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TO: PROFESSOR KYLE GRAHAM

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NOTES AND/OR COMMENTS:

Re: *Hammontree v. Jenner* (1971) 20 Cal. App.3d 528

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2ND CIVIL NO.
38197

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In the Court of Appeal

SECOND APPELLATE DISTRICT

State of California

MAXINE HAMMONTREE and DALE HAMMONTREE,
Plaintiffs and Appellants,

vs.

THOMAS H. JENNER,
Defendant and Respondent.

APPEAL FROM SUPERIOR COURT OF LOS ANGELES COUNTY.
HON. KENNETH A. WHITE, JUDGE.

RESPONDENT'S REPLY BRIEF

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TABLE OF AUTHORITIES CITED

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RESPONDENT'S REPLY BRIEF

I
INTRODUCTION

This is an action by Maxine Hammontree and Dale Hammontree (Appellants) for personal injuries and property damage arising out of an automobile accident. The accident occurred when the Respondent, Thomas H. Jenner (Jenner), suddenly and without warning had an epileptic seizure causing him to lose consciousness and control of his automobile.

The case was tried to a jury. At the conclusion of the trial, but before closing argument, Appellants withdrew any claim that the accident was caused by Jenner's negligence. Rather, Appellants offered an instruction (refused by the Trial Court) which predicated liability on the theory that a motorist who is suddenly and without warning stricken by a heart attack, fainting spell, or epileptic seizure and by reason thereof is unable to control his automobile should be held strictly

liable for any accident proximately caused thereby [R.T. p. 97, lines 14-25; C.T. p. 74].

A jury verdict was returned in favor of Jenner [C.T. p. 11]; and Appellants have appealed from the Judgment entered on the jury verdict [C.T. pp. 12-13].

II
STATEMENT OF FACTS

Insofar as pertinent to the issues raised on this appeal, the following factual summary is offered:

1. Once in 1952 and once in 1953 Jenner suffered an epileptic seizure. However, from 1953 to the date of the accident, April 25, 1967, Jenner had no recurrence and was wholly asymptomatic [R.T. p. 77, lines 14-22; p. 94, line 18, to p. 95, line 3].

2. After Jenner's first seizure in 1952, he obtained medical treatment [R.T. p. 77, line 23, to p. 78, line 2; p. 91, lines 7-14]; and his condition was diagnosed as petit mal seizure [R.T. p. 91, lines 24-26]. Thereafter, upon his doctor's orders he took the drug dilantin and later the drug fulantin to prevent epileptic seizures [R.T. p. 78, line 16, to p. 79, line 7; p. 91, line 27, to p. 92, line 10; p. 93, line 17, to p. 94, line 2].

3. Jenner's doctor notified the Department of Motor Vehicles of his condition and Jenner's driver's license was placed on probation [R.T. p. 79, line 13, to p. 80, line 4; p. 92, lines 13-27].[1] The terms of the probation were that Jenner be examined by a physician every six months and a written report of that

[1]The law of this State does not prohibit a person who has a history of epilepsey from operating a motor vehicle provided the Department of Motor Vehicles has licensed him to drive after being advised of his condition. (Vehicle Code §§ 12805 and 12806).

examination be submitted to the Department. In approximately 1960, this condition of probation was changed by reducing the medical examination to once a year [R.T. p. 80, lines 5-19; p. 92, line 28, to p. 93, line 11]. Jenner fully complied with the terms of his probation [R.T. p. 80, lines 20-24].

4. Jenner's doctor testified that, based upon repeated examinations of Jenner and the history that was given to him, it was his opinion that it was safe for Jenner to drive an automobile [R.T. p. 94, lines 3-8].

5. Prior to the subject accident Jenner had done everything exactly as his doctor had told him to do to avoid a seizure and he had no "inkling or any warning of any kind" that a seizure was about to ensue [R.T. p. 80, line 28, to p. 81, line 4; R.T. p. 82, lines 3-6].

III

ISSUES ON APPEAL

As previously discussed, Appellants withdrew any claim that the accident was caused by Jenner's negligence. Instead, they based their case on the theory of strict liability, contending that if a motorist loses his ability to safely operate and control his automobile because of some sudden and unforeseeable seizure or heart failure which results in injury to an innocent person, the driver should be held strictly liable.

The sole issue presented on this appeal is that the trial court committed reversible error when it refused to give the following instruction predicated on the theory of strict liability [C.T. p. 74]:

> "When the evidence shows that a driver of a motor vehicle on a public street or highway loses his ability to safely operate and control such ve-

hicle because of some seizure or health failure, that driver is nevertheless legally liable for all injuries and property damage which an innocent person may suffer as a proximate result of the defendant's inability to so control or operate his motor vehicle.

"This is true even if you find the defendant driver had no warning of any such impending seizure or health failure."

On the other hand, Jenner contends that in the absence of negligence, there is no liability, and therefore, that the above instruction was properly refused. Since Appellants waived any claim of negligence, there is no basis for liability against Jenner for the accident.

IV
LEGAL DISCUSSION

A. The Defense of Unavoidable Accident Is Available to Bar Recovery in the Present Case.

It is established that no liability will be imposed upon an operator of an automobile for an accident caused by some fortuitous occurrence and not by the driver's negligence. Thus, where the accident is caused by the driver's sudden and unanticipated loss of consciousness due to a fainting spell, or a heart attack or for some other similar reason, no liability will be imposed. The following cases are illustrative of this rule:

Tannyhill v. Pacific Motor Trans. Co. (1964) 227 Cal.App.2d 512, 520 [defense of unavoidable accident available to the defendant, where record supports a finding that the accident may have been caused by the

driver's losing control of his tractor-truck by reason of a heart attack];

Zabunoff v. Walker (1961) 192 Cal.App.2d 8, 11 [A sudden sneeze by the defendant driver causing him to fail to see the plaintiff's automobile, resulting in a collision; judgment in favor of the defendant driver predicated upon the defense of unavoidable accident affirmed];

Ford v. Carew & English (1948) 89 Cal.App.2d 199, 203-204 [sudden, unanticipated fainting spell causing the defendant driver to lose control of his automobile; judgment in favor of the defendant driver predicated on the defense of unavoidable accident affirmed].

B. The Doctrine of Strict Liability Has No Application to Accidents Resulting From the Unavoidable Unforeseen Illness or Disability of the Driver of a Vehicle.

Appellants seek to circumvent the defense of unavoidable accident by requesting this court to superimpose the "no fault" doctrine of products liability cases upon the operators of automobiles. In other words, Appellants are asking this Court, by judicial fiat, to eradicate the unavoidable accident defense in automobile accident cases. However, no state (except Massachusetts by legislative enactment) has abandoned the "fault" doctrine as the criterion for recovery in automobile accident cases. Indeed, recently our Supreme Court in the companion landmark cases of *Maloney v. Rath* (1968) 69 Cal.2d 442 and *Clark v. Dziabas* (1968) 69 Cal.2d 449 specifically *refused* to apply the doctrine of strict liability to automobile drivers.

In *Maloney v. Rath, supra,* the accident was caused by brake failure of the defendant's automotile resulting

from a ruptured hydraulic fuel line. The defendant neither knew nor had reason to know that her brakes were defective until they failed. Judgment was for the defendant. On appeal the plaintiff contended that a motorist should be held strictly liable for damage caused by a brake failure. In specifically refusing to apply the doctrine of strict liability to drivers of automobiles, the Supreme Court stated its reasons at pages 445-446 as follows:

> "We are aware, however, of the growing dissatisfaction with the law of negligence as an effective and appropriate means for governing compensation for the increasingly serious harms caused by automobiles. (See Ehrenzweig, Negligence Without Fault (1951); Keeton and O'Connell, Basic Protection for the Traffic Victim (1965); Franklin, *Replacing the Negligence Lottery* (1967) 53 Va.L.Rev. 774; Keeton, *Is There a Place for Negligence in Modern Tort Law?* (1967) 53 Va.L.Rev. 886; cf. *Urie v. Thompson* (1949) 337 U.S. 163, 196 [93 L.Ed. 1282, 1306, 69 S.Ct. 1018, 11 A.L.R.2d 252] (concurring opinion of Frankfurter, J.).) If the problem of fixing responsibility under a system of strict liability were as uncomplicated as it seems to be in this case, a court might be tempted to follow the lead of decisions recognizing strict liability in other circumstances. (See dissenting opinion of Shenk, J., in *Alarid v. Vanier, supra,* 50 Cal.2d 617, 629.)
>
> "In few cases, however, are the facts likely to be as simple as they are here. In the next case an accident might be caused by the combination of a brake failure and a stop-light failure under circumstances that would have permitted effective

use of an emergency handbrake had the following motorist been properly alerted by the spotlight required by the Vehicle Code. (Veh. Code, §24603.) In another case, a pedestrian might stumble and fall on a dangerous and defective pavement causing a motorist having the right of way to drive across the center line of the highway and strike a speeding oncoming car. Who is to be strictly liable to whom in such cases? However imperfectly it operates, the law of negligence allocates the risks and determines who shall or shall not be compensated when persons simultaneously engaged in the common enterprise of using the streets and highways have accidents. It does so by invoking familiar rules with respect to the reasonably prudent man, duty, proximate cause, contributory negligence, last clear chance, the effect of statutory violations, and imminent peril. A rule of strict liability would require its own attendant coterie of rules to allocate risk and govern compensation among co-users of the streets and highways.

"Unless the ratio decidendi of a decision making an abrupt change in the law can point with reasonable certainty to the solution of similar cases, it cannot help but create uncertainty in the area of its concern. In many situations the problems caused by such uncertainty will not outweigh the considerations that dictate change as the appropriate common law development. To invoke a rule of strict liability on users of the streets and highways, however, without also establishing in substantial detail how the new rule should operate would only contribute confusion to the automobile

accident problem. Settlement and claims adjustment procedures would become chaotic until the new rules were worked out on a case-by-case basis, and the hardships of delayed compensation would be seriously intensified. *Only the Legislature, if it deems it wise to do so, can avoid such difficulties by enacting a comprehensive plan for the compensation of automobile accident victims in place of or in addition to the law of negligence.*" (Emphasis added.)

In light of the foregoing, driver liability for injury resulting from accidents in the field of automobile tort law remains rooted in principles of negligence, not strict liability. Inasmuch as Appellants waived any claim of negligence on Jenner's part, there is no basis for reversing the judgment.

V

CONCLUSION

For the reasons herein set forth the judgment should be affirmed.

Respectfully submitted,

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