

EPILEPSY AND DRIVING

The case of *Hammontree v. Jenner* presents a unique opportunity to investigate the relationship between epilepsy, driving and the law's treatment of disability. In its 1971 decision, the California Court of Appeals rejected the plaintiff's contention that a driver is strictly liable for injuries that result from an epileptic seizure that occurs while the defendant is driving. A basic understanding of epilepsy provides further context for the issues faced by the court.

I.

EPILEPSY

A conservative estimate puts the number of people in the United States afflicted with recurring epileptic seizures at over one million.¹ Epilepsy is not actually a disease, but rather a symptom of a group of diseases characterized by repeated episodes of sudden over activity of the nervous system.² These episodes may be associated with convulsions or lapses of consciousness that are commonly identified as seizures. When the cause of the epilepsy is known, it may be cured by treating the underlying disease, or by surgically removing the diseased brain tissue; otherwise, seizures may be prevented or controlled by medication.³

Epileptic seizures may occur without any warning, though two types of sensations preceding a seizure may function as such. A *prodrome* is a feeling of tension, depression, or even elation that may last for extended periods. An *aura* is a briefer warning that can be considered the start of the actual seizure, taking the form of a strange taste or smell, visual sensation, or other odd sensations.⁴ There is no evidence that the defendant in *Hammontree* experienced an aura or a prodrome or anything else that could have provided a warning of the attack.

People with epilepsy have faced a long and harsh history of discrimination. Until recently some states required their sterilization or prohibited

¹ 24 Am. Jur. Proof of Facts 2d, *Traumatic Epilepsy* § 1 (2004).

² 53 Am. Jur. Proof of Facts 3d, *Proof of Physical Disability of Driver of Motor Vehicle* § 9 (2004).

³ *Id.*

⁴ 24 Am. Jur. Proof of Facts 2d, *Traumatic Epilepsy* § 4.

persons with the syndrome to marry (in North Carolina sterilization was required in order for people with epilepsy to marry).⁵ Discrimination also limited the educational and employment opportunities for people with epilepsy.⁶

In recent decades, there has been a growing awareness and rejection of discrimination against people with epilepsy and other physical and mental impairments. In 1976 Congress enacted the Education for All Handicapped Children Act (now known as the Individuals with Disabilities Education Act) requiring states to educate children with disabilities. And in 1990, Congress passed the Americans with Disabilities Act (ADA), prohibiting discrimination by employers, states and local governments, and public accommodations on the basis of disability. However, the fact that epilepsy manifests itself so differently among individuals and that it may be controlled by medication has posed a challenge for individuals with epilepsy who have tried to bring ADA claims as courts have questioned whether they fall within the statute's definition of an individual with a disability.

Still, attitudes are changing. Given that epilepsy is such a varied condition, there has been a major shift away from generalized policies to the recognition that people should be treated on an individual basis. This approach applies not only to how symptoms are treated, but also to whether any limitations should be placed on an individual's ability to drive a car or engage in other common activities.

II. EPILEPSY AND DRIVING

Individuals with epilepsy have a death rate about three times higher than that of other individuals. Some of this increased mortality is due to death from seizures, but it is also due to a higher rate of accidental death from accidents such as drowning.⁷

Nevertheless, the overall risk posed by drivers with epilepsy appears to be small. According to experts at Johns Hopkins University School of Medicine and the University of Maryland, Baltimore, between 1995 and 1997, out of an average

⁵ *Id.* at § 1.

⁶ *Id.*

⁷ *Id.* at § 11.

of 44,000 automobile deaths per year in the United States, only 86 deaths were due to accidents caused by seizures.⁸ Thus, less than 0.2% of automobile fatalities listed seizures or epilepsy as a contributing factor.

The same study showed that people with seizures did have 2.3 times the rate of fatal car accidents compared to people with cardiovascular disease or high blood pressured, and 4.6 times the rate compared to people with diabetes.⁹ Alcohol, however, caused 6.6 times more fatal crashes than those associated with medical conditions as a whole and 156 times more fatal crash than those associated with seizures.¹⁰ Based on this study, researchers have concluded that fatal car accidents due to seizures are uncommon and that most fatal car accidents are related to alcohol, driving error, or driving conditions.

However, this study alone cannot answer the question whether individuals with epilepsy should be permitted to drive and, if so, whether they should be liable for accidents that may result from a seizure. First, although statistics can be very useful to highlight the nature and extent of a problem, we need to be careful in interpreting them. As Benjamin Disraeli once famously proclaimed, "[t]here are three kinds of lies: lies, damned lies, and statistics." Humor aside, Disraeli's sentiment reminds us to be self-conscious about using statistics. Keeping in mind the source of statistical figures, what is being measured, and what it is being compared to, allows us to make an informed assessment based on authority, validity, and relevance. Thus before we jump to any conclusions based on the studies reported above, we might want to be careful to know whether the studies are reliable. And we might want to ask a variety of questions such as whether the study took into account the possibility that individuals with epilepsy drove fewer hours than did other individuals (if people with epilepsy drove less, then the fact that they were in fewer accidents may not be due to the relatively low risk of their driving, simply to the fact that they seldom drive).

⁸ Hitti, Miranda. *Epilepsy Causes Few Fatal Car Accidents*, *WebMD Medical News*, <http://my.webmd.com/content/article/94/102924.htm> (accessed June 11, 2005).

⁹ *Id.*

¹⁰ *Id.*

Second, the study cannot answer the question of how we should respond to its findings. For example, what should we make of the fact that almost every health concern could manifest a symptom that might impede a driver's ability to control a vehicle? Does that suggest that we should limit an individual's ability to drive more broadly than we do now, that we should treat epilepsy more similarly to other medical conditions, or that we should take no account of medical conditions? We may also want to ask whether prior knowledge of a mere propensity for seizures should suffice to restrict a basic right like driving. Robert Fisher, MD, PhD, a professor of neurology at Stanford University advocates for people with epilepsy to be able to drive provided that they are seizure-free. He sees it as a balancing act, providing for traffic safety without sacrificing the rights of the half to one percent of the population that has epilepsy.¹¹ However, what about the difficulty of determining when one can be considered "seizure-free"? The one area where experts agree is that the likelihood of epileptic attacks persisting in the future is not a question that can be answered with any degree of certainty.¹²

III. LICENSING

In our society today, driving is often an essential prerequisite to the ability to maintain an independent life. In many parts of the country, it is difficult to work, shop, or obtain basic medical care without having a car. Thus the denial of the right to drive has severe consequences. On the other hand, automobiles are dangerous. As noted above, 44,000 Americans die each year due to automobile accidents. The challenge for state legislatures and courts is to reconcile the need of individuals to drive with public safety.

For the most part, states rely on a system of licensing to decide who can and cannot drive safely. In *Hammontree*, the California Department of Motor Vehicles was advised that the defendant had epilepsy and issued a driver's license

¹¹ Barclay, Laurie. *Epilepsy Can Increase Risk of Traffic Accidents*, *WebMD Medical News*, http://my.webmd.com/content/Article/34/1728_88599.htm (accessed June 11, 2005).

¹² 24 Am. Jur. Proof of Facts 2d, *Traumatic Epilepsy* § 15.

conditioned upon his reporting to a doctor every six months. This was later changed to once a year. Today, California's Vehicle Code also allows for conditional licensing and periodic medical updates, the frequency of which is left to the discretion of the Department of Motor Vehicles. The current California Vehicle Code states: "The department may refuse to issue to, or renew a driver's license of, any person who has a disorder characterized by lapses of consciousness or who has experienced, within the last three years, either a lapse of consciousness or an episode of marked confusion caused by any condition which may bring about recurrent lapses . . ."¹³ In the interest of public health, the Department of Motor Vehicles appears to have been given great latitude in withholding a license or issuing a restricted or probationary one.

As in the case of *Jenner*, physicians or surgeons in California must also immediately report to the local health officer individuals that have been diagnosed with "a disorder characterized by lapse of consciousness."¹⁴ The local health officer must then, in turn, report these individuals to the Department of Motor Vehicles.¹⁵ A physician who does not comply with the Health and Safety code and neglects to report an epileptic patient may be held liable for damages if a car accident is caused by a seizure.¹⁶

Like California, all states have some restrictions that limit driving with epilepsy, though the standards used differ. However, researchers have found that there is little difference, in terms of safety, in using a three-month standard as opposed to a six to twelve month standard for the period required to be seizure-free; of greater importance is establishing a more "uniform and reliable" reporting system for physicians, and considering individual medical conditions in determining whether an epileptic should be allowed to drive.¹⁷ Thus, there appears to be a move away from a requirement of "absolute periods" of being

¹³ Cal. Veh. Code § 12806 (c).

¹⁴ Calif. Health and Safety Code § 410(a).

¹⁵ *Id.* at § 410(b).

¹⁶ Epilepsy Foundation. *California Driver Licensing Laws*, *Epilepsy Foundation Website*, <http://epilepsyfoundation.org/answerplace/Social/driving/statedrivinglaws.cfm> (accessed June, 11, 2005).

¹⁷ Barclay, *Epilepsy Can Increase Risk of Traffic Accidents*.

seizure-free to a more individualized approach. California embraces this position and considers seizure-free periods of three, six, and twelve months when reviewing each driver's case, in addition to other factors such as severity and nature of seizures, use of medication, and driving history.¹⁸ How should state licensing laws influence courts when they determine civil liability for accidents caused by a seizure?

In analyzing the driver's liability in *Hammontree*, the California Court of Appeals had to grapple with numerous issues at the core of tort law while understanding the context particular to the medical and social understanding of epilepsy. The reconciliation of individual liberty and public safety is a common challenge in tort law cases. By understanding the historical and statistical context in which these dilemmas arise, courts and lawyers can gain a fuller appreciation of the magnitude of the task.

¹⁸ Epilepsy Foundation. *California Driver Licensing Laws*.

THE IDEA OF THE HOLDING OF A CASE

When lawyers argue about precedents, they frequently refer to the "holding" of a case. The holding is the principle or rule that supposedly was the essential basis of the decision of the case. Theoretically holdings are tailored to fit only the facts before the court in the particular case; courts are not supposed to rule on issues that are not presented by the record in the case before the court. The word dictum refers to portions of an opinion in which a court speaks to issues that were not properly before it, or in which a court formulates a rule in broader terms than were needed to decide the particular case.

Obviously, the effect of a particular case as precedent is going to depend on how we characterize the holding of that case. If a particular precedent is unfavorable, counsel will often attempt to describe its holding in the narrowest possible terms. A purpose of this tactic is to lay the groundwork for an effort to distinguish the unwelcome precedent from the case now at hand. If a precedent is generally favorable, counsel will often describe the holding of the case in broad terms. These argumentative techniques are fundamental to lawyerly advocacy.

By way of illustration, here are two different ways of stating the holding in *Hammontree*:

1. *A narrow statement*: "Where personal injury, not resulting in death, is caused by sudden loss of control of an automobile owned and operated by an individual for private, non-business purposes; where loss of control was without forewarning and due to lesser epileptic seizures occurring for the first time in 14 years; where, on expert testimony, the condition was successfully controlled by medication; and where the driver complied with all monitoring required by the relevant state motor vehicle agency, liability, if any, is predicated upon a showing of defendant's negligence."
2. *A broad statement*: "Liability in auto accident cases leading to personal injury due to sudden loss of vehicle control is predicated upon a showing of the defendant's negligence."

It is possible to state the rationale of a case at even higher levels of generality. E.g., (*very broad statement of holding*): "A person is not liable for the harm he/she causes while involuntarily unconscious, even though the person commenced a dangerous activity knowing of the possibility of sudden loss of consciousness;" or "As between two innocents, the victim must absorb the loss."