policy-wise. This could tend to reintroduce all the vagaries of proximate cause. For this reason more clarification by the court at this point would be desirable. But the ambiguity played no role in the Dixie decision, for the court promptly announced, "Under the circumstances of this case the negligent conduct is undoubtedly a substantial factor in bringing about the collision if the collision would not have occurred without it." Thus it identifies substantial factor and the indispensable antecedent test as being the same.

The influence of the Dixie opinion in prompting courts of appeal to regard causation within its proper and modest perspective as a factual matter to be determined according to the probabilities has been great. The decision has been resorted to with approval in a large number of subsequent decisions even when no serious "proximate cause" problem faced the courts.

**The Protection Afforded by Rules of Law**

Even though the issues of wrongdoing and cause were answered favorably to the Dixie Drive-It-Yourself System, it does not follow that liability must be automatically forthcoming. There remains the ultimate policy problem: should recovery be allowed despite the carelessness of L, the driver of plaintiff's truck? It can be noted that L's inadvertence was also a cause (indispensable antecedent) of the damage to the vehicle.

25. Id.
The supreme court at this point proceeded to make a direct policy assault on the problem. It turned to the criminal statute whose violation had served to make the defendant's conduct wrongful and it inquired as to whether this statute should be so construed as to extend protection against the risk, or hazard, that later a confused or inattentive motorist approaching from the rear might fail to advert to the danger ahead unless he were given specific advance warning by the light or flag required by the statute. The court's affirmative answer to this inquiry determined the outcome of the litigation favorably to plaintiff.

In truth, there was little novelty in this approach. Courts had long before explored the protective ambit of criminal statutes or ordinances in civil controversies. Usually, however, this had resulted in an announcement that the risk or hazard presented in the case at hand was beyond the scope of protection afforded by the criminal measure invoked by the plaintiff. In other words the approach had brought about denials of recovery. One of the earliest and the most clearly formulated of these is *Lopes v. Sahuque*, decided in 1905. Here the defendant had allowed his horse and cart to stand in the street unattended in violation of a New Orleans city ordinance. The plaintiff, a small child, was injured when some other children who were playing upon the cart allowed it to be suddenly tilted so that it struck the plaintiff. The court denied recovery. In so doing, it observed, "There is not a day but some court is called upon to restrict the scope of statutes so as to bring their operation within the limits of the intention and object of the General Assembly, however general the terms may be. Courts are much more limited in the interpretation of the statutes—that is, in ascertaining the meaning of the words employed by the Legislature—than they are in the application and construction of the laws, taking notice of the object and purpose of the same."28

The court then proceeded directly to the point:

"The ordinance declared to have been violated in this case was not intended to protect and safeguard generally children who might go into the street and there enter upon or into the property of citizens which might have been incautiously or even improperly left there. That was not its purpose, and injury to a child received under such circumstances would not be the natural and direct consequences

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27. 114 La. 1004, 38 So. 810 (1905).
28. Id. at 1016, 38 So. at 814.
of the violation of the ordinance, but a collateral consequence dependent as to its legal effect upon the special facts under which the injury occurred."^{29}

We have noted that the court in the *Lopes* case emphasized the propriety of resorting to a determination of the scope of a statute for the purpose of restricting its operation. We encounter more difficulty and confusion when we examine the decisions prior to *Dixie* in an effort to discover some earlier case espousing an interpretation that would serve to expand, rather than to restrict, the area of protection afforded in a civil suit by some criminal statute. Cases are not infrequently found holding that the intervention of some piece of conduct by a third party (or by the plaintiff himself) did not serve to over-extend the permissible range of coverage afforded by a criminal measure. We are obliged, however, to note that in each such instance the court expressed itself as satisfied that the intervening conduct in question was not negligent in character. In one case^{30} a safety statute obliged railroads to install "tattletails" or knotted ropes suspended on frames above the tracks in order to warn employees on the tops of the cars of an approaching bridge or other dangerous intrusion over the tracks. When an employee suffered injury which could have been avoided if the defendant railroad had provided the warning device, the defendant insisted that the victim himself should have known of the danger independently of any warning that might have been afforded. The court, after observing that a purpose of the statute was to afford a warning to the unwary, continued by emphasizing that any inattention on the victim's part probably resulted from a justifiable reliance upon the warning that would have been afforded if the defendant had fulfilled its duty. The court thus was able to exonerate the plaintiff of blame.

The criminal measure involved in *Maggiore v. Laundry & Dry Cleaning Service*^{31} was an ordinance that forbade the leaving of a vehicle standing in a public way without removing the ignition key. An electric propelled truck was allowed by defendant to stand on a narrow New Orleans street with the key in place so that an application of outside force to the vehicle could excite the electric motor and cause it to move forward on its own power. When the presence of this truck interfered

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29. *Id.*
with access into the narrow street from a private driveway, the plaintiff and a friend attempted to push it away from the obstructed drive. As a result the motor started and the vehicle propelled itself against the plaintiff, injuring him. In imposing liability the court of appeal found that one of the purposes of the ordinance violated was to insure that such an accident would not occur. The court, however, took care to point out that the plaintiff's conduct in attempting to move the truck should not be regarded as negligent. We are left, therefore, with the impression that the benefit of the ordinance would have been denied the plaintiff if his efforts had been less cautious than they were.

Alexander v. Standard Oil Co. of La. affords an instance where the court dealt with our problem in clear and unequivocal language. It was faced with a situation where a child suffered injury while employed by defendant contrary to the Child Labor Law. The court expressly adverted to the purpose of the statute in support of its holding that the victim's own carelessness was not available as a defense to the employer: "The reason children are forbidden to be employed in dangerous occupations being that they are presumed to be incapable of taking care of themselves, it would seem to be illogical to hold them responsible for their negligence." The force of this observation was weakened, however, when the court thereafter succeeded in finding that the child plaintiff was not negligent.

The caution with which the courts in these early decisions had tackled the prospect of affording protection against the risk of intervening negligence is probably attributable to the fact that in each instance above, the intervening behavior with which the court was obliged to deal was the plaintiff's own conduct. If the victim himself were found to be contributorily negligent, this would be available as a defense even though all other considerations had favored recovery. Apart from this contributory negligence involvement there is little reason to suspect that the courts would have proceeded as hesitantly as they did. For we may recall our earlier observation that the Louisiana courts had become thoroughly accustomed to extending protection against the risk of subsequent third party misconduct by simply resorting to doctrines of proximate cause.

32. 140 La. 54, 72 So. 806 (1916).
33. Id. at 68, 72 So. at 811.
34. See cases cited at note 19 supra.
I suggest that Dixie's potential for usefulness lies, not in any novelty that inheres in the decision, but rather in its insistence that cause and legal duty be approached as separate matters and that considerations of policy be liberated from the chrysalis of causation jargon and allowed to stand on their own footing.

The specific policy inquiry that the court faced in the Dixie decision can be posed without much difficulty: Why did the legislature adopt a criminal statute requiring that all motorists who come to an extended halt on the public way must install flags or lanterns at a considerable distance both fore and aft of their vehicles? What risks did the lawmakers have in mind when they effected this enactment? Did they envision the prospect that some oncoming motorist might not be sufficiently alert to avoid a rear-end collision unless he were forewarned by such signals? If so, and the court concludes that one purpose of the statute was to alert even those whose state of unwariness is not readily excusable, can the judge consistently refer thereafter to that same state of inattention as a sound reason in support of a judgment that would relieve the obstructing motorist of liability? On this the opinion observed:

"To deny recovery because of the plaintiff's exposure to the risk from which it was the purpose of the law to protect him would nullify the statutory duty and render its protection meaningless."^35

It seems to me that the merit of this opinion lies not in the fact that the court arrived at an indisputably correct conclusion on policy, which may or may not be the case, but rather in the forthright recognition that the answer must lie within the court's own version of the statutory purpose, be its image of that purpose right or wrong. Under the attack suggested by Dixie the court openly assumes the responsibility of passing judgment according to its best light.

The problem of determining legislative intention is fraught with difficulty and the judge who embarks on the task is constantly tempted toward self-delusion. Too frequently he finds that he is only playing a game in a hall of mirrors. To begin with, a statute such as that under consideration in Dixie is entirely a criminal measure, and insofar as we can know, the

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lawmakers were wholly indifferent toward civil liability. Otherwise, it is to be expected that they would have made some mention of claims for damages. But even assuming that the prospect of civil consequences rested vaguely in the back of a lawmaker's mind, what can we surmise as to his "intention" concerning the specific narrow little risk with which the court was confronted in Dixie? If the legislator were asked about the hazard of the inattentive motorist, would he not in all honesty be obliged to reply, "Gosh, fellows, I must confess that such a matter as that never entered my mind."?

Despite these difficulties, the court has elected to accept the statutory criminal mandate as its guide in passing judgment on the defendant's conduct, and it is this purely voluntary acceptance of the criminal legislation that underlies the so-called negligence per se rule. But having once made the legislative measure its own, the court cannot escape the responsibility of defining appropriate boundaries for its operation in each instance and it must proceed to fix those risks that fall within or without the rule's protective ambit.

Whenever the terms of the statute itself afford some indication of the precise range of risks that the lawmakers had in mind, or whenever some clue as to this may be afforded by an examination of the measure in its entirety, the legislature's intention will, of course, prevail. But more often than not the court has no such assistance available in the truly difficult case. In such instances it must be guided solely by its own unaided judgment as to whether the statutory rule is appropriate to the very special risk or hazard presented by the facts of the controversy at hand. This calls for judicial legislation of the

36. In discussing the explanation of the negligence per se rule, Prosser observed, "Perhaps the most satisfactory explanation is that the courts are seeking, by something in the nature of judicial legislation, to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind. The statutory standard of conduct is simply adopted voluntarily, out of deference and respect for the legislature. This is borne out by a considerable number of cases in which the terms of a criminal statute have been applied in a civil action, notwithstanding the fact that the statute was for some reason totally ineffective as a basis for criminal conviction—as where it had not been properly enacted, or did not exactly cover the situation, or the defendant was incapable of crime, and could not be prosecuted; and by one or two others in which there has been flat refusal to accept a standard regarded as unreasonable." W. Prosser, The Law of Torts § 35, at 193 (3d ed. 1964). See also the excellent and profound discussion of Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv. L. Rev. 453 (1933).
highest order, and the untrammeled judgment of the court should not be impaired or hemmed in by any real or imagined rule of "proximate cause."

The course of the decisions subsequent to Dixie presents an interesting pattern indicating that generally the courts of appeal have received the opinion with understanding and have applied it with considerable ingenuity and common sense. Recovery has been forthcoming without difficulty in the few cases that appear to have involved precisely the same situation as in Dixie—that is to say, where the driver of the vehicle approaching from the rear was inattentive and struck the illegally parked car of the defendant.\textsuperscript{37} But when the situation becomes more complex and involves something beyond a collision between these two vehicles the courts have encountered trouble. This is neatly illustrated in \textit{Woods v. Employers Liab. Assur. Corp.}\textsuperscript{38} Here there were two impacts: defendant's automobile stood unlighted in the highway and was struck by a second carelessly driven vehicle, resulting in injury to one of several passengers in the latter car. The court encountered no difficulty at this point and allowed recovery against both the driver and the defendant. But the matter did not end there, for the resulting wreckage in the highway presented an obstruction onto which, fifteen minutes later, a carelessly driven truck plowed its way. This in turn resulted in an injury to a second passenger in the same vehicle that had been involved in the initial collision. Although the truck driver was obviously responsible for this latter accident, could the same be said of defendant whose violation of the warning statute had initiated the sequence of events that resulted in the harm?

An unqualified affirmative answer here could prove troublesome indeed, for it would invite the contention in future litigation that whoever is responsible for an initial collision and resultant wreckage on the public way must respond without more ado for all pile-ups that may thereafter be occasioned. The variety of subsequent mishaps that could follow in the wake of a single collision on a busy highway is almost unlimited. The pile-up sequence may follow the initial collision immediately in point of time, and with or without blame on the part of those persons later involved. Or the second impact may be delayed fifteen min-


\textsuperscript{38} 172 So.2d 100 (La. App. 1st Cir. 1965).
utes (as in the Woods case) or even longer. Again, oncoming motorists, seeing the obstructing collision, may sustain injury in their efforts to face the resultant congestion or to bypass the wreckage; and, further, in so doing they may have been behaving with due caution for their own safety or they may have been deliberately "chancing it." There may even be involved a collision between two vehicles, both of which arrived on the scene after the initial accident. The problem as to how far the court should extend its protection here is baffling. From one point of view it can be argued that the defendant whose misconduct results in rendering the public highway more perilous for those who come along later could properly be made to pay the full cost of the congestion risk for which his wrongdoing was a cause-in-fact. But the invitation to unlimited liability may well invite caution. If the range of responsibility is to be limited, where should the line be drawn? The court of appeal in the Woods case felt that the elapsed time of fifteen minutes between the two collisions was determinative, and it refused recovery. The decision represented the court's best estimate of policy, and who is to say that it was right or that it was wrong? The decision was a tough one, but the court knew exactly what it was facing and it avoided all entrapments of proximate cause. The approach of the Dixie decision was employed consistently throughout.

Another distinguishing feature of the Woods case deserves attention. There were two distinct accidents. The defendant's initial wrong of parking without lights was followed by impact with another vehicle; and this impact, in its turn, brought into being the spectacle of two helpless vehicles stalled on the public thoroughfare. Under such a showing a new and independent invitation to danger has arisen, and, in a sense, the original failure by the defendant to warn oncomers of the presence of his car has spent its force policy-wise, except as it serves as a causal antecedent to whatever follows. The perilous setting that now leads to a pileup or other post accident mishap is one that tends to generate its own characteristic problems, such as those suggested above. The risk of pileup is one that can follow indiscriminately in the wake of any kind of highway collision. Hence it is not a matter of decisive importance whether the cause of the initial impact was speed, inattention, driving with faulty equipment, or parking a vehicle without adequate warning.

39. Liability has sometimes been extended freely in such situations. See the excellent discussion in Note, 9 La. L. Rev. 421 (1949).
Although the fact situation presented in Dixie was that of a direct collision between the defendant's unlawfully parked truck and the truck belonging to the plaintiff, frequently there is no physical contact between the parked vehicle and the one that ultimately suffers damage. For example, an oncoming driver may fail to make a reasonable adjustment to the defendant's obstruction and thus injure some other vehicle or its occupants. This should not present a serious obstacle to recovery under the newer approach.\textsuperscript{40} Several instances of this kind had been faced by the courts of appeal prior to the Dixie decision.\textsuperscript{41} In each the oncoming motorist was aware of the obstruction presented by the defendant's vehicle and he thereafter conducted himself in such a manner as to bring about a collision with plaintiff. Illustrative here is Williams v. Pelican Creamery Inc.\textsuperscript{42} The defendant's vehicle was unlawfully parked without provision of lights as required by statute. The plaintiff thereafter approached from the rear, saw defendant's car, and came to a halt, awaiting an opportunity to overtake. While he was so detained, a truck to the rear of plaintiff's car moved out into the left lane and attempted to overtake both vehicles. In so doing, a trailer pulled by the large truck struck the plaintiff's car with such force as to drive the vehicle into the parked truck, inflicting the injuries in question. It is noteworthy that failure to have lights on the parked truck was not a cause-in-fact of the incident, since the plaintiff had safely brought his car to a halt, and the driver of the overtaking truck was fully aware of the entire picture.

In such situations as these the only effect of the obstructor's negligence has been to interject an annoying impediment in the path of the later oncoming motorist and thus to tempt him to embark upon a negligent course of action. If he consciously and deliberately encounters the congestion and then proceeds to handle the situation poorly, can we safely conclude that this risk of his creation must uniformly be regarded as one that can

\textsuperscript{40} Recovery for an accident of this type was allowed by the Court of Appeal for the Third Circuit in Perry v. Herrin, 215 So.2d 167 (La. App. 3d Cir. 1968). The unlawfully parked car of defendant highway department resulted in a collision between two vehicles approaching the parked car from opposite directions. The judges were not in accord as to which of these latter two drivers was negligent, but it was agreed by all that the innocent party could recover against the highway department.

\textsuperscript{41} Williams v. Pelican Creamery Inc., 30 So.2d 574 (La. App. 1st Cir. 1947); Ardoin v. Williams, 108 So.2d 817 (La. App. 2d Cir. 1959); Dollar v. Aetna Cas. & Sur. Co., 87 So.2d 549 (La. App. 2d Cir. 1958).

\textsuperscript{42} 30 So.2d 574 (La. App. 1st Cir. 1947).
appropriately be imposed upon the person responsible for the initial obstruction?

In the earlier decisions of the type discussed above, recovery was denied, usually with the observation that the obstructor's negligence had become passive or that the intervening wrongdoing had broken the chain of causation. Without questioning the wisdom of these decisions when tested on their own facts and in terms of their outcome, one may nevertheless express concern over the type of explanation afforded in the opinions. Resort to the language of proximate cause here can invite an unduly arbitrary disposition of the controversies. Is it indeed true that even a highly dangerous obstruction of the public way created by the defendant must always become a "passive" condition whenever there is intervening wrongful conduct by some oncoming motorist? Does the intervening conduct serve to insulate the original wrongdoer, so long as the later behavior can be labeled "negligent," irrespective of how serious or how trivial it may be? It seems to me that more elbow room is needed here than can be afforded by pat phrases of proximate cause.

The subtle shadings of the risk patterns presented in such cases as these can be illustrated by Steagall v. Houston Fire & Cas. Ins. Co., a decision that followed promptly in the wake of Dixie. Defendant parked his car in a small shopping center so that the rear wheels extended slightly more than two feet into the traveled way in violation of a local ordinance. The vehicle in which plaintiff was a passenger and which was being driven by her husband proceeded up the highway toward the spot where defendant's car protruded into the road. As he approached, another vehicle coming from the opposite direction appeared ahead, making it impossible for plaintiff's husband to move left toward the center of the road. Consequently, he collided with the protruding rear wheels of defendant's car and plaintiff, his passenger, suffered resulting injuries. The husband was chargeable with failure to make a timely observation of the parked car ahead and to control his vehicle accordingly. The controversy was presented to the Court of Appeal for the Third Circuit on an exception of no cause of action. The court, relying upon the Dixie decision, overruled the exception and remanded the case for trial.

The difference (if there is one) between the hazard pre-
sented just above and the hazards characteristic of the cases we have previously discussed is not one that is easy to put into words. Here the defendant’s unlawful obstruction served to imperil the normal current of traffic as it was flowing by and it imposed an unreasonable burden on the skill and alertness of those who at the time were in active use of the highway. If plaintiff’s husband had safely brought his vehicle to a halt facing the rear of the illegally parked car and had thereafter proceeded to move out into the stream of traffic and in so doing had negligently brought about a collision, the analogy of the cases discussed earlier would be much closer, and liability on the part of the original obstructing motorist might plausibly be denied. Yet it is upon distinctions such as these—which are almost intuitive—that judgment may properly be made to depend. Any legal rule or formula to which the court may appropriately resort for guidance in these situations should be one that makes possible a free range for the exercise of the judge’s own talent. The truly useful formula may suggest, but it should never compel, the judgment to be pronounced.

Several recent decisions invite speculation concerning the wide variety of factors that may properly exert their influence in situations involving civil liability for unlawfully parked vehicles. First, the demands of a given criminal prohibition against parking may appear to be overly exacting or, again, a statutory prohibition of such conduct may present troublesome ambiguities when its interpretation is attempted. Louisiana Revised Statutes 32:141(A) affords an illustration. Under its terms the criminal prohibition against parking on the public highway admits an exception wherever the highway is inside a “business or residential district.” If the parking that leads to an accident occurs at a spot that is only doubtfully included within the statutory prohibition, should a court not feel free to take this into consideration when the statute is invoked in a civil controversy? Similarly, parking may be prohibited within certain narrow areas solely for the reason that congestion is to be expected at such limited places. If the driver unlawfully parked his vehicle at such a spot during a period when no congestion existed, might his conduct not be regarded as excusable for the purpose of civil litigation, even though he would be subject to a criminal proceeding?44 Is it not arguable that whenever the hazard of con-

44. Attention here is called to Pierre v. Allstate Ins. Co., 221 So.2d 846 (La. App. 4th Cir. 1969), where a parking statute of this type was involved.
gestion that prompted a prohibition of this sort is missing, resort to the statute should not be available in a suit for damages?

The same problem of excusable violation may arise by reason of extenuating circumstances that attended the defendant's conduct in parking his vehicle. An excellent illustration suggesting how such considerations may have influenced judgment is afforded by the supreme court decision in Rowe v. Travelers Ins. Co.45 The court here was obviously impressed with the fact that the left rear wheel of the defendant's car intruded only marginally on the highway. It also clearly appeared that at the time of the accident the car had remained there for only a few minutes while the driver, a woman, and her friends were attempting to cope with an emergency arising from a sudden motor failure. The lights of the stalled vehicle were burning and there was nothing to interfere with the ability of an oncoming driver to see the road and the parked car. The court, however, was obliged to conclude that the driver of the parked vehicle could have moved it completely from the highway and that she was negligent in failing to do so. The car was struck by a truck approaching from the rear, whose driver failed to observe the lighted parked car until he was thirty feet or less from its rear. The court concluded that he should have appreciated the situation earlier. As a result of the collision the truck, which had been leased from plaintiff, was damaged and the present suit was instituted by the lessor. It can thus be seen that if we ignore the extenuating circumstances attendant upon the parking, the facts are almost indistinguishable from those presented in Dixie. The court, however, denied recovery against the driver of the parked car. The opinion wholly ignored the Dixie case and made the following observation in the uninformative language of proximate cause:

"Although Mrs. Rowe did not remove her vehicle entirely off the highway, Coe has failed to establish that this constituted negligence which was a proximate or contributing cause of the accident. The sole and the proximate cause of this collision was the failure of Coe to observe what he could and should have observed."46

This writer cannot escape the conclusion that there is an adequate explanation of the Rowe decision, and that it lies in

46. Id. at 667, 219 So.2d at 489.
the court's conviction (although unexpressed) that the particular violation involved was excusable for the purpose of civil litigation. The objection may be raised at this point that no violation of a criminal statute can be regarded as excusable in a civil suit unless the same conduct would be excusable in a criminal proceeding. I suggest, however, in reply that such an argument does not take fully into account the underlying basis of the so-called negligence *per se* rule. We may bear in mind our previous observation that when a court accepts a criminal statute as a standard for civil liability it does so through its wholly voluntary choice. The average criminal statute imposes no requirement, either express or implied, that it must control the disposition of a mere suit for damages. The judge who elects to import a criminal rule does so only because he regards it as being appropriate in a civil controversy before him. He can and should reject it unless he concludes that the measure affords appropriate protection of the class of persons to which the plaintiff belongs, that it protects against the kind of harm that was suffered and further, that it is designed to afford protection against the specific hazard presented in the controversy at hand.

By the same token, the judge in a civil proceeding may remain free to recognize as an excusable violation some piece of conduct that would not or could not be so recognized in a criminal prosecution. Furthermore, the judge should be free to look at the circumstances surrounding the violation when he faces the question as to how far, and to what risks, liability should be extended in a given controversy. If he can elect to ignore the criminal statute entirely, certainly he should be free to accept it subject to such limitations, justifications and exclusions as he regards appropriate. It seems to me that the existence of this wide range of permissible latitude for judgment is a built-in feature of the doctrine of negligence *per se* as it has been explained by many courts and writers.

The approach to tort liability suggested in *Dixie Drive It Yourself v. American Beverage Company* has been followed in

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a substantial group of decisions involving a broad variety of situations other than that of the unlawfully parked motorist. It is interesting to note that these decisions have resulted favorably to plaintiff or to defendant in almost equal proportions. We may turn our attention first to a few representative cases involving injuries in traffic and presenting in somewhat novel settings the problem of the intervening negligence of the third party, which has been our chief concern up to this point.

In Westchester Fire Insurance Co. v. Dardar,50 the conduct of three defendant drivers, A, B, and C, led to an intersectional collision in New Orleans. A was proceeding at a reasonable speed along a thoroughfare that was favored by stop signs on intersecting streets. B, who was proceeding on such a street, entered the intersection in disregard of the stop sign. He collided with A with such force that A's car passed out of control, left the public way and crashed into an adjacent structure belonging to the plaintiff. Although B was negligent in entering the superior street protected by a stop sign, the view of the sign ahead was obscured by the presence of a vehicle belonging to defendant C, which was parked within fifteen feet of the sign in violation of a municipal ordinance. C, along with B, was subjected to liability for the damage inflicted on plaintiff's structure. The opinion makes reference to Dixie in support of the court's observation that the hazard of an intersectional collision which is attributable to a driver's ignorance of the presence of a warning sign is one that falls directly within the scope of protection of the ordinance violated by C. The court also pointed out that the mere possibility that B might have proceeded into the intersection even if a view of the sign had not been afforded, does not prevent a conclusion that the unlawful presence of C's parked vehicle was a cause-in-fact of the mishap. It is noteworthy in the Westchester Fire Insurance Company case that the court treated the penal rule imposed by an ordinance just as though a criminal statute had been involved.

An interesting variation of the same theme is found in Vidrine v. General Fire & Casualty Co.51 The city of Ville Platte maintained a traffic signal at the intersection of LaSalle Street and Latour Street. That side of the light facing LaSalle Street was not in operating condition. The light, however, was func-

50. 158 So.2d 239 (La. App. 4th Cir. 1963).
51. 168 So.2d 449 (La. App. 3d Cir. 1964).
tioning as to the signal facing Latour Street. Mrs. Vidrine was proceeding down LaSalle Street and, finding the signal inoperative, assumed that it had been intentionally extinguished by the city for the time. She therefore concluded that LaSalle Street, in the absence of the signal, was entitled to the right of way, and she proceeded slowly across the intersection without stopping. At the same time Mrs. Ardoin, approaching the intersection on Latour Street, saw the light was green and assumed that she could proceed into the intersection without stopping. The result was a collision. Suit was brought by both Mrs. Ardoin and Mrs. Vidrine against the liability insurer of the City of Ville Platte. The court concluded that the light had been inoperative for several days and that the condition was due to the negligence of the city. The defendant argued that in Mrs. Ardoin's suit it could not be subjected to liability because the negligence of the city was passive and the later conduct of Mrs. Vidrine intervened and precluded liability on the part of the municipality. Although the court conceded that Mrs. Vidrine's mistaken appraisal of the reason for the extinguished signal amounted to negligence, yet it refused to hold that this conduct in any way affected the liability of the city with respect to Mrs. Ardoin, in whose favor the light was operating and served as an invitation to proceed. The opinion relied upon the decision in Dixie: "[T]he failure of the municipal employees to remedy the defective traffic signal created an undue risk of harm to traffic at the intersection. The intended purpose of the duty was to prevent accidents such as that which occurred herein."52 This case is of particular interest because it did not involve the violation of a criminal statute, but rather the breach of a duty imposed by courts demanding reasonable care in the maintenance of traffic signals.

There is sound reason for extending to judge-made rules the same approach that prevails for rules enacted in criminal statutes or ordinances. The body of law we call negligence can appropriately be regarded as a mass of particularized duties which share a common characteristic called "reasonable behavior." Although we tend to muse upon negligence as though it enjoys an independent ideational existence of its own, yet in truth negligence represents only an aggregate of very specific exactions devised by courts to control particular items of human

52. Id. at 454.
conduct. In actual controversies no one is negligent in the abstract. Instead, a defendant is chargeable with negligence in that he failed to maintain a reasonable diligent watchout, or he failed to maintain a reasonable speed, or he failed to give an appropriate signal upon turning his vehicle, and so on. Always he is chargeable with some specific shortcoming that is prohibited by “law”; and “law” here can realistically be regarded only as the body of particularized court-made rules with which the defendant’s conduct has allegedly conflicted. It follows that these rules, like the statutory rules of legislatures or city councils, must be given appropriate boundaries by the courts in cases as they arise. The protective limits of each prohibition must be fixed and there must be a determination as to which hazards fall within or without the protective boundary. Hence the problem faced in Dixie is not one that is peculiar to statutory interpretation. I suggest that all the niceties of proximate cause language represent efforts to bound legal duties in cases where no statute is involved without betraying the creative judicial process which, in truth, is at work in each instance.

The following group of decisions is offered as representative indications of the variety of situations in which the approach of the Dixie decision has been employed even where no statute or ordinance was involved. Dartez v. City of Sulphur,53 decided by the Court of Appeal for the Third Circuit, probably affords the most helpful discussion of the non-statutory duty problem that this writer has discovered. The facts show that the defendant city maintained a parking meter located on the sidewalk which was so bent that it protruded at a 45 degree angle into the adjacent sidewalk area. Plaintiff, a pedestrian, was aware of this defect and on several occasions he had walked around the bent meter. On the occasion in question he caught his foot on a piece of bailing wire (for which the defendant was not responsible) and in falling he fell across the parking meter post, sustaining rather serious injuries to his private parts. His claim against the city was denied in the court of appeal. The court was not content merely to observe that the negligence of the city was not the proximate cause of the injury or that the nature of the accident was unforeseeable, or that the conduct of the plaintiff intervened and rendered the city’s negligence passive. Instead, Tate, J., observed: “[T]he plaintiff’s injuries resulted

53. 179 So.2d 482 (La. App. 3d Cir. 1965).
because when he fell the bent post happened to be in the way. The duty imposed upon the city not to obstruct the walkway by the bent pole did not include within its scope the protection of those who might need the space occupied by the bent pole in order to fall free of it and thus to hit the sidewalk instead, nor to guard against resulting harms so highly extraordinary as to be unforeseeable within reason."

Other decisions in which the Dixie rationale was employed in dealing with a non-statutory duty are listed in the footnotes.

54. Id. at 485.
55. There follow below representative decisions relating to traffic accidents where no statute or ordinance was involved. For present purposes it is of particular interest to recall that there is virtually no conceivable piece of driver misconduct that cannot be regarded as a violation of some one or more of the myriad Rules of the Road that are crowded into Title 32 of the Louisiana Revised Statutes. At times the provisions of this title are explicit in their commands, but with equal frequency, other measures do no more than require that under given circumstances the operator shall proceed "cautiously" or "with reasonable care."

Fontenot v. Fidelity Gen. Ins. Co., 185 So.2d 896 (La. App. 3d Cir. 1966) (passenger in defendant's cab propelled from cab while attempting to close cab door which was not fully latched due to negligence of defendant). This case, with an opinion by Tate, J., and a vigorous dissenting opinion by Hood, J., is particularly instructive as a demonstration of two opposed conceptions of the proper policy that should control in a given situation. Hall v. State, 213 So.2d 169 (La. App. 3d Cir. 1968) (driver ran off road and into canal, which resulted in the drowning of passenger; highway was dangerously deceptive at the place of accident because of an absence of warning signs; defendant's claim that inadvertence of the driver was intervening proximate cause was dismissed with reference to Dixie; obviously one of the purposes of the duty to provide warning signs is to alert the inattentive driver). Newton v. Allstate Ins. Co., 209 So.2d 744 (La. App. 2d Cir. 1968) (defendant A negligently lost control of car while attempting to descend icy incline on highway overpass, and her car came to rest in the left lane; plaintiff, a following motorist, brought his vehicle to a halt in the face of the obstruction; defendant B, following plaintiff, failed to control his car when faced with the sudden obstruction and struck plaintiff's car; recovery was allowed against defendant A, who initiated the congestion through her negligence; the references to the Dixie decision are appropriate and interesting; this case can profitably be compared with the pileup situations discussed earlier in the text). Vander v. New York Fire & Marine Underwriters Inc., 192 So.2d 635 (La. App. 3d Cir. 1966) (plaintiff brought car to halt so as to avoid striking children who suddenly moved into path of vehicle; was struck by following car carelessly operated by defendant; discussion is noteworthy for special concurring opinion of Tate, J., who observed that even if plaintiff were negligent in failing to discharge his duty to observe the children, this duty does not exist for protection against the risk of a rear-end collision with a careless motorist who follows). Broussard v. State Farm Mut. Auto. Ins. Co., 188 So.2d 111 (La. App. 3d Cir. 1966) (oncoming truck on highway suddenly swerved into its left lane during heavy fog which resulted in head-on collision with car driven by defendant; suit instituted on behalf of passenger in defendant's car; after settlement with trucker, suit was brought against defendant for proceeding too fast through the fog; the claim was dismissed: "Any duty of [defendant] ... to proceed at a slower speed because of the fog was, insofar as here pertinent, designed to prevent accident through his running into objects in his path because of his inability to see them sooner because
It may be noted in the Dartez case above that a resort by the court to the broad policy approach of the Dixie decision resulted in a conclusion that the risk encountered was excluded from the protection of the duty imposed on defendant, and recovery was denied for that reason. A similar denial of recovery will fre-

of the fog, . . . or else to prevent an accident resulting from collision with those entitled to expect a slower approach of oncoming traffic who might therefore cross rashly into his path because of obscured perception of his approach. . . ." Id. at 116). Muse v. Patterson & Co., 182 So. 2d 665 (La. App. 1st Cir. 1965) (highway contractor who failed to post warning of dangerous highway condition not liable to injured motorist who was aware of the condition).

The following are representative of decisions involving situations outside the area of traffic accidents, and where no statute or ordinance was involved. Norton v. Argonaut Ins. Co., 144 So. 2d 249 (La. App. 1st Cir. 1962) (physician negligently failed to designate on hospital chart that prescribed dosage of digitalis should not be administered to infant by injection; was subject to liability for death from overdosage even though the nurse administering the drug should have been aware of danger and should have administered the dosage orally; the hazard that a nurse may not be as alert as her duty requires affords one of the underlying reasons for the precautionary duties imposed upon the physician). Larned v. Wallace, 146 So.2d 434 (La. App. 3d Cir. 1962) (somewhat similar to preceding case; supervisory employee at oil well who so negligently arranged operational plan of work that a danger to workers was created was not relieved of liability for injury when casing tongs fell by reason of the carelessness of a subordinate worker under the plan).

Perhaps the most revealing decision in this group is Todd v. Aetna Cas. & Sur. Co., 219 So.2d 538 (La. App. 3d Cir. 1969). The deceased's car, which was properly parked on a city street, was knocked thirty feet forward into a ditch through the negligent driving of defendant motorist. At this time the deceased was not present. He was called to the scene of the accident from a neighboring house and became highly excited over the mishap. While he was watching several men in an effort to extricate his vehicle, he suffered a heart attack and died. The issues involved in the resulting litigation were basic and far-reaching. Persons who suffer physical injury as a consequence of emotional excitement brought about by witnessing an accident, even though it involves an impact with a member of the family, are almost uniformly denied recovery. The problem has usually been discussed in basic terms of the limited character of the duty to avoid an inflection of emotional disturbance. The excellent opinion by Judge Culpepper deserves particular notice. The approach of the Dixie decision dominates the entire discussion: "[T]he inquiry is whether the duty not to run into parked automobiles on the street includes protection against the hazard that the owner of the vehicle may be in a house nearby and may become so mentally distressed over the damages to his vehicle that illness or bodily harm may result. A mere statement of the question almost gives the answer. As a matter of legal policy we hold the defendant's duty did not include protection against such unforeseeable consequences as occurred here." Id. at 544. The profound influence of the Dixie decision is further indicated by the insistence of the opinion that causation be restricted to its simple factual significance. "[T]he first inquiry is whether defendant's negligence was cause-in-fact of Mr. Todd's death. Clearly it was. But for the fact that the defendant struck Mr. Todd's automobile and knocked it in the ditch, Mr. Todd would not have suffered the mental anguish which, according to the expert medical testimony discussed above, was the immediate cause of his death." Id. at 541. The court is thus enabled to attack the policy problem directly and uninfluenced by any confusion on the matter of causation.
quently follow the court's undertaking to determine whether the risk and the duty are matched. The cases here are numerous.56

56. The decision in Jackson v. Beechwood, Inc., 180 So.2d 732 (La. App. 1st Cir. 1965) affords an excellent illustration of skillful employment of the Dixie approach. Defendants maintained a borrow pit in violation of a city ordinance. Plaintiff's intestate, a youth seventeen years of age and a good swimmer, attempted to swim across the pit and sustained a cramp which resulted in his drowning. In denying recovery the court observed: "The ordinance was intended to guard against concealed or hidden hazards which so frequently exist in excavations of this nature. Likewise, it protects against the hazard of children of tender years who may fall or venture into the pit. However, the ordinance does not make a landowner an insurer, nor does it protect against the hazard that a trespasser capable of looking after his own safety and an excellent swimmer will intentionally use the artificial lake and drown therein." Id. at 733.

Another well conceived opinion in which the Dixie approach was properly employed to prevent recovery is O'Connor v. St. Louis Fire & Marine Ins. Co., 217 So.2d 750 (La. App. 4th Cir. 1969). As the facts indicated, Magazine Street in New Orleans will accommodate four lanes of traffic, but the two outside lanes are devoted to parking, leaving only two inner lanes for vehicles in motion. The street is a one-way street. Defendant A doubleparked its truck in order to make a delivery, thus obscuring the left-hand lane. Defendant B, driving a cab, suddenly encountered a child who dashed out from behind the doubleparked truck. It is conceded that the cab driver was unable to avoid the accident, and suit against him was dismissed. The claim against the truck operator was based on its violation of a city ordinance prohibiting doubleparking. The court properly denied that the parents of the child were entitled to rely upon this violation. The opinion observed: "It is our opinion that the injury which was suffered by the young child was not one which the statute was contemplated to protect. Had the truck been legally parked next to the curb the result to the young child would have been the same had she run out from in front of it into the street into the path of the approaching taxi." Id. at 753.

In Clingman v. Millerville Mud Sales, Inc., 146 So.2d 240 (La. App. 3d Cir. 1962), the defendant negligently backed into the highway and was struck by plaintiff who was driving at an excessive speed and failed to bring her car under control. Her claim for injuries might have been dismissed on the basis of contributory negligence, but the plaintiff urged a rationale based on his apparent misunderstanding that Dixie insured recovery against a negligent defendant despite any intervening negligence. The court appropriately replied: "It [Dixie] does not stand for the proposition that once the defendant is found negligent all subsequent or concurrent actions on the part of the plaintiff must be disregarded in determining whether or not plea of contributory negligence will bar recovery of the plaintiff." Id. at 242.

Parnell v. Connecticut Fire Ins. Co., 245 La. 16, 156 So.2d 462 (1963), is an interesting decision by the Supreme Court in which the approach of the Dixie decision was applied to the behavior of the plaintiff, and resulted in a denial of recovery on the basis of contributory negligence. The testimony showed that defendant's car was parked on the east parking lane of a city street facing north. Defendant entered the car and started to pull out, at which time he looked over his left shoulder to ascertain whether traffic was coming and thus diverted his eyes from the road directly ahead of him. As he went into motion he struck a bicycle operated by plaintiff who, contrary to ordinance, was proceeding down the east side of the same street and moving southward (with the result that he was proceeding on his left side of the street). There was a resulting collision and plaintiff, the bicyclist, was injured. It was conceded that the defendant was negligent in diverting his eyes. The Supreme Court, however, held that the plaintiff was guilty of contributory negligence in being on the lefthand side of the street in violation of the ordinance. The court
It will be noted that in most of the cited instances the court undertook to explain the policy approach suggested in the *Dixie* opinion in its effort to correct a not infrequent misapprehension of the true purport of the decision. Counsel have pressed the courts with a contention that intervening wrongdoing by a third party (or even by the plaintiff himself) must be consistently ignored in any suit against a defendant whose original negligence set the stage for the ensuing accident. This, they appear to urge, is what the *Dixie* decision stands for—it is the rule of the case.

observed, expressly following the approach of the *Dixie* decision: "Traffic laws heretofore mentioned are designed to protect the occupants of vehicles against the very type of accident that occurred here. The plaintiff's violation of the ordinance and statute was negligence in this case for by driving in the wrong direction he forsook the protection the statutes were designed to afford him, and in so doing he endangered himself." *Id.* at 22, 156 So.2d at 464. This writer has difficulty with the *Parnell* decision with respect to the proper view of the policy underlying the ordinance violated by the plaintiff. Any bicyclist was entitled to be on the same side of the street with defendant when the latter was backing out his car. Plaintiff's violation therefore did not place him at a prohibited spot. He was merely proceeding in an inappropriate direction for the side that he had chosen. It is difficult to believe that the same accident would not have occurred if the plaintiff had been at the same spot going in the opposite direction, in which case he would not have been in violation of law.

According to the long established rule in Louisiana and elsewhere, a motorist who, in violation of statute, leaves his car unattended with the ignition key in the lock, is nevertheless not responsible for the carelessness of a thief who steals the car and thereafter injures someone through his driving. In *Call v. Huffman*, 163 So.2d 397 (La. App. 2d Cir. 1964), a victim of such an accident urged a reconsideration of the established position above. He insisted (mistakenly, I suggest) that under the *Dixie* decision an intervening wrongful act (such as that of a thief) can never serve to insulate an original wrongdoer from ultimate liability. The court had no difficulty in denying recovery by pointing out, consistently with the approach of *Dixie*, that the purpose of the statute violated in the instant case was not to insure the safety of persons on the highway against the careless driving of a thief. Berluchaux v. Employers Mut. of Wausau, 194 So.2d 463 (La. App. 4th Cir. 1967) is in accord.

In *Muse v. Patterson & Co.*, 182 So.2d 665 (La. App. 1st Cir. 1965), the right wheels of a motorist's car went off the highway and downward eleven inches into a deeply depressed shoulder. In an effort to extricate the vehicle back onto the road the motorist collided with the oncoming car of plaintiff. In a suit against the defendant, the highway construction contractor, the plaintiff had urged *Dixie* on the court. He insisted that it stands for the proposition that even though the driver of the car that was experiencing difficulty might be regarded as negligent, this should not prevent the earlier negligence of the defendant contractor from operating as the proximate cause. In answer, the court observed that the only shortcoming chargeable against the latter was its failure to erect signs indicating the presence of danger due to highway construction. The only purpose of such signs, it continued, was to afford knowledge, and under the circumstances of the instant case the motorist involved was independently aware of the condition. Somewhat similar is *Martin v. State Dept. of Highways*, 175 So.2d 411 (La. App. 4th Cir. 1965) (alleged duty of highway department to provide special protective barrier on drawbridge did not extend to the risk of injury to a car that was being operated without brakes; note the close analogy to an absence of cause-in-fact).
The writer suggests that this line of argument stems from an unfortunately polarized approach. It is assumed (incorrectly) that prior to the Dixie decision, intervening negligence of a third party had served uniformly to break the chain of proximate causation between the original negligence of the defendant (which accordingly became "passive") and the ultimate injury suffered by the plaintiff. The second step in this same line of argument is that the Dixie decision repudiated the old rule, and, by so doing, it established its polar opposite in lieu thereof. I have attempted earlier to point out what appears to be the fallacy here. The court in the Dixie decision only concluded that under the specific facts as presented in that case the heedlessness of the motorist approaching from the rear created a risk factor that fell within the protective scope of the specific statutory rule prohibiting the parking of a vehicle on the highway without warning. By the same token there is implicit in the opinion the corollary proposition that should the court later find itself faced with a different prohibition or with a different piece of intervening conduct, it would be entirely free to follow the policy dictates of the newer situation and to afford immunity to the original wrongdoer whenever this may appear to be sound policywise. Insofar as I can see, the Dixie decision represents exclusively an approach or a method of attack; there can be no such thing as the rule of the Dixie decision which might require that the case be distinguished in future litigation. 

57. See text accompanying note 20 supra.
58. Cf. Pierre v. Allstate Ins. Co., 221 So.2d 846 (La. App. 4th Cir. 1969), where the court of appeal reversed its position on rehearing in order to give effect to a newly discovered basis upon which it felt it could "distinguish" the Dixie decision.