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FILED

DEC 29 1969

WILLIAM J. ...  
Clerk

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

MAXINE BARRONFREE, et al.,  
Plaintiffs,  
vs.  
THOMAS E. JENNER, et al.,  
Defendants.

5772  
No. 00 0772 B  
SUPPLEMENTAL POINTS  
AND AUTHORITIES IN  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT

Summary Judgment is a drastic procedure and should be used with caution so that it does not become a substitute for the open trial method of determining facts.

Pettis v. General Telephone Company of California (1967)  
60 C2d 503

The provisions of this section (C.C.P. 437 a) were never intended to eliminate the jury as the finder of fact.

Pygote v. Cook (1965) 236 CA2d 700

The function of the trial court in a motion for summary judgment is limited to a determination of whether facts have been presented by declarations which present triable issues in light of the pleadings; if no justiciable issue is presented, summary judgment may be entered, but if a fact issue is presented, motion therefor must be denied.

Williams v. Winter (1962) 206CA2d 474

The matter to be determined by the trial court on a motion for summary judgment is whether facts have been presented

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1 which give rise to a triable factual issue, and the court may not  
2 pass upon the issue itself.

3 Pattin v. General Telephone Company of California (1967)  
4 66 C2d 503

## I

5  
6 Plaintiff's oral presentation to the court in support of  
7 his motion attempted to characterize the defendant's activity as  
8 subjecting him to absolute or strict liability for which no defense  
9 was or could be interposed. Said argument ignores the long estab-  
10 lished rule in this state that the doctrine of absolute liability  
11 or liability without fault is predicated on the theory that the  
12 actor, realizing the hazard of his undertaking, nevertheless assumes  
13 the risk connected therewith.

14 Motzer v. Paoli, 110 CA2d 141 (emphasis added).

15 The key words in this rule are the realization by the  
16 actor of the hazard of his undertaking. Applying the rule to the  
17 instant case, insofar as the doctrine of absolute liability is  
18 or may be involved, the issue as to the defendant is whether he  
19 realized the "hazard of his undertaking" in view of the complete  
20 absence of any seizures or other complaints relative to an epi-  
21 leptic condition since 1953. That issue is one of fact, the  
22 determination of which should be left to those exclusive judges  
23 of the questions of fact.

## II

24  
25 Insofar as plaintiff has directed his presentation to the  
26 characterization of automobile operation as an ultra hazardous  
27 activity, "an activity is ultra-hazardous if it (a) necessarily  
28 involves a risk of serious harm to the person, land or chattels of  
29 others which cannot be eliminated by the exercise of the utmost  
30 care, and (b) is not a matter of common usage...an activity is a  
31 matter of common usage if it is customarily carried on by the  
32 great mass of mankind or by many people in the community."

1  
2 Since the doctrine of ultra-hazardous activity is not  
3 applicable to the operation of an airplane - Boyd v. White, 210  
4 OR2d 641 - which is an activity capable of infinitely greater harm  
5 and is also not so commonly used as is the automobile, it would be  
6 reaching far beyond our settled law to impose the standards of an  
7 ultra-hazardous activity upon the operation of a passenger vehicle.

8  
9 III

10 Insofar as plaintiff's oral presentation in support of  
11 his motion was directed to a characterization of the operation of  
12 defendant's motor vehicle as analogous to a products liability case,  
13 plaintiff still has the burden of proving that defendant either  
14 knew or should in the exercise of reasonable care have known of the  
15 danger of an accident arising out of the operation of his motor  
16 vehicle. This burden appears analogous to a plaintiff's burden  
17 of showing negligence in a manufacturer or design situation. The  
18 Affidavits which the court presently has before it reveal a triable  
19 issue of fact as to defendant's due care and reasonableness in  
20 dealing with his physical condition. While plaintiff may be  
21 aided in advancing his products liability analogy by a *res ipsa*  
22 *loquitur* doctrine, the courts have held that if, despite the  
23 circumstances, the probabilities point equally to a cause for which  
24 the defendant is not responsible as to defendant's negligence, then  
25 *res ipsa loquitur* should not apply.

26 Cunningham v. Coca Cola Bottling Company, 87 OR2d 106

27 Legal responsibility is based on legal fault, an issue  
28 that should be determined only after a thorough consideration of  
29 defendant's physical condition and his knowledge of its propensity  
30 to manifest itself.

31  
32 IV

To impose a burden of strict liability for the operation  
of a passenger vehicle is to impose upon an automobile owner and

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1 driver an absolute responsibility for anything and everything that  
2 may happen to, by and as a result of the mere fact that his vehicle  
3 occupies the roadway. Examples of the imposition of such liability  
4 without fault would include the situation of a person experiencing  
5 a sudden and totally unexpected heart attack; or the person  
6 suffering a spontaneous rupture of an intracranial aneurysm, a  
7 condition that might be foreseen only by the administration of a  
8 painful and dangerous arteriogram; or those acts of God which  
9 inexorably propel man and machine along a course and toward a des-  
10 tination over which man has no control. Such a burden is not im-  
11 posed by a body of statutory law such as ours, that permits persons  
12 with an epileptic history to operate a passenger car.

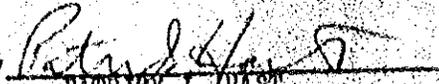
## V

14 In the case of a brake failure automobile accident, where  
15 the plaintiff may be entitled to a res ipsa loquitur instruction,  
16 the defendant is entitled to come forward with evidence of his due  
17 care, though in fact he may have been grossly inattentive to the  
18 mechanical condition of his vehicle. It would be a harsh rule of  
19 law that would deny a defendant having an unfortunate physical  
20 condition this same right of coming forward with evidence of his  
21 due care in having diagnoses and treated an epileptic condition  
22 and having complied with all of the laws of the State of California  
23 with regard to his being licensed to operate a motor vehicle. It  
24 is submitted that if such an extension of our present law is to be  
25 made, it should devolve upon the legislature to do so.

26 Dated this 26th day of December, 1969.

27 Respectfully submitted,

28 LAVOLLETTE & JOHNSON

29  
30 By   
31 PATRICK J. MAST  
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