Torts—Where Reasonable Minds Could Differ, the Jury Should Decide Questions Concerning Proximate Cause and Independent Intervening Cause In Cases Where Car Owner Leaves Keys in Ignition Switch and Theft of Car Results in Injuries to Third Parties.—*Davis v. Thornton* (Mich. 1970).

Defendant Williams was driving the car of his employer, defendant Thornton, while on his employer's business. He parked the car and left the keys in the ignition, with the doors unlocked. A group of minors took the car for a joy ride, crossed the centerline of a highway and collided with plaintiff's car, killing one and severely injuring five of the other occupants of plaintiff's car. Plaintiffs brought suit, claiming that the defendants' negligence was the proximate cause of their various injuries. Trial court granted summary judgment in favor of defendant on ground that pleading failed to state a cause of action. The Michigan supreme court, *Held*, reversed and remanded, two justices dissenting. It is for the jury to decide whether the act of a motorist in leaving keys in his car was the proximate cause of injuries suffered after the car was stolen, and whether such theft broke the chain of causation between the car owner's negligent act and the subsequent injuries. *Davis v. Thornton*, 384 Mich. 138, 180 N.W.2d 11 (1970).

Most first year law students learn that a prima facia case of negligence consists of the following: act or omission to act by the defendant, duty (of ordinary care or some "special" duty), breach of duty, proximate cause, and damages.[1] While elements and basic rules or "black letter law" are easily mastered, only the foolish or uninitiated fail to realize the difficulties which can, and do, come into play. As in the famous case of *Palsgraf v. Long Island Railroad Co.*,[2] *Davis*, and similar cases, present factual situations which demand decisions which are not easily reached.

One of the primary issues presented in the principal case is whether a car owner who leaves his keys in his car (in the ignition switch or otherwise) owes a duty to protect others from the intervening acts of third parties—youthful joy rider or adult thief—which result in damage or injury. *Curtis v. Jacobson*[3] is representative of the majority viewpoint in such cases. In *Curtis*, the Supreme Judicial Court of Maine held that in determining liability for damages to a parked auto struck by a stolen taxicab which had been parked with its motor running in a private driveway, the taxicab driver was under no legal duty to anticipate the sudden unlawful act of thieves.[4] The Supreme Court of Arizona, in *Shafer v. Monte Mansfield Motors*,[5] held that the duty of an auto dealer

1 *See* Green, *Foreseeability In Negligence Law*, 61 Columbia L. Rev. 1401 (1961).

2 222 App. Div. 166, 225 N.Y.S. 412 (1927); 248 N.Y. 339, 162 N.E. 99 (1928). For an excellent review of the facts and analysis of the opinions rendered in this case, *see* W. Prosser, *Selected Topics on the Law of Torts*, in The Thomas M. Cooley Lectures 191 (1953).

3 142 Me. 351, 54 A.2d 520 (1947).

4 *Id.* at 361, 54 A.2d at 525.

5 91 Ariz. 331, 372 P.2d 333 (1962).

whose employee left keys in an unattended vehicle on the dealer's lot did not extend to plaintiffs who sustained damages in an accident with the person who had converted the dealer's vehicle.[6] In *Davis*, the Supreme Court of Michigan stated that a conclusion concerning "duty" should be made by a jury, and that reasonable men, in considering defendant's violation of an ordinance and available statistics, could find that defendant's act was negligent.

Many jurisdictions, particularly major metropolitan areas, have enacted car-locking ordinances or statutes which some courts have interpreted as safety measures intended to protect the users of public streets and highways at large.[7] However, violation of such an ordinance is not necessarily negligence *per se*.[8] Under similar factual circumstances, various courts have disagreed concerning the effect that should be given to a violation of such a statute.[9] It must be conceded at this point, however, that in such cases "[t]he great majority [of courts] have refused to hold the defendant liable, either with or without a car-locking ordinance."[10] In an exhaustive opinion by Justice Traynor, the Supreme Court of California, in *Richards v. Stanley*,[11] held that the San Francisco ordinance which prohibited persons from leaving their motor vehicles unattended and unlocked with the ignition key in the vehicle did not impose a duty upon the driver to protect members of the general public from the risk of motoring activities of a thief.[12] Although the 1954 *Richards* decision is considered a lead case and has been relied upon many times in other jurisdictions,[13] later discussion will offer criticism, together with alternative suggestions. It should also be noted that the *Richards* decision was probably necessitated by the municipal code section's somewhat unique provision ". . . nor shall this section or any violation thereof be admissible as evidence affecting recovery in any civil action for theft of such motor vehicle, or the insurance thereon, or have any other bearing in any civil action."[14]

In any negligence case, proving breach of duty is only part of the battle for the plaintiff's attorney. In order for negligence to be actionable, it must be the legal, or proximate cause of the injury or damage. In granting defendant's motion for new trial, the Supreme Judicial Court of Maine, in *Curtis*, said: "Negligence is the proximate cause of an injury only when the injury is the natural and probable result of it and in the light of attending circumstances it ought to have been foreseen by a person of ordinary care."[15] It is the opinion of this writer that such a "test" for proximate cause often renders unjust results,

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[6] *Id.* at 334, 372 P.2d at 335.
[7] *See, e.g.*, Justus v. Wood, 209 Tenn. 55, 349 S.W.2d 793 (1961).
[8] *See, e.g.*, Kass v. Schneiderman, 197 N.Y.S.2d 979, 21 Misc. 2d 518 (1960).
[9] *See* Annot., 51 A.L.R.2d 633 (1957); 38 AM. JUR. *Negligence* § 158 (1941).
[10] W. PROSSER, LAW OF TORTS, § 51, at 323 (3d ed. 1964); *see* cases listed therein, at notes 38 and 39.
[11] 43 Cal. 2d 60, 271 P.2d 23 (1954).
[12] *Id.* at 69, 271 P.2d at 29.
[13] *See* cases listed at note 3 in Shafer v. Monte Mansfield Motors, 91 Ariz. 331, 333, 373 P.2d 333, 334 (1962).
[14] *See* note 1 in Richards v. Stanley, 43 Cal. 2d 60, 61, 271 P.2d 23, 24 (1954).
[15] 142 Me. at 360, 54 A.2d at 524.

and later discussion shall review court adopted "tests" which seem far more enlightened. In *Anderson v. Theisen*,[16] the Supreme Court of Minnesota was willing to assume, *arguendo*, that violation of the Minneapolis ordinance in question was negligence, but that:

> . . . we are of the opinion that the negligent driving of the thieves was the proximate cause of decedent's death and that the negligence of defendant, if any, was too remote in the eyes of the law to be regarded as connected as cause therewith. The weight of authority is to that effect.[17]

A leading minority case concerning the questions of proximate cause and intervening force as they pertain to the type of case under review is *Ross v. Hartman*.[18] In this case, the United States Court of Appeals for the District of Columbia stated that the purpose of an ordinance requiring motor vehicles to be locked is not to prevent theft for the sake of the owners or police, but to promote the safety of the public in the streets.[19] The court therefore held that violation of a District of Columbia traffic ordinance intended to promote public safety was negligence, and that where such negligence created the hazard and brought about the harm which the ordinance was intended to prevent, it was a legal, or "proximate" cause of the harm.[20] Later, in *Schaff v. R. W. Claxton, Inc.*,[21] the court stated:

> It is true that the *Ross* case involved the violation of an ordinance against leaving an unlocked car in a "public place," and we do not think that a restaurant's private parking space is a "public space" within the meaning of the ordinance. But we said in the *Ross* case: "In the absence of an ordinance . . . leaving a car unlocked might not be negligent in some circumstances, although in other circumstances it might be both negligent and a legal or 'proximate' cause of a resulting accident." Under that ruling, the evidence in the present case should have been submitted to the jury . . . .[22]

Another leading minority case, *Ney v. Yellow Cab Co.*,[23] also involved violation of a locking ordinance and negligent driving by a thief resulting in damage. The Supreme Court of Illinois affirmed judgment for the plaintiff, holding that the question whether the owner of the taxicab which was stolen was liable for damage because an employee of the owner of the taxicab left it unattended with the key in the ignition and the motor running, in violation of a statute, was for the jury.[24] The court also quoted part of Cardozo's opinion in *Palsgraf* and thereafter suggested that indeed the world of 1954 had changed so radically from that of 1928 so as to justify adaptive changes in the common

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16 231 Minn. 369, 43 N.W.2d 272 (1950).
17 *Id.* at 372, 43 N.W.2d at 273.
18 139 F.2d 14 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944).
19 *Id.* at 15.
20 *Id.*
21 144 F.2d 532 (D.C. Cir. 1944).
22 *Id.* at 533.
23 2 Ill. 2d 74, 117 N.E.2d 74 (1954).
24 *Id.* at 83, 117 N.E.2d at 80.

law concerning standards of behavior.[25] In *Ney*, the court quoted one of its earlier decisions[26] as the "test" for proximate cause:

> What constitutes proximate cause has been defined in numerous decisions, and there is practically no difference of opinion as to what the rule is. The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen as likely to occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which resulted from his act.[27]

The court in *Ney* went on to state that the intervention of a criminal act does not necessarily interrupt the relation of cause and effect between negligence and an injury, that indeed if at the time of the negligence the criminal act might reasonably have been foreseen, the causal chain is not broken by the intervention of such act.[28]

In the absence of statute or ordinance there has been a strong and clear statement of the minority viewpoint. In *Mellish v. Cooney*,[29] the Second Circuit Court of Connecticut found that leaving an auto on a city street, after dark, and with keys in the ignition, was a negligent act and that the owner should have foreseen the possibility that a thief might steal the auto and cause damage to innocent persons.[30] In *Mellish*, therefore, the intervening act of a thief clearly furnished no such break in the chain of causation as would absolve the owner of liability for damage resulting when the thief drove the auto into a collision.

A recent case involving these same questions is *Gaither v. Myers*.[31] The facts in this case were that a District of Columbia resident left his keys in the tailgate of his station wagon and the car was stolen and driven into Maryland, where a collision occurred, injuring the plaintiff Myers, a resident of Maryland. The court of appeals held that the District of Columbia tort rule that negligently leaving keys in an automobile may be the proximate cause of a collision, even though the automobile was being driven by a thief, was applicable even though the Maryland rule would hold, as a matter of law, that the intervening conduct of a thief would break the chain of causation and insulate the offender from tort liability.[32] The court in *Gaither* expressly approved the District of Columbia Court of Appeals finding that the ordinance in question was violated even when the driver removed the key from the ignition if he did not remove the key completely from the car.[33]

As in most tort cases, the outcome concerning liability of car owners after

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25 *Id.* at 81, 117 N.E.2d at 79.
26 Neering v. Illinois Cent. R.R., 383 Ill. 366, 50 N.E.2d 497 (1943).
27 2 Ill. 2d 74, 79, 117 N.E.2d 74, 78 (1954).
28 *Id.* at 80, 117 N.E.2d at 78.
29 23 Conn. Supp. 350, 183 A.2d 753 (1962).
30 *Id.* at 351, 183 A.2d at 754.
31 404 F.2d 216 (D.C. Cir. 1968).
32 *Id.* at 224; *see also* Liberto v. Holfeldt, 221 Md. 62, 155 A.2d 698 (1959), *accord* McAllister v. Driever, 318 F.2d 513 (4th Cir. 1963).
33 *Id.* at 220.

third parties take the vehicles and cause injury or damage often depends upon the precise facts and circumstances involved. Even the *Ross* case expressly stated that such liability was not absolute, but rather, depended upon consideration of the given facts and surrounding circumstances.[34] However, within state jurisdictions, predictable patterns are evident, and it must be reiterated that regardless of statutes or ordinances, cases holding car owners liable for injuries or damage caused by the negligent driving of a thief or joy-rider are still distinctly in the minority.[35]

While it may be stated that there are majority and minority positions on the question being analyzed, the high courts of Iowa and other states have not decided the issue. In the most recent Iowa case providing the opportunity for such a decision, the Iowa supreme court split 4-4,[36] and without opinion, affirmed (by operation of law) a lower court decision[37] which had sustained defendant's motion to dismiss. It seems unfortunate that the court did not reach a more definite decision, with an attendant opinion which could have clarified the court's viewpoint concerning the issues involved. Whether it is safe to assume that the court is leaning toward the majority position is somewhat indefinite; however, it is hoped that the Iowa court will, in the future, adopt the minority viewpoint and allow the jury (with rare exception) to decide the questions of negligence, proximate cause and intervening force. Such an adoption of the minority view by the Iowa supreme court would seemingly involve no great difficulty concerning such key legal concepts as proximate cause, for the Iowa court has evolved an enlightened "test" for proximate cause.[38]

Dean Prosser has suggested that normally such cases present no issue of causation, for there seems to be no doubt that the defendant has created a situation acted upon by another force to bring about the result. Prosser feels the problem is best stated in terms of duty to protect the plaintiff against such an

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[34] 139 F.2d at 15, n.10.

[35] *See* W. PROSSER, *supra* note 10.

[36] Bolden v. Tom Kelly Buick, Inc., 121 N.W.2d 200 (Iowa 1963).

[37] The matter was submitted on defendant's motion to dismiss in the District Court of Webster County, Honorable John M. Schaupp presiding.

[38] *See, e.g.*, Nizzi v. Laverty Sprayers Inc., 259 Iowa 112, 143 N.W.2d 312 (1966), wherein the court stated that if, on looking back from injury, connection between negligence and injury appears *unnatural, unreasonable*, and *improbable* in light of common experience, such negligence would be a remote rather than a proximate cause. (Emphasis added). The Iowa court used the same language in Hennemann v. McCalla, 260 Iowa 60, 148 N.W.2d 447 (1967). In the latter case the court also quoted the RESTATEMENT (SECOND) OF TORTS § 447, as follows:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
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> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
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> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
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> (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

intervening cause, one which is *foreign to the risk he has created.*[39] While it seems unlikely, in cases such as these, that proximate cause should be relegated to such a minor role, it shall be assumed, *arguendo*, that the duty element is of major importance.

In Iowa, the only part of the *Palsgraf* case to be quoted by the Iowa supreme court is in the case of *Appling v. Stuck*,[40] (quoting Justice Cardozo's majority opinion): "The risk reasonably to be perceived defines the duty to be obeyed. . . ."[41] If indeed the Iowa court has not adopted the restrictive rule of the foreseeable plaintiff, but rather considers the concept of foreseeable risk of harm to be more reliable, it would seem that ordinances or statutes would not be required to establish a duty to protect the public from risk of negligent driving by thieves or joy riders.

Eminent authorities have argued that there is little reason for a car owner to perceive the risk that a thief will be an incompetent driver[42] or that he will drive negligently.[43] With deference, it is suggested that such views are naive, in the face of recent statistics.[44] While statistics are often abused, it would seem that a modern day car owner of reasonable awareness would realize the distinct possibility that a key left in a car might serve as an invitation to a thief or joy rider, and that such intervention might well result in damage or injury to an innocent third person.

In addition to the alarming statistics concerning accident rates of autos stolen or taken for joy riding, the growth in car population in the United States is overwhelming.[45] In light of these trends, with attendant media coverage which practically defies lack of awareness, it seems desirable that judges take judicial notice of such trends and statistics and impose the duty upon car owners to take their keys out of their cars so as to alleviate the risk of harm to the public due to negligent driving of an intervenor. It seems extremely naive to adopt the nonsensical standard that the car owner need actual knowledge of a car thief[46] or potential joy rider in the vicinity. Obviously, the duty should not be to discover such persons, but rather, simply to remove the keys from the car so as to decrease the potential danger. It is recognized that some courts[47]

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39 W. PROSSER, LAW OF TORTS at 322 (3d ed. 1964). (Emphasis added).

40 164 N.W.2d 810 (Iowa 1969).

41 *Id.* at 814.

42 *See, e.g.,* Justice Traynor's opinion in Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954).

43 W. PROSSER, LAW OF TORTS at 323, n.40 (3d ed. 1964).

44 Excellent review of authoritative and persuasive statistics was made in Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968). *Davis,* the principal case, in turn cited some of the statistics cited in *Gaither.*

45 The Conference Board, a private business research organization, reported in March, 1971, that the number of automobiles in the United States was increasing by 6,000 a day. The Des Moines Register, March 17, 1971, at 1, col. 5.

46 Gower v. Lamb, 282 S.W.2d 867, 872 (Mo. 1955); Record, at 11, Bolden v. Tom Kelly Buick, Inc., 121 N.W.2d 200 (Iowa 1963).

47 *See, e.g.,* Shafer v. Monte Mansfield Motors, 91 Ariz. 331, 334, 372 P.2d 333, 335 (1962).

have been reluctant to take judicial notice of statistics; however, other courts[48] feel it necessary and are willing to do so.

While the surrendering of personal freedom of action is in many instances unfortunate, it seems apparent that we must accept various concomitant responsibilities of living in our crowded, complex society. In view of the available statistics, television advertisements, and general public awareness concerning the deadliness of automobile mishaps involving stolen vehicles, it would seem that enlightened courts such as the *Davis* court have properly enlarged the potential scope of liability.

The reasonable and prudent car owner should recognize, and not object to, a duty to protect innocent third parties from negligent intervention of the type discussed herein. While results may seem harsh for the relatively innocent defendant, a common guideline is often used which provides that the least guilty party shall be entitled to recovery. It should be noted that the minority position advocated herein retains flexibility, in that liability is not absolute.[49] Perhaps the most important aspect of the minority viewpoint is a greater willingness to let the jury decide the issues of negligence and proximate cause as fact questions.[50] This approach seems justified in light of the fact that most jurors are car owners and the defendant in such cases is normally not a "target" defendant. Juries should be trusted as being capable of rendering intelligent and just decisions where unusual circumstances indicate that the defendant should not be held responsible. Also, as in *Davis*, the requirement that reasonable minds might differ concerning the factual data presented must be fulfilled before the case will be submitted to a jury. Certainly any future decision by the Iowa supreme court will depend upon the precise factual pattern involved. Fortunately, less confusion seems to accrue when various "labels" are avoided, and the Iowa concepts of duty and proximate cause discussed above are utilized. Such common sense standards would seemingly facilitate the adoption by the Iowa court of the better reasoned minority viewpoint as presented in *Davis*.

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[48] Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); Davis v. Thornton, 384 Mich. 138, 180 N.W.2d 11 (1970).

[49] For an opinion which distinguishes the strong minority viewpoint in Mellish v. Cooney, 23 Conn. Supp. 350, 183 A.2d 753 (1962), *see* Suglia v. National Credit System, Inc., 4 Conn. Cir. 133, 227 A.2d 101 (1966).

[50] *See* note 48, *supra*.

Usury—A "Revolving" Charge Account Under Which the Vendee Purchases Merchandise and Pays 1½% on the Declining Unpaid Balance Does Not Constitute a Time-Price Sale so as to Remove it from Usury Law Control.—*State v. J. C. Penney & Co.* (Wis. 1970).

The State of Wisconsin brought an action seeking injunctive relief against the defendant retailer for the alleged violation of the Wisconsin usury statutes. Defendant offered merchandise to customers either for cash or on a revolving charge account which charged an additional 1½% per month on the unpaid balance thirty days past the date of first billing. The trial court held that the charging practice violated the state's maximum 12% per annum usury statute,[1] but denied injunctive relief on the ground that the right to assert the violation of the statute is personal to the persons who transact business with defendant. Therefore the state was held as not the proper plaintiff. Upon appeal to the Supreme Court of Wisconsin, defendant-appellee urged that the transaction fell under the "time-price doctrine" and therefore was not subject to the usury statutes. The supreme court reversed, agreeing with the district court that the substance, not the form of a transaction determines if it is subject to usury laws and agreeing also that the particular transaction involved in the case did not fall within the time-price doctrine so as to remove it from coverage of the usury laws. The case was reversed on the issue of the state's ability to bring suit against defendant. Unlike the district court, the supreme court held that defendant's actions constituted a public nuisance which could be enjoined by the state. *State v. J. C. Penney & Co.*, 48 Wis. 2d 125, 179 N.W. 2d 641 (1970).

Interest rate control or control of the "cost of money" has existed for centuries. Since the time of Hammurabi,[2] societies have realized that the citizen on the street requires governmental protection from the seller and lender. Stoning and/or banishing unscrupulous moneylenders was not an uncommon method of such early control. In general the term "usury" denotes the practice of charging more for a loan of money than is allowed by law, and influenced by the christian church which regarded the taking of interest for loaned money as a vice, the early laws of many nations outlawed it. As international trade grew, the Cannonist doctrine bent with the necessities of economic existence. In 1545 the Statute of Henry VIII legalized the taking of interest. The availability of money was essential to the economic conditions of the day, and as was true in other aspects of early European life, the religious ideal gave way to strict necessity.

In 1971, the image of the lender has changed considerably. From an object of contempt and a target of religious pressure, the lender has now become—judging by the number of financed automobiles and appliances—a virtual Saint Nicholas in the eyes of the American consumer. However, the

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1 Wis. Stat. Ann., §§ 138.05(1), 138.09(9)(a) (1970).

2 Wigmore, A Panorama of the World's Legal Systems 88-90 (West's ed. 1928).