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TORTS—LIABILITY OF ICE CREAM STREET VENDORS—
MOBILIZING THE INVITOR-INVITEE RELATIONSHIP

Defendant, Trowen Frozen Products, Inc., owned and operated an ice cream vending business offering a wide assortment of ice cream products for sale to the public. "[N]inety per cent of defendant's customers were children ranging in age from 4 to 16; the best hours for making sales were from 4 to 7 p.m. when the children were home from school but before they went to bed. . . ."¹ Defendant's policy was to assign one employee per truck whose job was to drive the truck and sell Trowen's products. The truck would proceed through a residential area, attracting customers from both sides of the street with a mechanical loudspeaker system which continuously broadcast a simple tune. When a potential customer attracted the driver's attention, he would stop the truck at the right hand curb, alight from the truck, and serve the customer. On May 14, 1964, five-year-old Carol Ann Ellis heard the music emanating from defendant's approaching truck and ran to her house to obtain money for a purchase. The driver, traveling east, had stopped his ice cream truck almost opposite Carol's house to serve several customers. Having obtained a quarter, Carol and her eight-year-old brother Rickey hastily dashed down the driveway toward the truck. As they approached the curb, their father, who was working on the car in the driveway, yelled, "Stop." This he did as a precautionary measure and not out of awareness of any specific danger. Rickey stopped at the curb, but Carol, in her haste, continued into the street; she looked to the right but not the left. As she entered the highway she was struck by an automobile traveling in the west-bound lane at approximately twenty miles per hour. The ice cream salesman testified that he was closing the compartments of the truck, preparatory to leaving, when he observed the automobile traveling west; "he then heard a 'thud'; he did not see . . . [Carol] before she was struck by the car. . . ."² Carol brought an action for personal injuries against the defendant vending company³ by her guardian ad litem. At the close of plaintiff's case the trial court sitting with a jury granted a nonsuit to the defendant, concluding, "that it was unable to find a legal duty 'on the part of this defendant towards this plaintiff under the particular circumstances. . . .'"⁴ On appeal, judgment was reversed for the plaintiff on the ground that there was a duty owed to the plaintiff by defendant based upon an invitor-invitee theory of negligence. *Ellis v. Trowen Frozen Products, Inc.*, 264 Cal. App. 2d 499, 70 Cal. Rptr. 487 (1968).

¹ *Ellis v. Trowen Frozen Products, Inc.*, 264 Cal. App. 2d 499, 501, 70 Cal. Rptr. 487, 489 (1968).

² *Id.*

³ The driver-salesman of the vending truck was not a party to the suit, and the action against the defendant owner and operator of the automobile was dismissed.

⁴ *Supra* note 1, at 502, 70 Cal. Rptr. at 489.

The objectives of this note are: to analyze the efficacy of the theory of liability expounded in *Ellis*, in itself and in light of a number of representative cases in which the courts advanced other theories of liability in similar fact situations;⁵ to set forth some observed implications and consequences of these decisions; and to synthesize some intimations in reference to these theories.

In the street ice cream vending type cases or "Pied Piper" cases, as they are often denoted, an ever present element is that of attraction to the truck of its predominantly youthful customers. This is principally due to the nature of these trucks—their generally elaborate decorations, sound devices, and lights. This notion of "attraction" has induced numerous courts into an evaluation of the doctrine of "attractive nuisance" in determining the liability of the defending party. The consequence has been an almost universal rejection of this doctrine in the "Pied Piper" situation.⁶

The rule, first known as the "turntable doctrine," was expounded in *Railroad Co. v. Stout*⁷ in 1873. Two years later it acquired the designation of "attractive nuisance" from its application in *Keffe v. Milwaukee and St. Paul R. Co.*⁸ wherein the court was preoccupied with the concepts of allurements and enticement. In common legal parlance:

Under the attractive nuisance doctrine liability is imposed for injuries to *children of tender years*, even though they are technical trespassers, where such injuries are the result of the failure of the owner or person in charge to take proper precautions to prevent injuries to children by instrumentalities or conditions which he should know would naturally *attract* them into unsuspected danger.⁹

It will be observed that the rationale of the doctrine, based upon legally recognized policy considerations, is to hold liable the defendant possessor of

⁵ For a further discussion and explanation of these theories, see 19 ALA. L. REV. 228 (1966); 18 ARK. L. REV. 178 (1964); Comment, *Torts: Pied Piper Doctrine—Right of Recovery of Children Attracted into Street by Vendors for Injury by Another Vehicle*, 3 TULSA L.J. 146 (1966).

⁶ *Mead v. Parker*, 221 F. Supp. 601 (E.D. Tenn. 1963), *aff'd*, 340 F.2d 157 (6th Cir. 1965); *Burkett v. Southern Belle Dairy Co.*, 272 S.W.2d 661 (Ky. App. 1954); *Molliere v. American Insurance Group*, 158 So. 2d 279 (La. App. 1963); *Sidders v. Mobile Softee, Inc.*, 19 Ohio Op. 2d 446, 184 N.E.2d 115 (1961). See generally *Ice Delivery Co. v. Thomas*, 290 Ky. 230, 160 S.W.2d 605 (1942) (ice delivery truck not "attractive nuisance"); *Baker-Evans Ice Cream Co. v. Tedesco*, 114 Ohio St. 170, 150 N.E. 745 (1926) (ice cream truck making deliveries held not "attractive nuisance"); *Coffey v. Oscar Mayer & Co.*, 252 Wis. 473, 32 N.W.2d 235 (1948) (ice truck stopping at intervals to make deliveries held not "attractive nuisance"); Annot., 3 A.L.R.2d 758 (1949); Annot., 74 A.L.R.2d 1056 (1960).

⁷ 84 U.S. 657 (1873).

⁸ 21 Minn. 207, 18 Am. R. 393 (1875).

⁹ 65 C.J.S. *Negligence* § 63(71) (1966) (emphasis added).

land who could otherwise plead trespass.¹⁰ Convincingly, this doctrine as originally conceived, applies to owners and possessors of land and objects thereon, and, as stated, modern judicial sentiment has held it inapplicable to the mobile street vendor case.¹¹ Moreover, in *Sidders v. Mobile Softee, Inc.*,¹² the court rejected the "attractive nuisance" doctrine on the basis that a street vending operation does not constitute a nuisance, when it declared:

The defendant is accused of being a sort of modern Pied Piper and as such responsible for any and all mishaps to its young customers. It is not an insurer of the safety of its patrons. Nor is it charged with a violation of law. The operation of an ice cream vending truck attractive to children is admittedly not a nuisance.¹³

As in most jurisdictions today, the American Law Institute's *Restatement (Second) of Torts* does not predicate its reformulation of the "attractive nuisance" doctrine on the element of attractiveness,¹⁴ but recognizes "that the basis of the rule is merely the ordinary negligence basis of a duty of reasonable care not to inflict foreseeable harm on another. . . ."¹⁵ Although, as stated above, the "attractive nuisance" doctrine in its traditional character has been rejected in the "Pied Piper" situation, the rule of the *Restatement*, as contrasted with that doctrine, has received pseudo recognition in such a case, *Mackey v. Spradlin*.¹⁶

In *Mackey* the Court of Appeals of Kentucky reversed and remanded a judgment upon a directed verdict for defendant operators and owners in a suit brought by the administrator of the estate of a seven year old who was killed when he darted from behind the vendor's ice cream wagon into the side of a passing truck. The court recognized that they were not dealing with an "attractive nuisance" case but announced that "much the same policy considerations the attractive nuisance theory was designed to recognize and satisfy" were present and "[t]he differences are superficial."¹⁷ Judge Palmore said:

¹⁰ *Id.*; 2 HARPER & JAMES, THE LAW OF TORTS § 27.5, at 1447-50 (1956); PROSSER, TORTS § 59, at 372-77 (3d ed. 1964).

¹¹ *Supra* note 6.

¹² 19 Ohio Op. 2d 446, 184 N.E.2d 115 (1961).

¹³ *Id.* at 448, 184 N.E.2d at 117.

¹⁴ RESTATEMENT (SECOND) OF TORTS § 339 (1965).

¹⁵ *Id.*, comment (b) at 198. See also PROSSER, *supra* note 10, § 59, at 374, and cases cited therein.

¹⁶ 397 S.W.2d 33 (Ky. App. 1965).

¹⁷ *Id.* at 37.

The danger is enhanced by the sense of haste that is purposely aroused in the children of a neighborhood by the tinkling of bells and flashing of lights heralding the imminent arrival of an *attraction* that will stay but a moment and be gone unless they come at once. . . . Common sense and the most minimal regard for humanity suggest that one who intentionally attracts small children to a place in or so close to a street or highway that there is danger of their being struck by passing traffic should be under a duty to maintain a lookout for such traffic and, if he observes or in the exercise of ordinary care should observe a vehicle approaching close enough to constitute an immediate hazard, to warn the children present in the immediate area of the *attraction* or make such other reasonable effort to prevent their being injured as may be necessary in the circumstances.¹⁸

In *Mackey*, therefore, the court states that they do not have an "attractive nuisance" case; yet they utilize "attractive nuisance" principles in justifying reversal of the trial court. Of distinct importance, however, is the fact that in *Mackey* the vendors were held negligent as a matter of law for failing to exercise reasonable care to prevent the accident in not keeping a lookout on behalf of their customer. "The gist of their [vendors'] negligence is that they should have realized the danger of just such an accident. . . ." ¹⁹ Perceiving that the "gist" of defendants' negligence rested in their failure to foresee the possibility of harm to the plaintiff while utilizing "attractive nuisance" principles, the court has in effect applied the *Restatement's* reformulation of the "attractive nuisance" doctrine to a "Pied Piper" case. That is to say that in *Mackey* the court properly observed that the basis of the "attractive nuisance" doctrine is no longer attractiveness but "merely the ordinary negligence basis of a duty of reasonable care not to inflict foreseeable harm on another. . . ." ²⁰ However, the doctrine as so expounded, is, as the *Restatement* indicates, applicable to "a possessor of land," ²¹ and generally is applied only to trespassers.²²

Clearly by the weight of authority, the "attractive nuisance" doctrine *per se* is inapplicable to the "Pied Piper" case.²³ A recognition of the *Restatement's* reformulated conception of the "attractive nuisance" doctrine²⁴ was, in effect, made in *Mackey*. Such a consideration of the doctrine acknowledges that its true basis is an exercise of care so as not to inflict foreseeable harm on another. But why is this evasive process via "attractive nuisance" principles necessary, when all that the court need consider when confronted with the issue of a defendant vendor's negligence is his conduct as against that of

¹⁸ *Id.* at 37-38 (emphasis added).

¹⁹ *Id.* at 38.

²⁰ RESTATEMENT (SECOND) OF TORTS § 339 comment (b).

²¹ *Supra* note 14.

²² *Supra* note 10.

²³ *Supra* notes 6, 10 and 14.

²⁴ *Supra* note 14.

a reasonable man under the circumstances?²⁵ Such a consideration was the basis of the opinion of the Supreme Court of Minnesota in the case of *Jacobs v. Draper*.²⁶

The factual situation in *Jacobs* is quite similar to that in *Ellis*, the principal case. Defendant's employee had stopped his musically equipped ice cream truck to serve plaintiff's son as well as other customers. As three and one-half year old Patrick darted from in front of the ice cream truck on his return across the street, he was struck by an automobile and died shortly thereafter. The automobile driver was exonerated of responsibility, but the jury found the defendant business owner negligent. The Supreme Court of Minnesota affirmed, stating "[we] are satisfied . . . that the jury could properly find that . . . [the defendant] did not discharge his *common-law duty* to use due care not to injure plaintiff's child."²⁷ The question of defendant's negligence was one of fact, rather than one of law, as in *Mackey*.

The court, cognizant that the defendant "used recorded music to attract customers, and was selling a product enticing in itself to children,"²⁸ cited the *Mackey* case with favor and recognized, as did the *Mackey* court, that such a "Pied Piper" case is vested with many of the same policy considerations the "attractive nuisance" theory was designed to recognize and satisfy. Notwithstanding, the theory in *Jacobs* rested solely upon the common law basis of negligence. The court declared:

Whether or not a duty has been violated depends upon the *risks* of the situation, the dangers known or reasonably to have been *foreseen*, and all of the then existing circumstances. . . . Where a person knows or has reason to know that children are likely to be in the vicinity, the greater hazard created by their presence or probable presence is a circumstance to be considered in determining whether reasonable care was used. The duty, however, always remains the same—reasonable care under the circumstances.²⁹

The court further noted:

[W]hen children are in the vicinity, much is necessarily to be expected of them which would not be looked for on the part of an adult. It may be *anticipated* that a child will dash into the street in the path of a car. . . . In all such cases, the question comes down essentially to one of whether the risk outweighs the utility of the actor's conduct.³⁰

²⁵ The reasonable man conducts himself so as not to expose others to unreasonable risks of foreseeable harm. See RESTATEMENT (SECOND) OF TORTS §§ 298, 302-03 (1965). See generally PROSSER, *supra* note 10, §§ 31-32.

²⁶ 274 Minn. 110, 142 N.W.2d 628 (1966).

²⁷ *Id.* at 116, 142 N.W.2d at 632 (emphasis added).

²⁸ *Id.* at 117, 142 N.W.2d at 633.

²⁹ *Id.* at 113, 142 N.W.2d at 631 (emphasis added).

³⁰ *Id.* at 117, 142 N.W.2d at 633 (emphasis added). Compare *Mackey v. Spradlin*,

The gist of defendant's negligence was that under the circumstances he should have foreseen just such an accident. The circumstances to be considered by the jury in relating defendant's conduct to that of a reasonable man were: that the truck was parked in an area where many children resided; that music was used to attract customers; and that the product sold was in itself enticing to children. These factors of attractiveness and enticement were merely circumstances to be considered by the jury and not the keystone for the application of "attractive nuisance" principles as in *Mackey*.

A secondary theory of liability, which at times appears in a case of this nature,³¹ was presented in *Jacobs*, but not determined therein. Defendant's ice cream truck had been parked in violation of a parking ordinance and a Minnesota statute which imposed a duty upon a vehicle operator toward pedestrians. The court refused to consider the duty so imposed, stating that such violations "would only be cumulative with his breach of the common-law duty of due care."³² In *Mead v. Parker*,³³ one theory of recovery employed by plaintiff was that defendant was negligent in parking on the wrong side of the street in violation of a city ordinance. The Court of Appeals held, in part, that plaintiff was not a member of the class which the lawmaking body intended to protect by the ordinance. Thus, violation of that ordinance constituted no negligence toward the non-beneficiary child.³⁴

However, notwithstanding *Mead*, once a statute or ordinance has been found to be applicable, one of three consequences follows a violation thereof, depending upon the jurisdiction: a violation will be conclusive of negligence—this is termed negligence per se;³⁵ a "violation creates a presumption of negligence, which may be rebutted by a showing of an adequate excuse but calls for a binding instruction in the absence of such evidence";³⁶ or a violation will constitute evidence of negligence to be accepted or rejected by the jury.³⁷ This theory of negligence, based upon the

supra note 16 (risk outweighs utility) with *Mead v. Parker*, *supra* note 6 and *Goff v. Carlino*, 181 So. 2d 426 (La. App. 1965) (utility outweighs risk).

³¹ See, e.g., *Mead v. Parker*, *supra* note 6; *Landers v. French's Ice Cream Co.*, 98 Ga. App. 317, 106 S.E.2d 325 (1958); *Vought v. Jones*, 205 Va. 719, 139 S.E.2d 810 (1965); *Saulsbury v. Williams*, 205 Va. 727, 139 S.E.2d 816 (1965).

³² *Supra* note 26, at 119, 142 N.W.2d at 634.

³³ *Supra* note 6.

³⁴ Before liability can be based upon the violation of a statute, the person harmed must show that he is a member of the class which the legislature intended to protect by the enactment of the statute. See, e.g., RESTATEMENT (SECOND) OF TORTS § 288 (1965); 65 C.J.S. *Negligence* § 19(5)(d) (1966); PROSSER, *supra* note 10, § 35, at 202.

³⁵ See, e.g., RESTATEMENT (SECOND) OF TORTS § 288B (1965); 65 C.J.S. *Negligence* § 19(3) (1966); PROSSER, *supra* note 10, § 35.

³⁶ PROSSER, *supra* note 10, § 35.

³⁷ See, e.g., 65 C.J.S. *Negligence* § 19(2) (1966); PROSSER, *supra* note 10, § 35.

violation of a validly pleaded statute or ordinance, has been successfully employed as negligence per se and evidence of negligence in the "Pied Piper" situation.³⁸

In *Landers v. French's Ice Cream Company*,³⁹ the plaintiff alleged negligence against the defendant vendor because he was illegally parked in violation of applicable ordinances. The appeals court, recognizing that the violations constituted negligence per se, held that defendant vendor's alleged violation of a city ordinance "presented a jury question as to whether the alleged negligence of [the defendant] was a concurring proximate cause of the plaintiff's injuries."⁴⁰ The Supreme Court of Appeals of Virginia, adopting the position that a violation constitutes evidence of negligence, in *Saulsbury v. Williams*,⁴¹ affirmed a lower court decision regarding the propriety of a jury's finding that a street vendor was negligent in parking his truck in violation of a provision of the state code. Plaintiff alleged the violation of a code providing that the truck shall not park so as to render "dangerous the use of the highway by others"⁴²; the jury found the defendant negligent based upon violation of that provision. A companion case to *Saulsbury* is *Vought v. Jones*,⁴³ wherein plaintiff alleged that the defendant was negligent in stopping or parking on the road and dispensing ice cream in violation of certain city ordinances. At the close of plaintiff's evidence, the trial judge entered a summary judgment for defendants. The reviewing court reversed and held that the question of defendants' negligence, based on a violation of the ordinance, was a question for the jury. The evidence produced by the plaintiff also presented a jury question pertaining to any possible violations by the defendant of duties or obligations owed to the plaintiff based on common law principles. The court summarily asserted that since the plaintiff was a *business invitee*, the defendant was under a duty to provide a reasonably safe place for the plaintiff-invitee, and that a determination as to whether this obligation had been fulfilled was properly a question for the jury. This theory of a common law duty arising out of a "Pied Piper" situation based on an invitor-invitee relationship received full expansion in *Schwartz v. Helms Bakery Limited*.⁴⁴

Defendant owner was in the business of selling bakery products from a

³⁸ *Landers v. French's Ice Cream Co.*, *supra* note 31; *Saulsbury v. Williams*, *supra* note 31; *Vought v. Jones*, *supra* note 31.

³⁹ *Supra* note 31; *see also* Annot., 74 A.L.R.2d 1050 (1960).

⁴⁰ *Landers v. French's Ice Cream Co.*, *supra* note 31, at 321, 139 S.E.2d at 329.

⁴¹ *Supra* note 31.

⁴² *Saulsbury v. Williams*, *supra* note 31, at 731, 139 S.E.2d at 819, quoting from VA. CODE ANN., § 46.1-248 (Repl. Vol. 1958).

⁴³ *Supra* note 31.

⁴⁴ 67 Cal. 2d 232, 430 P.2d 68 (1967).

truck which traveled up and down residential streets. The defendant driver knew the four-year-old plaintiff, and when the child asked the driver to wait for him while he went home to get a dime, the driver *told* the child that he would proceed up the street and wait for him there. After making several sales, the driver prepared to depart, believing the child would no longer arrive. At that moment the plaintiff shouted, "Hey, wait!" and darted out into the street where he was struck by a car.⁴⁵

The defendants owner and driver contended that they owed no duty to the plaintiff under the circumstances. The Supreme Court of California held that the defendants had established two legal relationships with the plaintiff; and, "[f]rom each such relationship the common law imposes a duty upon defendants to exercise ordinary care for the safety of persons such as plaintiff, and to avoid the creation of unreasonable risks of foreseeable harm."⁴⁶ The first legal relationship was established when the driver undertook to direct the conduct of the plaintiff. "A second and concomitant legal relationship arose between the child and the driver when the driver *invited* the child to become a customer of his business."⁴⁷ Whether or not the duties so established had been fulfilled was a question of fact for the jury, and the trial court was held to have erred in removing that question from them.

This application of the invitor-invitee relationship to a street vending situation so as to establish a duty on the part of the vendor is a novel extension of that theory of liability. The status of the vendor as a business invitor was first expressed in *Vought v. Jones*;⁴⁸ however, Justice Eggleston offered no explanation of the applicability of the doctrine in his opinion. This ratiocination was provided in *Schwartz* and followed in *Ellis*.

Clearly, in *Schwartz*, defendant vendor *expressly* invited the infant plaintiff to become a customer, thus establishing the relationship. Once acquiring a status as an invitor, the vendor assumed "the duty to exercise reasonable care to prevent his [plaintiff's] being injured on 'the premises.'"⁴⁹ This concept of "premises," Justice Tobringer comments, may be less or greater than the invitor's property. Of further consequence in an invitor-invitee relationship is the factor of *control* over the "premises," for, as the court declares, "[t]he crucial element is control . . ."⁵⁰; and a vendor will be liable for an injury caused on his "premises," "if, and only if, the injury is caused

⁴⁵ The defendant automobile driver was dismissed with prejudice and her liability was not at issue.

⁴⁶ *Supra* note 44, at 236, 430 P.2d at 70.

⁴⁷ *Supra* note 44, at 236, 430 P.2d at 70. (emphasis added).

⁴⁸ *Supra* note 31.

⁴⁹ *Supra* note 44, at 239, 430 P.2d at 72-73.

⁵⁰ *Supra* note 44, at 239, 430 P.2d at 73.

by a dangerous condition, or unreasonable risk of harm, *within the invitor's control.*"⁵¹

Schwartz was decided by the Supreme Court of California in July, 1967. In July, 1968, a California appeals court decided the *Ellis* case, relying heavily on *Schwartz*, but establishing the defendant vendor's duty on his status as an invitor created by *implied* invitation. The court in *Ellis* announced:

[W]hen an actor . . . has a product which is sold on its trucks on public streets to a very high percentage of child customers, and in so doing uses a commonly recognized sound device which a child relates to the product, the actor has extended an *invitation* to children who are attracted to and desire to purchase the product. . . . The potential customers who are attracted to and who approach the truck are classed as *invitees*.⁵²

Arguing the validity of such a basis upon which to found the relationship, the appellants in their brief stated:

Seldom is there an express invitation as in *Schwartz*. *The normal situation is an implied invitation to become a business invitee. Schwartz* should therefore apply to our case to raise a duty in defendant to exercise toward plaintiff the care of a reasonable and prudent person.⁵³

The implied invitation so constituted by defendant's music and manner of operation has the same vital effect as an express invitation, and on that basis there is no legal ground on which to distinguish the two cases.⁵⁴ These factors of allurements, enticement, and attractiveness, which in *Mackey*, discussed above, were regarded as factors prompting a decision on grounds analogous to an "attractive nuisance" situation, in the novel *Ellis* case, constituted elements adducing an implied invitation. The court in *Schwartz*, recognizing the inapplicability of the traditional "attractive nuisance" theory in a "Pied Piper" situation, commented: "the attractive nuisance doctrine, as such, is generally applied only to trespassers . . ." ⁵⁵ and that in defining the vendor's duty in terms of his status as an invitor, this court avoided the necessity of expressing an opinion as to whether defendant's truck constituted an "attractive nuisance"⁵⁶ as the courts found necessary in both *Mackey v. Spradlin* and *Jacobs v. Draper*, both discussed above.

⁵¹ *Supra* note 44, at 243 n.10, 430 P.2d at 75 n.10 (emphasis added).

⁵² *Supra* note 1, at 502, 70 Cal. Rptr. at 490. (emphasis added).

⁵³ Brief for Appellant at 7, *Ellis v. Trowen Frozen Products, Inc.*, *supra* note 52 (emphasis added).

⁵⁴ It is a firmly established proposition that an invitation may be express or implied and the duties of the invitor are the same in either case. See 65 C.J.S. *Negligence* § 63(41), at 715, 716 (1966).

⁵⁵ *Supra* note 44, at 236 n.2, 430 P.2d at 70-71 n.2.

⁵⁶ *Supra* note 44, at 236 n.2, 430 P.2d at 70 n.2.

Establishing defendant's standing as an invitor imposes upon him a more limited duty than that impressed upon the vendor in *Jacobs* wherein defendant's duty was purely that imposed by the common law. The essential elements of "premises" and control composing the duty of the vendor in *Ellis* and *Schwartz*, by their nature, limit the common law duty of exercising ordinary care to prevent exposing others to unreasonable risks of foreseeable harm to those persons on the "premises" under the control of the defendant peddler. Two questions arise: (1) what are defendant's "premises," and (2) are those "premises" under his control?

In *Ellis* the court commented that, "[t]he courts would be blind to reality if the 'area' or 'premises' were, in the case at bench or under like facts, confined to the truck itself."⁵⁷ The *Schwartz* court cites several cases⁵⁸ in support of its proposition that "premises" need not be confined to the invitor's property but may be constituted by an area less than his property or encompass an area beyond the bounds thereof. Just what constitutes this element of "premises," a necessary element in defining defendant's duty, must be established, for under this novel theory, the vendor's duty only extends to those on the "premises." It is in this manner that the scope of defendant's duty is limited, and the limitation applies to the immediate vicinity, for as Justice Tobriner declared:

The driver, as invitor, . . . may be held to the duty of exercising such reasonable care for plaintiff's safety in the *immediate vicinity* of the truck as would be expected of an ordinarily prudent man in the same circumstances.⁵⁹

Not only is the defendant's common law duty limited to the immediate vicinity by characterizing the vendor as an invitor, but the jury must be instructed that the "premises" must be under his control and supervision. Accordingly, the scope of the common law duty imposed upon the vendor is further limited. The Supreme Court in *Schwartz* summed it up most explicitly when it said:

Defendants may therefore be held liable for an injury occurring to their customer in the *immediate vicinity* of the truck if the circumstances causing the injury are within the range of defendants' reasonable *supervision and control*.⁶⁰

These explicated shortcomings in California's theory of establishing a vendor's duty on an invitor-invitee relationship, without considering the legitimacy of applying the concepts of such a relationship to a mobile street vending situation, concomitant with the substantial rejection of the "attractive

⁵⁷ *Supra* note 52.

⁵⁸ *Supra* note 44, at 239 nn.5 & 6, 430 P.2d at 73 nn.5 & 6. See also PROSSER, TORTS § 61, at 401-02 (3d ed. 1964).

⁵⁹ *Supra* note 44, at 242-43, 430 P.2d at 75 (emphasis added).

⁶⁰ *Supra* note 44, at 243 n.10, 430 P.2d at 75 n.10 (emphasis added).

nuisance" doctrine in the "Pied Piper" situation, exemplifies the merit of the workable theory expounded in *Jacobs v. Draper*.⁶¹

It will be recalled that in *Jacobs*, defendant's liability rested solely upon the common law basis of negligence, that is, the duty to use ordinary care so as to avoid the creation of unreasonable risks of foreseeable harm.⁶² The feasibility of this theory becomes most apparent when it is recognized that by basing the vendor's duty on this common law principle a threefold benefit is obtained: (1) the court may avoid any decision as to whether or not the "Pied Piper" operation constitutes an "attractive nuisance";⁶³ (2) the scope of the common law duty is not reduced to the *immediate vicinity* under the vendor's *control*; and (3) this duty is ever present and thus precludes as a prerequisite thereto the establishment of either an "attractive nuisance" type situation⁶⁴ or an invitor-invitee relationship.

In light of the cases examined and the criticisms advanced, it is aptly observed that when confronted with a "Pied Piper" case and the issue before the court is whether or not the defendant vendor bears any duty toward the plaintiff, the most feasible basis of establishing a duty is upon that ever present common law duty to use ordinary care so as to avoid the creation of unreasonable risks of foreseeable harm.⁶⁵ Submission to the jury as a question of fact the issue of the fulfillment of this duty should be accompanied by a consideration of the effect of a violation of any appropriate statute or ordinance. Where a statute or ordinance regulating the usage of public streets by vehicles is found to apply to the defendant vendor, his violation thereof may be evidence of negligence or a determinative factor in establishing the alleged negligence.

The diversity of legal theory employed in these similar fact situations suggests a fertile area for legislative enactment to establish a statutory duty on the part of a street vendor.⁶⁶ Undoubtedly, the standard of conduct for the street peddler "may be defined and established by a legislative enactment which lays down requirements of conduct, and provides expressly or by

⁶¹ *Supra* note 26.

⁶² *Supra* note 26, at 115-17, 142 N.W.2d at 632-33. See generally PROSSER, *supra* note 58, §§ 31-32.

⁶³ As heretofore established, the "attractive nuisance" doctrine has been substantially rejected in the "Pied Piper" situation; furthermore, the "doctrine" is applicable to possessors of land and is generally applied to trespassers.

⁶⁴ It will be recalled that in *Mackey v. Spradlin*, discussed *supra*, although the defendants were negligent for failing to exercise reasonable care, this duty arose out of a *de facto* "attractive nuisance" situation.

⁶⁵ See *Thomas v. Goodies Ice Cream Co.*, 13 Ohio App. 2d 67, 233 N.E.2d 876 (1968) wherein the court held defendant vendor owed to the plaintiff this common law duty.

⁶⁶ It is well established that a duty may be imposed by the common law or by legislative enactment. See, e.g., RESTATEMENT (SECOND) OF TORTS § 285 (1965); 65 C.J.S. *Negligence* § 1(4), at 444-45 (1966); PROSSER, *supra* note 58, § 35, at 191 & nn.84-85.

implication that a violation shall entail civil liability in tort."⁶⁷ In establishing the character of the vendor's conduct several factors of prime importance would merit legislative consideration.

The judicial decisions establishing the requisite manner of the vendor's conduct evolved in a restricted atmosphere in that the plaintiff, in each case of moment, was a child of "tender years,"⁶⁸ thus precluding an issue of contributory negligence. Some courts still adhere to arbitrary age limits regarding a child's negligence⁶⁹ in holding that a child under seven years is incapable of negligence, that between seven and fourteen years he is presumed incapable but may be shown to be capable, and that from fourteen to twenty-one years he is presumed capable, but that the contrary may be shown.⁷⁰ However, a majority of courts have held a child under seven years to be capable of some negligence.⁷¹ The effect of contributory negligence in the absence of modifying legislation is to act as a complete bar to plaintiff's recovery.⁷² The legislature, therefore, in pronouncing the standard of conduct to which a street vendor must conform, may increase or decrease the scope of that duty by including provisions with respect to the contributory negligence of an infant plaintiff. The efficacy of such a consideration is of prime importance since by the nature of the ice cream vendor's business, an overwhelming majority of his customers are children.

A further point of consideration in formulating a standard by which a street vendor must conduct his operation is the degree to which that standard might work a hardship upon the vendor. The concept of hardship is juxtaposed with two other concepts: the utility of the ice cream vendor's operation, and what he can do or may be required to do to ensure compliance with his obligations. In *Goff v. Carlino*⁷³ the court stated:

[P]arking the ice cream truck in the residential area undoubtedly created the foreseeable hazard that a careless child might be injured in crossing the street. But selling ice cream from mobile trucks in residential areas is a lawful business with social value; it would be virtually impossible to engage in this business if the ice

⁶⁷ RESTATEMENT (SECOND) OF TORTS § 285, comment (b) at 21 (1965).

⁶⁸ In *Ellis v. Trowen Frozen Products, Inc.*, the child plaintiff was 5 years old; *Mackey v. Spradlin*, 7 years old; *Jacobs v. Draper*, 3 years old; *Mead v. Parker*, 5 years old; *Landers v. French's Ice Cream Co.*, 5 years old; *Saulsbury v. Williams*, 3 years old; *Vought v. Jones*, 5 years old; and in *Schwartz v. Helms Bakery Limited*, 4 years old.

⁶⁹ "[C]ontributory negligence, in general, is determined and governed by the same tests and rules as the negligence of the defendant." PROSSER, *supra* note 58, § 64, at 429. See also 65A C.J.S. *Negligence* § 144 (1966).

⁷⁰ PROSSER, *supra* note 58, § 32, at 158 & nn.56-58.

⁷¹ PROSSER, *supra* note 58, at 158 n.60.

⁷² See, e.g., RESTATEMENT (SECOND) OF TORTS § 467 & Special Note (1965); PROSSER, *supra* note 58, § 64, at 435.

⁷³ 181 So. 2d 426 (La. App. 1965).

cream peddler could not park or if he were required to watch out for and to guide children across the streets to and from the truck.⁷⁴

Thus, the judge in *Goff* held that the legal utility of the peddler's operation outweighed the risk of foreseeable harm and, therefore, the risk was not an unreasonable one.⁷⁵ To hold that the risk outweighed the utility would raise a controvertible issue as to the probable imposition of a hardship upon the vendor by necessitating a change in the manner of his operation concomitant with the outweighing risk. The greater the degree of change deemed necessary, the greater the potential hardship, extending to the point of making it virtually impossible to engage in the business. Also, in *Mead v. Parker* the court held, "that it would have been extremely difficult for the defendants to have prevented any obvious danger to youthful purchasers of its merchandise without totally destroying the usefulness of the vending truck . . .,"⁷⁶ likewise implying that the nature of the business dictates that a change in operational procedure would work a hardship upon the huckster.⁷⁷

This factor of the social utility of an ice cream peddler's operation, as opposed to the risk of harm he creates, must be examined by legislative draftsmen in light of what measures might be imposed upon the vendor to reduce this risk and yet not destroy the economic feasibility of his business. It may be suggested that a number of measures be taken which could easily and economically make safer these ice cream vending operations: (1) the vendor might discourage children from crossing the street by returning shortly traveling in the opposite direction in order to serve them; (2) a hired man or boy could ride on the truck to act as a crossing guard when the truck stopped for customers; (3) the truck could be equipped with flashing lights so as to warn motorists that customers are in its vicinity;⁷⁸ and (4) the possible dangers of the street could be broadcast over a loud-speaker system relaying a repetitive message of warning. Pragmatically, the increase in operational costs necessitated by expenditures on these safety measures would boost the price of the product proportionally; thus, the customer himself would pay for his added protection. Consequently, the vendor sustains no penalty and the customer, generally a child, is afforded added safety.

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⁷⁴ *Id.* at 428.

⁷⁵ See generally RESTATEMENT (SECOND) OF TORTS § 291 & comment (d) (1965).

⁷⁶ 340 F.2d 157, 159 (6th Cir. 1965).

⁷⁷ See also *Molliere v. American Insurance Group*, 158 So.2d 279, 283 (La. App. 1963), wherein the court argued that to hold defendant vendor's truck an "attractive nuisance" would bring all highway vendors within the realm of the doctrine and impose upon them "unusual precautionary measures to prevent accidents" to their young customers.

⁷⁸ Brief for Appellant, *supra* note 53, at 9 (source of first three suggestions).