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LA FOLLETTE & JOHNSON
ATTORNEYS AT LAW
SUITE 1500 SUNSET-VINE TOWER
6290 SUNSET BOULEVARD
LOS ANGELES, CALIFORNIA 90028
TELEPHONE [illegible]

Attorneys for Defendant

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

MAXINE [illegible], et al., Plaintiffs, vs. THOMAS E. JENNER, et al., Defendants.	5772 No. NC C 6772 B SUPPLEMENTAL POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Summary Judgment is a drastic prosedure 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) 66 C2d 503

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

Fugate 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) 206 CA2d 474

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

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

Pettis v. General Telephone Company of California (1967) 66 C2d 503

I

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

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

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

II

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

p.

Luthringer v. Moore, 31 C2d 489, 498

Since the doctrine of ultra-hazardous activity is not applicable to the operation of an airplane - Boyd v. White, 216 CA2d 641 - which is an activity capable of infinitely greater harm and is also not so commonly used as is the automobile, it would be reaching far beyond our settled law to impose the standards of an ultra-hazardous activity upon the operation of a passenger vehicle.

III

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

Cunningham v. Coca Cola Bottling Company, 87 CA2d 106

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

IV

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

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

V

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

Dated this 26th day of December, 1969.

Respectfully submitted,

LAFOLLETTE & JOHNSON

By _____
PATRICK J. HAST