

1962

# Richard Jacques v. Dallas Farrimond : Brief of Appellant

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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RICHARD JACQUES, by and through  
his guardian, ad litem, Pauline Murphy,  
*Plaintiff-Appellant,*

—vs—

DALLAS FARRIMOND, by and  
through his guardian ad litem, Thomas  
Smith Farrimond and THOMAS  
SMITH FARRIMOND, personally,  
*Defendants-Respondents.*

Case No.

9724

FILED

APR 26 1962

APPELLANT'S BRIEF

\_\_\_\_\_  
Clerk, Supreme Court, Utah

Appeal from the judgment of the Third District  
Court for Salt Lake County,  
Honorable A. H. Ellett, Judge.

\_\_\_\_\_  
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## APPELLANT'S BRIEF

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### STATEMENT OF KIND OF CASE

This is an action to recover damages for loss of eye, kidney, one-half of his liver, and other serious personal injuries by boy plaintiff.

### DISPOSITION IN LOWER COURT

A jury in District Court of Salt Lake County, State of Utah, awarded \$20,000.00 general damages in a special verdict. District Judge A. H. Ellett entered a verdict of "No Cause of Action" by reason of the jury answering "Yes" to a special interrogatory which asked, "Did Richard Jacques voluntarily assume the risks incident

to the manner in which Dallas Farrimond was driving the car insofar as intoxication *and* wilful misconduct were concerned?"

A motion for a new trial was denied.

### RELIEF SOUGHT ON APPEAL

1. That jury's verdict be reinstated, or in the alternative,
2. That plaintiff be granted a new trial.

### STATEMENT OF FACTS

Richard Jacques, a 16 year old minor, was critically injured on January 4, 1961 when the defendant, Dallas Farrimond's, automobile, in which the plaintiff was riding in right rear seat as a guest, went out of control and sheared off a utility pole near 2085 Viewmont Drive in Salt Lake County, State of Utah. The vehicle was east bound on Viewmont Drive when it went out of control and skidded 124 feet, clipped a utility pole and then skidded sideways for an additional 67 feet. Farrimond, who is usually a careful driver and well acquainted with the area and road, never applied his brakes. (Tr. 184) The plaintiff, Richard Jacques, was riding in the right rear seat of the car which struck the pole and caused him to suffer the following injuries:

- a. Severe injury to his right side and both sides of his chest.
- b. Multiple severe scalp, face and eye lacerations, with total destruction of his right eye by a laceration which passed through the eyeball.

- c. Severe contusions of right lung, with multiple rib and costochondral fractures on both sides of his chest, resulting in partial rotation of the sternum.
- d. Fracture of right scapula and left sternal clavical joint.
- e. Severe multiple lacerations of the right lobe of the liver and colon.
- f. Destruction of right kidney, necessitating removal.
- g. Lacerations of right hand.
- h. Cerebral concussion.

The pertinent events leading up to a catastrophic collision commenced about 7:15 P.M. when the defendant, Dallas Farrimond, drove his 1955 Buick Super automobile to the plaintiff's home to pick him up. Immediately thereafter, Dwight Tolley, Dick Gorringer, Richard Rhead and George Ligeros were called for and Farrimond drove to the House of Pizza which is situated at 21st South and 9th East. Farrimond, Jacques, Rhead and Tolley all testified there was no drinking by Farrimond until he reached the House of Pizza and plaintiff's attorney made no claim to his prior drinking. (Tr. 245, Tr 177) At approximately 9:30 P.M., George Ligeros was given a bottle of gin which had two or three inches of gin in the bottom. Farrimond testified that Ligeros brought the gin out to his car where it was mixed with 76 mixer and consumed by Ligeros, Jacques and himself. The plaintiff, Jacques, denied drinking. The collision occurred at approximately 10:00 P.M.

Defendant Farrimond further testified that he met Arlene Huntzinger at the House of Pizza and was quite upset over the fact that she had driven there in another man's car; (Tr. 156, Tr 179) and further infuriated when told she expected to marry another man. (Tr 364) While this episode was going on, the other boys were outside engaged in a dough fight. Jacques had no knowledge whatsoever of any dispute between Farrimond and his girl friend. It was agreed that Farrimond was usually a careful driver. Arlene Huntzinger, his girl friend, left the House of Pizza first then Farrimond decided to go out to her home. Farrimond testified that the boys got in his car and drove down 9th East to 39th South, up 39th South to 13th East, out 13th East to 48th South, up 48th South to Viewmont Drive and southeast on Viewmont Drive to point of collision, which was within a hundred or so feet from the Huntzinger home. It is undisputed that Farrimond drove at excessive rates of speed (Tr 365) on 9th East. It is also undisputed that he favorably responded to protests made by (Tr 365, Tr 151) the guests and drove more carefully up to the time he commenced speeding down Viewmont Drive. (Tr 183, Tr 186, Tr 187, Tr 222) At this point Richard Rhead said, "Dallas, you won't make this corner going this fast." Farrimond disregarded the warning and the collision ensued. Farrimond admitted he was well-acquainted with the road (Tr 184) and the general area and had travelled it many times before.

## ARGUMENT

### POINT NUMBER ONE:

The trial court erred in formulating the special ver-

dict by requiring jury to find conclusions of law rather than ultimate conclusions of fact.

### POINT NUMBER TWO:

The trial court erred not finding as a matter of law in this case that the defense of assumption of risk cannot be used against wilful misconduct.

### POINT NUMBER THREE:

The trial court erred in instructing on negligence and contributory negligence when these matters were not in issue.

POINT NUMBER ONE: Examination of the interrogatories in the special verdict which was given to the jury by the court reveals the following matters: (Tr 81)

Question No. 1: Was Dallas Farrimond intoxicated immediately prior to the collision? Answer. Yes.

This was a question which would require an ultimate fact which could properly be answered by the jury. — The court continued — If so, was the intoxication a proximate cause of the collision? Answer. Yes.

The question of proximate cause will be reserved for a later argument and included in our general article.

Question No. 2. Immediately prior to the collision, was Dallas Farrimond guilty of wilful misconduct? Answer. Yes.

If so, was such wilful misconduct a proximate cause of the collision? Answer. Yes.



Question No. 3. During the trip and immediately prior to the collision, did Richard Jacques voluntarily assume the risks in the manner in which Dallas Farrimond driving the car in so far as the intoxication and wilful misconduct is concerned? Answer. Yes.

Question No. 4. During the trip immediately prior to the collision, did Richard Jacques encourage Dallas Farrimond to drive at an excessive rate of speed? Answer. No.

Question No. 5. Showing by the preponderance of the evidence of the case, what amount of money would fairly and adequately recompense Richard Jacques for any and all damages he has sustained as a result of the collision? (See Instruction No. 19.)

Answer. \$20,000.00.

It is the appellant's contention in this case that the two questions, one regarding wilful misconduct and the other regarding assumption of risk were in effect submitting to the jury a requirement of them to answer questions of law rather than ultimate questions of fact. The function of a special verdict with its interrogatories is to obviate sympathy verdicts in personal injury cases but in endeavoring to do away with said sympathy verdicts, the questions themselves should not become so onerous, so involved, so oppressive that the function itself is lost sight of and the reverse of what is intended happens and that justice itself is lost by the use of said special verdicts. It is admitted that it throws an unduly oppressive burden on the jury, even with instructions, to make definitive answers in connection with complex concepts of the law

such as wilful misconduct and assumption of risk where the courts themselves are, to a large extent, in a quandry as to exactly what they mean. There are extensive annotations in the American Law Reports on both issues that the fact that the jury was being confused by both of the concepts is indicated by these portions of the record:

On page 452 of the record at line 6, the court says: "I was about to call you in to talk to you about going to dinner. The bailiff suggested that you may have some questions. You can be seated if you wish to. Do you have a question that you would like to talk to me about?"

Then the court proceeds to answer the question made by the foreman of the jury, Mr. Alder, on line 24, as follows:

"MR. ALDER: We want to know about misconduct, the amount — whether a person voluntarily speeds is guilty of misconduct?"

Then we have an elaborate explanation by the court on line 18 of page 453 where the court proceeds to explain wanton misconduct:

"MRS. SAVILLE: Is wilful misconduct almost the same as wilfully wanting to kill somebody?"

Then there is another explanation of the court; that it doesn't mean exactly to kill someone; and so the colloquy proceeds, indicating that the jury is hopelessly lost in a maze of legal technicalities in connection with the concept of wilful misconduct.

With regard to the concept of assumption of risk, we find in the record on page 457 the following questions and answers: line 18.

"No. III. During the trip and immediately prior to the collision did Richard Jacques voluntarily assume the risks incident to the manner in which Dallas Farrimond was driving the car insofar as intoxication and wilful misconduct were concerned?" The answer is "Yes."

That is signed by Mrs. Saville, Mr. Shaw, Mr. Wilhelmsen, Mr. Driscoll, Mr. England, Mr. Pack, and Mr. Jackson. Let's see. Mr. Alder did not sign that. Beg pardon?

MR. ALDER: That may have been unintentional.

THE COURT: Did you mean to sign that?

MR. ALDER: Read that again.

THE COURT: "During the trip and immediately prior to the collision did Richard Jacques voluntarily assume the risks incident to the manner in which Dallas Farrimond was driving the car insofar as intoxication and wilful misconduct were concerned?"

MR. ALDER: We discussed that quite a bit, Judge, and we figured that he was not compelled to ride in that car, and in that way he was assuming the risk. Now, you can put my name on that if that is—

THE COURT: No, you will have to put your own. If under my instructions you think that he with knowledge of this trouble rode in that car, then he did assume the risk.

MR. ALDER: No one knew at that time when he was in the car that they were going to be in the wreck, but he was riding in the car wilfully and not being compelled is the way they decided this.

**THE COURT:** Of course, you can't explain your verdict after you are out. There can't be any explanations, but if there is any question, I want you to read my instruction on that.

Court proceeds to read his instruction.

Now it is true that the deliberations of the jury in connection with how they arrived at their verdict may not be a proper matter for the record, but it is a proper matter of the record for the Supreme Court of Utah to determine the confusion that is extant in the minds of the jury when they are actually called upon to determine questions of law riding under the guise of ultimate questions of fact.

It is further significant and interesting to note that the eagerness of the jury to please the trial judge, and the record reveals the friendliness of the trial judge with the jury; and it might be added as a sidenote that it is the function of a trial court to *formally* present the law to the jury, and that is all; and it is the function of the jury not to try to determine which way the judge is thinking concerning the facts, but to make the finding of fact themselves objectively.

**POINT NUMBER TWO:** So far as we can determine, the Supreme Court of the State of Utah has not determined the precise issue of whether assumption of risk can be used as a defense against wilful misconduct. It is alluded to in *Ferguson vs. Jongsma* 10 Utah 2nd 179. In that case, the distinction was made between contributory negligence and assumption of risk at page 190 it states that: "Contributory negligence is based

upon carelessness, inadvertence and unintended risk but assumption of risk requires an intelligent and deliberate choice to assume a known risk. Assumption of risk requires knowledge by plaintiff of a specific defect or dangerous condition caused by the defendants negligence or lacking of due care which the plaintiff could have voluntarily and deliberately avoided and thereby assumed the risks of injuries he sustained. On the other hand, contributory negligence requires evidence only that plaintiff failed to use the care for his own safety which an ordinary reasonable and prudent person could use under the existing circumstances."

In *Milligan vs. Harwood* 11 Utah 7 2nd 74 with regards to intoxication, it is stated on page 76: "Of course if the plaintiff would have known Harwood was intoxicated at the time they embarked on the journey, he would probably be in the position of having assumed the risk."

In the main annotation on this subject in American Law Reports, 44 ALR 2nd 1342, CONTRIBUTORY NEGLIGENCE, ASSUMPTION OF RISK, OR RELATED DEFENSES AS AVAILABLE IN ACTION BASED ON AUTOMOBILE GUEST STATUTE OR SIMILAR COMMON-LAW RULE, at page 1347 Section 3, ASSUMPTION OF RISK:

"In jurisdictions which recognize a rule of assumption of risk as distinct from the defense of contributory negligence, it has usually been held that this defense is available to an automobile host charged with wilful or wanton misconduct or recklessness, even though the

guest's contributory negligence might not bar his recovery." Citing California, Colorado, Connecticut and Florida cases and others.

It is further stated on page 1347 *supra*: "Asserting that the doctrine of assumption of risk was not restricted to cases where there was a contract relationship between the parties, and that, under certain circumstances, it might operate in the field of negligence, the court in *Freedman v. Hurwitz* (1933) 116 Conn 283, 164 A 647, said that when so applicable in negligence actions the principle was distinct from that of contributory negligence, and that therefore the fact that contributory negligence was not a defense to an action under the guest statute did not in itself prevent the defense of assumption of risk in a proper case. The court went on to say, however, that the doctrine operated in a strictly limited field, since it must be shown, in order to bar recovery thereunder, that the injured person had known or ought reasonably to have perceived that the risk existed and that unless he took steps to protect himself he would be liable to injury, and that the incurring of the risk must be really voluntary."

See also the *Restatement of Torts Sec. 482 and 503* (2) which provides that plaintiffs contributory negligence shall not bar recovery from harm caused by the defendants reckless disregard for plaintiffs safety, but that a plaintiff is barred from recovery from harm caused by defendants reckless misconduct if knowing of such misconduct and the danger to himself involved therein, the plaintiff *recklessly* exposes himself thereto (emphasis ours). This comment points out that the plain-

tiff is not barred by failure to exercise reasonable care after knowing that the recklessness conduct and the dangers involved therein. Now even by that form of negligence known as voluntarily assumption of risk, but only where he only knows of the reckless misconduct, but also realizes the gravity of the risk involved so that he is not only unreasonably, but recklessly exposing himself.

So it will be seen, then, that the doctrine enunciated in the American Law reports that the assumption of risk is a defense to wilful misconduct involves a particular and peculiar type of assumption of risk and that is where the conduct of the plaintiff himself equals or exceeds an indifference of recklessness or wanton conduct of the defendant. It will also be seen that it was the plaintiff's contention statement of facts that first: the defendant was intoxicated, which wasn't apparent to the plaintiff or to any of the others, and secondly, that the defendant had that night a personal clash with his girl friend and that he was in the process of trying to reach her home in the fastest way possible with the utmost disregard for the safety of his guests. Therefore, under the statement of facts that the most favorable view that the reviewing court could take in favor of the defendant that it was apparent that none of the guests in that automobile could have known of either (a) the intoxication of the defendant, or (b) his reckless state of mind existing, because of his argument with his girl friend.

**POINT NUMBER THREE:** To add to the welter of blundering confusion created by the trial court in this matter, the trial court pre-emptorily and in dis-

regard of a ruling by the judge at the pretrial — arbitrarily ruled and instructed upon negligence, contributory negligence, reasonable care, due care, ordinary care, all of which had no issue or bearing on the case which in turn added to the already confused minds of the jury. (Tr. 74)

## CONCLUSION

It will be seen from a review of the facts of law in this case that special scrutiny and attention must be paid to the whole concept of special verdicts. While it is true that the primary function is to have them determine the operative facts upon which the court can then draw legal conclusions in order to avoid sympathy verdicts, at the same time, it can be a double edged sword and the function and purpose for what it was devised can be a cutting tool to sever justice itself. It can become a tool to use to bewilder the minds of the jury with the end result is that it accomplishes the opposite of what it intends to do.

We submit that in the instant case that this is exactly what happened and therefore respectfully request that the decision be reversed and that the appellant herein be granted a new trial.

Respectfully submitted,

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