

1960

# Jack A. Milligan v. Melvin Coy Harward, Kenneth B. McDuffy and C. E. Lindsey : Brief of Appellant

Utah Supreme Court

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King and Hughes; Counsel for Plaintiff and Appellant;

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Case No. 9121

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

MAR 2 - 1960

Clerk, Supreme Court, Utah

JACK A. MILLIGAN,  
*Plaintiff and Appellant,*

—vs.—

MELVIN COY HARWARD,  
KENNETH B. McDUFFY,  
and C. E. LINDSEY,  
*Defendants and Respondents.*

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BRIEF OF APPELLANT

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KING AND HUGHES  
*Counsel for Plaintiff and  
Appellant.*

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### BRIEF OF APPELLANT

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#### PRELIMINARY STATEMENT

Throughout this brief, plaintiff and appellant will be referred to as plaintiff, and defendant and respondents will be referred to by their surnames or as defendants.

All italics are ours.

## STATEMENT OF FACTS

Plaintiff was a guest passenger in an automobile driven by defendant, Melvin Coy Harward, on the 15th of August, 1958, which collided with the truck of defendant, Lindsey, at approximately 1:30 A.M.

Prior to the collision, plaintiff, James Finnegan, and Harward had been playing pool in the Lackawanna Club at 3110 South State Street.

As plaintiff, Harward and Finnegan, played pool they drank beer purchased from the Club. Plaintiff and Finnegan had had one glass of beer to drink during the evening of August 14th, prior to the time that they arrived at the Lackawanna Club and before they ate their supper.

Both Finnegan and plaintiff testified that they noticed nothing wrong with the way that the defendant, Harward, played pool; that as far as they could observe his behavior was entirely normal and regular. Plaintiff and Finnegan met Harward at the Lackawanna Club. Harward had had no supper before coming to the Club. (R. 160). After the plaintiff, Finnegan, and Harward had completed their pool games they went out of the Lackawanna Club to the defendant Harward's car and started north along State Street toward the New China Cafe located at about 2150 South State Street.

Defendant, Kenneth B. McDuffy, was the driver of a Kenilworth truck and trailer and had parked the vehicles at 2195 South State Street. Harward's automobile came into collision with the left rear of the truck. The weather was rainy. Plaintiff was seated in the car with back against the door on the righthand side relaxed and discussing with the driver Harward their social affairs and did not observe anything ahead of the car in which he was riding prior to its impact.

Plaintiff was seriously injured as result of the collision and at the time of the trial had not recovered fully from the effects of the accident.

Plaintiff claimed that the defendant Harward was guilty of wilful misconduct, or was intoxicated, at the time of the impact in which he received his injuries and that said conduct was the proximate cause of the injury and collision.

Plaintiff claimed that the defendants, McDuffy and Lindsey, were negligent in that the truck which was parked on the east side of State Street was unlighted and protruded out into the lane of traffic normally reserved for travelers proceeding in a northerly direction.

The evidence revealed that neither plaintiff nor Finnegan, the guests in the automobile of Harward, had noticed anything peculiar or unusual about Harward's conduct and did not believe, at the time they entered his automobile, that he was under the influence of intoxicat-

ing liquor, although both had played several hours of pool with him and observed him drinking beer as the game of pool proceeded. Officer Iba, after the accident, observed Harward for a while and formed the opinion that he was intoxicated. (R. 61).

Neither plaintiff nor Finnegan noticed anything unusual about the way that Harward operated his car as he drove it the few blocks north along State Street immediately prior to the collision.

Harward stated that immediately prior to the impact he turned his head away from the front to the right facing to the back seat to take a cigarette from Finnegan who was seated in the back seat. That as he came back the impact occurred. (R. 162).

After the presentation of plaintiff's evidence the trial court granted the motions of all defendants for dismissal of plaintiff's case on the ground and for the reason that the evidence would not justify a verdict in plaintiff's favor. From this Order of the Trial Court, plaintiff has prosecuted his appeal to this Court.

## SUMMARY OF ARGUMENT

### POINT I.

THE EVIDENCE DEMONSTRATED THAT HARWARD  
WAS GUILTY OF WILFUL MISCONDUCT OR INTOXICA-



TION PROXIMATELY CAUSING PLAINTIFF'S INJURIES.

(a) HARWARD WAS GUILTY OF WILFUL MISCONDUCT IN TURNING AROUND AND LOOKING TO THE BACK SEAT AS HE DROVE NORTH ON STATE STREET.

## POINT .II

THE EVIDENCE CREATED A QUESTION OF FACT AS TO THE CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.

## POINT III.

THE EVIDENCE DEMONSTRATED THAT THE DEFENDANTS McDUFFY AND LINDSEY WERE GUILTY OF NEGLIGENCE PROXIMATELY CONTRIBUTING TO CAUSING PLAINTIFF'S INJURIES.

## ARGUMENT

### POINT I.

THE EVIDENCE DEMONSTRATED THAT HARWARD WAS GUILTY OF WILFUL MISCONDUCT OR INTOXICATION PROXIMATELY CAUSING PLAINTIFF'S INJURIES.

The Jury was furnished with sufficient factual basis for a finding that the defendant, Harward, was intoxicated at the time of the collision and injury of plaintiff. The evidence and testimony of the witnesses is relatively free from conflict. Harward admitted that he had con-

sumed at least five cans of beer while playing pool with plaintiff and Finnegan. Officer Iba, after observing Harward for a considerable time came to the conclusion that he was under the influence of intoxicating liquor. The evidence showed that Harward had not eaten anything since approximately 2:00 or 3:00 o'clock in the afternoon. Under such circumstances the effect of the beer would be greater than the same amount of beverage on plaintiff and Finnegan, who had eaten a substantial supper prior to coming to the Club. The Jury might logically find that Harward was more affected by the beer which he drank because of the lack of food in his stomach than would have normally have been the case. Five cans of beer or five glasses of beer could be sufficient to affect his ability to drive and to make him unable to carefully and safely operate his vehicle. Iba's testimony from observation over a considerable period of time would be sufficient basis for the finding that Harward was intoxicated.

Each case must stand on its own peculiar factual basis, but perhaps a consideration of a few of the cases from this and other jurisdictions would be of assistance.

The closest case on the facts and law is *Johnson v. Marquis*, 93 Cal. App. 2nd 341, 209 P.2d 63. The California Guest Statute is similar in wording to our Utah Guest Statute. The basic legal principles were the same as will be applied in this Court. In the *Johnson*

case, the owner and driver of the automobile had not eaten anything during the afternoon and had only a cup of coffee and a sandwich for her lunch. She, and the two passengers, stopped at a cafe and there the driver had one Seven-up highball. She took over the driving of the automobile and drove from that time until she struck the back of a parked truck which had a red light burning at its rear. The road over which she drove was a two-lane highway and the night was stormy. The evidence shows that she drove at 80 to 90 miles per hour even though there were many turns in the highway.

The California Appellate Court emphasized the fact that the driver had not eaten for a considerable period prior to the time that she had the one Seven-up highball and pointed out that the exact effect of intoxicants on any one person is dependent on a number of factors and may be different in one state of bodily chemistry from what it is in another state of bodily chemistry. The Court upheld the Jury verdict and found that the driver was guilty of wilful misconduct or intoxication in causing the collision with the rear end of the truck and the injuries to the passengers.

In *Cox v. Johnson*, ..... Colo. ...., 339 P. 2d 989, the driver was drinking beer but appeared before the accident to have been sober. The evidence revealed that prior to the accident the driver had drunk from three to nine beers. Two witnesses testified that he did not appear

to be drunk. The plaintiff himself observed defendant drinking three or four beers.

The Colorado Supreme Court ruled that the questions of intoxication, assumption of risk, and wilful misconduct, were all questions of fact for the Jury. Plaintiff submits that the *Cox v. Johnson* case is in point on all of the questions before this Court.

*Perry v. Schmitt*, 184 Kan. 758, 339 P. 2d 36, is a case where the guest observed the driver drinking and the Court ruled that the question of intoxication was a question of fact for the Jury.

It is respectfully submitted that under the principles of law applicable and the evidence the Jury could have found, considering the evidence most favorably to the plaintiff, that Harward was intoxicated at the time of the collision.

#### SUB POINT "A"

(a) HARWARD WAS GUILTY OF WILFUL MISCONDUCT IN TURNING AROUND AND LOOKING TO THE BACK SEAT AS HE DROVE NORTH ON STATE STREET.

The conduct of the defendant, Harward, in turning around to take a cigarette from passenger, Finnegan, riding in the back seat is wilful misconduct. It was a

proximate cause of the collision between his car and the truck.

This Court has had a cigarette case before it on one prior occasion. In *Ricciuti v. Roberts*, 2 Utah 2d 45, 269 P.2d 282, the driver of the automobile dropped a cigarette in his clothing and while hunting the cigarette went over the curb and caused the injury to his passenger. The decision, reversing the Jury Verdict, was that the conduct of the driver was not the intentionally doing or omitting to do a negligent act, but that his hunting for the cigarette was an involuntary act and could not be the basis of a verdict which must be based on wilful misconduct. The Court pointed out that the cigarette was not intentionally dropped, and as a consequence it could not be held to be wilful.

In the present case, the distinction is clear. Harward, in turning around to the right to take a cigarette from a person riding in the back seat was not acting involuntarily but was voluntarily and intentionally acting. It seems obvious his act was very dangerous. This is especially true since he had begun to pull over toward the right-hand side of the highway preparatory to stopping at the New China Cafe.

There are a number of cases that have held that voluntarily and intentionally taking your eyes off the road is gross negligence or wilful misconduct.

*Gustaveson v. Vernon*, 165 Nebr. 745, 87 NW 2d. 395, was a case in which the driver took her eyes off the road for approximately four seconds, and during that time the car which she was driving veered across the road into a parked automobile on the side of the road and caused the injuries to her guest resulting in a jury verdict in her favor. The Nebraska Supreme Court upheld the verdict and considered the conduct on the part of the driver to be sufficient to justify a finding of the jury that she was guilty of gross negligence.

In *Dirks v. Gates*, 182 Kan. 581, 322 P.2d 750, the driver turned his head from the road to look back and observe traffic on the road behind him. As a result, the automobile went out of control and the injuries to his guest occurred. The Court held that such conduct on the part of the driver was wanton negligence and upheld the verdict in favor of the guest.

*Topel v. Correz*, 273 Wis. 611, 79 NW 2d 253, is a case of the driver being somewhat intoxicated, driving along the highway and watching the speedometer rather than keeping his eyes on the road and as a consequence the automobile ran off the road and into a tree injuring the owner of the automobile who was riding in it as a passenger. The Court held that this conduct on the part of the driver was sufficient to justify a verdict in favor of the owner guest riding in the automobile.

*Simpson v. Marks*, 349 Ill. App. 527, 111 NE 2d. 370, is a case of a driver who, the passenger claimed, took his hands off the wheel and attempted to make love to her while driving the automobile. The driver claimed, however, that he turned his head from the road to watch an accident scene that had occurred in the opposite lane of traffic and as a result the collision occurred. The Court considered both plaintiff's claim that the driver attempted to make love to her and took his hands off the wheel, and the driver's claim that what occurred was that he was looking back watching an automobile accident in the opposite lane of traffic. Defendant claimed that the plaintiff's story that he took his hands off the wheel to make love to her was so improbable and unreasonable as not to be worthy of belief. The Court ruled that even defendant's own story that he turned around to watch an automobile accident in the opposite lane of traffic would justify the Jury's verdict. The driver would be still guilty of wilful and wanton misconduct.

Perhaps the case closest to the facts of the case presently before the Court is *McGowan v. Camp*, 87 Ga. App. 671, 75 S.E. 2d 350. In this case, the driver of the automobile took her right hand off the wheel and her eyes off the road in order to reprimand her small son who was riding in the front seat with her. The Court held this conduct sufficient to constitute gross negligence and justify a verdict in favor of the guest of the driver. The Court pointed out that this kind of action was an

intentional and deliberate act on the part of the driver as distinguished from an involuntary act. This distinction exists between the present case and *Ricciuti v. Robinson*, 2 Utah 2d 45, 269 P.2d 282.

Plaintiff respectfully submits that the conduct of the defendant, Harward, was deliberate and wilful. It was the kind of action which was known and realizable as would greatly endanger persons riding in the automobile with the driver.

Such act, it is respectfully submitted, would justify a jury verdict on behalf of the plaintiff, if no intoxication was even considered. When considered with the fact of intoxication it would, of course, be much more forceful as far as justifying a Jury verdict in favor of plaintiff.

## POINT II.

THE EVIDENCE CREATED A QUESTION OF FACT AS TO THE CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.

The Court's granting of defendant's Motion to dismiss plaintiff's case might be justified upon a mistaken belief that under the evidence the plaintiff was contributorily negligent as matter of law.

There has been a great deal of appellate consideration of the question of whether or not a guest's knowledge



that the driver of the automobile in which he was riding had been drinking is sufficient to preclude recovery of the guest.

Some Courts have based the denial of a guest's right of recovery on the idea that the guest assumed the risk of injury in entering the automobile knowing that the driver had been drinking. Other Courts have considered it a simple question of contributory negligence on the part of the guest. The soundest rule seems to be the one which was adopted by this Court and set up in the case of *Shoemaker v. Floor*, 117 Utah 434, 217 P. 2d 382. The guest in the Schoemaker case observed the defendant take three drinks prior to the time that she got in the car and commenced her ride back to Salt Lake City. She testified, however, that even though she observed him take three drinks, the driver did not appear in any way to be under the influence of intoxicating liquor. This Court held that under such circumstances the guest did not assume the risk as matter of law, and was not guilty of contributory negligence.

Applying the principle set down in the *Shoemaker v. Floor* supra case, it would appear that even though plaintiff here knew that defendant Harward had been drinking beer, unless he knew it had so affected Harward as to incapacitate him from driving safely and prudently, he would not be guilty of contributory negligence nor would he have been held to assume risk as matter of law.

The principle applied by this Court in the *Schoemaker* case is similar to the principles applied by the California Court under similar Statute in the case of *Johnson v. Marquis*, 93 Cal. App. 2d 341, 209 P.2d 63. There, the guests were present with the driver when she drank one Seven-up highball, and thereafter drove the automobile into the back of a parked truck. The Court held that the guests did not assume the risk, or were not guilty of contributory negligence as matter of law. Each case must depend on the particular facts involved, and such facts are properly submitted to the Jury for determination.

*Cox v. Johnson*, ..... Colo. ...., 239 P. 2d 989, holds that the fact that the guest observed the driver drinking three or four beers did not, as matter of law, make him guilty of assumption of risk or contributory negligence.

In *Topel v. Correz*, 273 Wis. 611, 79 NW 2d 253, the owner of the automobile, because he, himself, was intoxicated and did not feel competent to drive his own car, requested another person to drive for him. The other driver was intoxicated and while watching the speedometer on the automobile ran off the road into a tree and injured the owner of the car who was his guest. The Court held that under the facts the owner guest was not guilty of contributory negligence or assumption of risk so that his recovery could be barred as matter of law.

*Davis v. Hollowell*, 326 Mich. 673, 40 NW 2d 641, 15 ALR 2d 1160, holds that knowledge on the part of a guest that driver had been drinking is not sufficient without more to bar the guest's recovery.

The annotation of the *Davis v. Hollowell* case, 15 ALR 2d 1165, is a very complete enumeration and analysis of the various holdings concerning the question of knowledge and contributory negligence, or assumption of risk. The annotators state their conclusion as follows:

“It has been held in a number of cases that mere knowledge that the driver has been drinking is not sufficient to preclude recovery under Guest Statutes.”

In support of this conclusion the Annotation cites cases from California, Colorado, Massachusetts, Michigan, Montana, Ohio, Oregon, Vermont, Virginia, Washington, and cites the Utah case of *Shoemaker v. Floor*. The annotation recites the principle that for a passenger to be barred from recovery he must know, or in the exercise of ordinary care, should know that the driver is so intoxicated as to be incapacitated from driving safely and prudently before recovery could be barred as matter of law.

Plaintiff respectfully submits that there is no showing from the evidence presented that he knew, or in the

exercise of ordinary care should have known that Harward was intoxicated so as to be incapacitated from driving safely and prudently. The action of the Trial Court cannot be justified on any theory that plaintiff assumed the risk, or was guilty of contributory negligence as matter of law.

### POINT III.

THE EVIDENCE DEMONSTRATED THAT THE DEFENDANTS McDUFFY AND LINDSEY WERE GUILTY OF NEGLIGENCE PROXIMATELY CONTRIBUTING TO CAUSING PLAINTIFF'S INJURIES.

One of the most hotly contested questions of fact in the presentation of plaintiff's evidence was where exactly the truck was parked on the highway and whether or not there were parking lights burning on it. Appendix "A" is a photograph of the drawing made by Officer Iba to illustrate his testimony and to show the various measurements which were made at the scene of the accident.

The Statutes of the State of Utah require that a vehicle be parked not more than eighteen (18) inches from the curb, *U.C.A. 1953, Section 41-6-104*. No truck operating on the highway may legally exceed eight feet in width, *U.C.A. 1953, Section 27-1-27*. Officer Iba and the Appendix "A" indicates that to the center of the rear wheel on the truck of Lindsey was 11 feet 5 $\frac{3}{4}$ ths inches from the curb line of State Street. This measurement

shows that the truck of the defendant Lindsey was not properly parked assuming that its width conformed and was the lawful width for such vehicles under the laws of the State of Utah.

Defendant Harward testified that there were no lights on the rear of the parked truck immediately prior to the collision. (R. 163). *U.C.A. 1953, Section 41-6-129* requires a vehicle to have such a light where it cannot be seen within a distance of 500 feet upon such highway.

Harward also testified that the right front of his automobile struck the left rear of the truck, and that the point of impact was barely a fraction of inches and had he been a few inches further out in the street he would have missed the truck, or had the truck been parked a few inches closer to the curb he would have cleared it. (R. 168)

There can be no doubt that where there is more than one cause of a collision all parties may be held responsible where negligence is found to exist.

In *Berry v. Visser*, 354 Mich. 38, 92 NW 2d 1, the Supreme Court of the State of Michigan held that even though a driver is negligent the negligence of the owner and driver of a parked vehicle may likewise be a proximate cause of the accident and both parties can be held

responsible for the ultimate damage to a party injured as a result of the collision.

Plaintiff respectfully submits that the evidence of Iba and the drawing, Appendix "A", together with the laws of the State of Utah, would justify submission to the Jury of the question of whether or not the defendants, McDuffy and Lindsey, were negligent, and whether or not their negligence was a proximate cause of the collision between the automobile in which plaintiff was a passenger and the truck parked at the side of the road into which the automobile collided.

### CONCLUSION

It is respectfully submitted that the facts of the case and the law of the State of Utah demonstrate that the Trial Court was in error in granting the motions of the defendant for dismissal of plaintiff's case at the close of plaintiff's evidence. The Judgment should be reversed. Plaintiff should be granted a new trial and an opportunity to have his cause of action submitted to a Jury for their consideration and determination.

Respectfully submitted,

KING AND HUGHES  
*Counsel for Plaintiff and  
Appellant.*

## APPENDIX "A"

