Case No: 1999/0553 QBENF

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (MR JUSTICE JOWITT)
Royal Courts of Justice
Strand, London, WC2A 2LL
Wednesday 21st June 2000

B e f o r e :
LORD JUSTICE KENNEDY
LORD JUSTICE POTTER
And
MR JUSTICE STEEL

- -

CHRISTOPHER JEBSON **Claimant**
- and -
MINISTRY OF DEFENCE **Respondent**

- -

(Transcript of the Handed Down Judgment of
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Bill Braithwaite QC and James Rowley Esq (instructed by Leigh Day & Co, Manchester for the claimant)
Robert Jay QC (instructed by the Treasury Solicitor for the respondent)

- -

Judgment
As Approved by the Court
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LORD JUSTICE POTTER:
INTRODUCTION

1. This is an appeal from the judgment of Mr Justice Jowitt on 6th May 1999 in which he dismissed the claim of the claimant, formerly a Guardsman in the Grenadier Guards, against the defendants in respect of an accident when the claimant fell from the defendants' service lorry on to the carriageway of an approach road leading on to the M275, as the lorry travelled en route from Portsmouth to the Longmoor Military Camp. The claimant suffered severe injuries which ended his military career.

THE FACTS

2. The claimant had been one of a group of some twenty soldiers who had travelled in the lorry from Longmoor Camp to Portsmouth for a night out. Although the men were off duty, the trip had been organised by their Company Commander with a specific view to their relaxation during a period of arduous training for duties in Northern Ireland. It was not in dispute that the night out would or might involve the party in a good deal of drinking. The lorry was supplied, together with a driver, Guardsman Wyatt, who in that role was the only one of the expedition who was on duty. The vehicle was in use for "recreational purposes" under the Joint Service Road Transport Regulations. As its driver, Wyatt was subject to a regulation which provided:

"Only the authorised driver of the vehicle is allowed to drive. He is on duty for the duration of the recreational journey and retains his responsibility for ensuring that all normal regulations for the operation of Service transport are observed .... . He is not to take part in any sport or recreational activity which may result in injury or excess fatigue."

The senior person who went on the trip was Lance-Sergeant Mayoh, who, under the Regulations, was the "Senior Passenger" and as such was

"Designated vehicle supervising officer and seated in the vehicle with the driver. He is in charge of all passengers and is to ensure that the vehicle is not overloaded ... [and] ... he is to ensure that the vehicle is driven in a safe and proper manner."

Apart from Lance-Sergeant Mayoh, the only other non-commissioned officers on the trip were Lance-Corporals Fear and Jones. However, because it was an off-duty party they were permitted, and indeed encouraged, to fraternise with the men on the trip. Mayoh was in a similar position. None had been appointed as formally in charge before the expedition departed, although Sergeant Mayoh assumed and accepted the role of Senior Passenger on the trip. Further, all of the NCOs and men were subject to the Queen's Regulations (Army) 1975 `PART 6 - DISCIPLINE' which, by general provision under Regulation 5.2A1 provides:

"... All Officers, Warrant Officers and NCOs are to maintain discipline over officers and soldiers of lower rank than themselves."

3. The vehicle provided was a DAF four-ton truck with the familiar outline of an army lorry. It was a rigid vehicle with a cab separate from the body, i.e. the `back' of the lorry in which the men were transported. As to the back of the lorry, the roof was solid for half its length, but the rear half was of canvas stretched over a frame. There were also canvas sides which could be rolled up so as to render the sides open if necessary, but which were on this occasion secured down. At the rear of the

lorry, there was a substantial hinged tailgate approximately half the height of the body of the vehicle but, when secured, there remained an open space above it up to the level of the canvas roof. Regulation 09106 of the Joint Service Load Transport Regulations applicable to the lorry provided,

"**Tail and sideboards**. Under no circumstances are passengers in cargo vehicles to sit on the side or tailboards of vehicles. The driver may refuse to proceed if the passengers do not conform."

There were twenty men on the trip. Seating was provided for eighteen in the back, with the driver and senior passenger in front. The driver and senior passenger had the responsibilities set out in the Regulations which I have quoted. However, so far as vision into the back of the lorry was concerned, there was no window or aperture affording the driver or senior passenger a view of what went on inside the rear of the lorry when it was on the move.

4. The accident occurred on the return journey. Most of the party had spent some three hours in Portsmouth drinking and in the words of one of them which the judge accepted, most were "plastered". Not so Guardsman Wyatt, who, as the driver of the lorry, was on duty and had remained sober throughout. Lance-Sergeant Mayoh had been drinking during the evening, but there is no evidence that he was drunk or that his judgement was adversely affected.

5. At the start of the return journey all those present got into the back of the lorry, there being seats for all, save that Mayoh got into the passenger seat in the cab alongside Wyatt, who had closed and secured the tailgate after the men had climbed in, he ensured that there was no one sitting upon it before he moved off. He then returned to his cab and drove off. Very soon afterwards Wyatt stopped in order to pick up two or three stragglers who arrived on the scene. Mayoh, who had told him to stop, got out of the cab in order to see them into the back of the lorry. Once he had done so, he got into the cab again and Wyatt drove off.

6. Everyone sat on the seats at the back until after the lorry moved off, save for one soldier who lay drunk upon the floor. After the lorry moved off, people began to move around and someone sat on the tailgate. Although off duty, Mayoh said that, as the senior passenger, he regarded himself as `effectively' the NCO in charge upon the journey. However, because there was no window in the back of the cab he was unable to keep an eye on what was happening behind him. He was thus in no position to provide active supervision of those in the back of the lorry and he had not asked either of the two Lance-Corporals in the back to do so. In his evidence, Wyatt described the two Lance-Corporals as both being "merry". Neither in fact provided any supervision.

7. Indeed, about fifteen minutes into the return journey, in the outskirts of Portsmouth, Lance-Corporal Fear stood up on his seat and then climbed onto the tailgate of the lorry with the apparent intention of climbing up on the canvas roof. The claimant stood up and shouted to him to get down, getting hold of his leg. He then got up onto the tailgate himself to try to persuade Fear to get back into the lorry.

8. Several minutes later the claimant fell onto the road. The moments leading up to

the accident were described by three young women who were following in a car driven by one of them. They described Fear, the claimant and perhaps a third man as apparently showing off, by waving and shouting at the occupants of the car. Miss Chumiac, the driver of the car, dropped back because of her fear that one of the men might fall on to the road in their path. This rowdy activity lasted at least five minutes until the claimant was seen to try to clamber up on to the canvas roof from the tailgate. However, he lost his footing and fell from the lorry onto the road, just as the lorry was joining the Motorway having accelerated away from traffic lights at the entrance to the slip road up to a speed of some forty-fifty miles per hour. When those in the back became aware of what had happened they banged on the cab and Wyatt stopped the lorry. The judge held that there were no grounds for criticising Wyatt's driving on that night.

THE ISSUES

9. It was common ground before the judge that, as carriers, the defendants owed a duty to the passengers carried in the lorry to take all due care and to carry them safely as far as reasonable care and forethought could attain that end:
see *Halsbury's Laws of England (4th ed)* (Vol. 51) paragraph 49. It was the nature and extent of that duty in the particular circumstances which was in dispute. On the facts as found by the judge the two principal issues before him, re-canvassed on this appeal, were:
(1) whether that duty of care, in addition to the duty to provide a lorry fit to carry passengers safely in the ordinary way, together with a careful driver, extended any further, so as to include or impose an obligation to supervise the drunken soldiers in the back of the lorry, in particular by ensuring that a sober NCO was in the back of the lorry to provide supervision and maintain discipline;
(2) whether, in any event, the claimant's accident was foreseeable.
10. As to Issue (1) the judge found that it was reasonably foreseeable by the defendants that, on an occasion of this kind, some of the soldiers would return to the lorry in various stages of drunkenness. It was also reasonably foreseeable that drunken men such as the plaintiff might well not sit sensibly on the seats provided during the journey but might:
"stand up, move and stumble or fall in the lorry ... even perhaps that they might sit on the tailgate"
and, in doing so, might suffer injury of a kind which could range from slight to serious injury. The judge further found the defendants to have been in breach of their duty of care by their failure to provide a sober person of authority in the rear of the lorry to supervise the behaviour of the party. Finally, he held that if supervision had been provided in the form of a sober person of authority to maintain discipline, it would have prevented the accident. He said:
"Whether or no the claimant would have been brought to order, the behaviour which led to his injuries at first trying to dissuade Fear from what he was doing though exposing himself to danger in the attempt, and then taking part himself in Fear's foolhardy activity went on sufficiently long for the lorry to have been brought safely to a halt by banging on the cab which Wyatt would have understood

as a signal to stop (as he did after the claimant's fall) in time to avoid the fall".
11. Having so found, however, the judge went on to find that the claimant's act of trying to climb onto the roof of the lorry was not reasonably foreseeable and thus liability was not proved. He stated:
"It would be wrong to approach this question by saying that drunkenness makes anything a man does in that state foreseeable, however bizarre or outrageous it may be. I must also be on guard against deploying the wisdom of hindsight. On the other hand, I must not lose sight of the fact that when a group of tipsy and drunken comrades are together after a night out, there is a risk that they may encourage each other into the commission of foolish acts. Nonetheless, when I ask myself dispassionately whether it was reasonably foreseeable that, while the lorry was in motion and not crawling along but travelling at forty to fifty miles per hour, the claimant, influenced by an excessive intake of alcohol, would go so far along the road of folly as to stand on the tailgate and try from there to climb onto the canvas top. I am clear that the answer must be no."
Having referred to the decision of the Privy Council in *The Wagon Mound* at p.426 and to certain passages from the decision in the House of Lords in *Hughes -v- Lord Advocate* [1963] AC 837 per Lord Guest at p.856 and Lord Pearce at p.857, the judge observed:
"This is not a case of danger arising unpredictably from a foreseeable accident. The accident itself, as I have found, was not foreseeable. As much as was reasonably foreseeable was that men affected by drink might stand up, move and stumble or fall in a lorry, that they might sit with their backs to the canvas covering, even perhaps that they might sit on the tailgate. But it was not reasonably foreseeable that they might do as the claimant did. That means that, conformity with the ordinary principle of foreseeability, the claimant's case must fail".
12. He went on to hold that, if liability had been established, the contributory negligence of the claimant would have been very high. He said:
"The claimant's conduct was persisted in over the period of time and was of such obvious foolhardiness - drink being no excuse - that I would have found he was three-quarters to blame for his accident."

THE PARTIES' SUBMISSIONS

13. There is both an Appeal and a Respondents Notice in this case. The appeal relates to Issue (2). Mr Braithwaite QC for the claimant contends that the judge, having correctly held that it was foreseeable that the claimant and others would behave in a foolish and rowdy manner in the rear of the lorry, and one of them might even have sat on the tailgate whilst the vehicle was in motion, was in error in deciding that the defendants could nonetheless avoid liability on the grounds that the precise manner of infliction of harm i.e. the claimant's attempt to clamber onto the roof from the tailgate was not foreseeable.
14. Mr Braithwaite relies on a passage from a speech of Lord Reid in *Hughe*s at p.845 as encapsulating his case. Lord Reid stated:
"So we have [first] a duty owed by the workmen, [second] the fact that if they had done as they ought to have done there would have been no accident and [third] the

fact that the injuries suffered by the Appellant though perhaps different in degree, did not differ in kind from injuries which might have resulted from an accident of a foreseeable nature. The ground on which this case has been decided against the Appellant is that the accident was of an unforeseeable type. Of course, the pursuer has to prove that the defenders' fault caused the accident, and there could be a case where the intrusion of a new and unexpected factor could be regarded as a cause of the accident rather than the fault of the defender. But that is not this case. The cause of this accident was a known source of danger, the lamp, but it behaved in an unpredictable way".

Mr Braithwaite contends that, if one substitutes for the words "the lamp" in the final sentence the words "the drunken and rowdy behaviour of the claimant" those observations apply directly to this case.

15. He relies also on a passage in the speech of Lord Morris in *Hughes* at p.852:

"I consider that the defendants do not avoid liability because they could not have foretold the exact way which the pursuer would play with the alluring objects which had been left to attract him or the exact way in which so doing he might get hurt"

Lord Morris concluded his speech:

"My Lords, in my view, there was a duty owed by the defenders to safeguard the pursuer against the type or kind of occurrence which in fact happened and which resulted in his injuries, and the defenders are not absolved from liability because they did not envisage "the precise concatenation of circumstances which led up to the accident."

Mr Braithwaite submits that, in the words of Lord Pearce at p.858:

"The accident was but a variant of the foreseeable. It was, to quote the words of Denning LJ in *Rowe -v-Minister of Health* "within the risk created by the negligence".

He relies also upon the well known words of Greer LJ in *Haynes -v-Harwood* [1935] 1KB 146 at p.156:

"It is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of a wrongful act"

16. Finally Mr Braithwaite draws our attention to the recent decision of the House of Lords in *Jolly -v- Sutton LBC* [2000] 1 WLR 1082. That case concerned an accident to children endeavouring to repair an abandoned boat on council-owned land and jacking it up so that it fell and injured one of them. The Court of Appeal (See [1998] 1 WLR 1546) had held that, although it was foreseeable that children might play on the boat and suffer injury if they were not careful, their activity in propping up the boat as they did for the purposes of seeking to repair it so as to cause injury when it fell off the prop was an accident of a different type or kind from anything which the council could reasonably have foreseen. The House of Lords reversed that decision. Lord Steyn observed at p.1089E-F:

"Very little needs to be said about the law. The decision in this case turned on the detail of findings of fact at first instance in the particular circumstances of this

case. Two general observations are, however, appropriate. First, in this corner of the law the results of decided cases are inevitably very fact-sensitive. Both counsel nevertheless at times invited Your lordships to compare the facts of the present case to the facts of other decided cases. That is a sterile exercise. Precedent is a valuable stabilising influence in our legal system. But, comparing the facts of and outcome of cases in this branch of law is a misuse of the only proper use of precedent, viz to identify the relevant rule to apply to the facts as found."

On the question of the law to be applied, Lord Hoffman stated at p.1091D-H:

"It is also agreed that what must have been foreseen is not the precise injury which occurred but injury of a given description. The foreseeability is not as to the particulars but the genus. And the description is formulated by reference to the nature of the risk which ought to have been foreseen. So in *Hughes -v- Lord Advocate* [1963] AC 837 the foreseeable risk was that a child would be injured by falling in the hole or being burned by a lamp or a combination of both. The House of Lords decided that the injury which actually materialised fell within the description, notwithstanding that it involved an unanticipated explosion of the lamp and consequent injuries of unexpected severity ... *Hughes -v- Lord Advocate* starts from the principle accepted in the *Wagon Mound No.1* and is concerned with whether the injury which happened was of a description which was reasonably foreseeable.

The short point in the present appeal is whether the judge was right in saying in general terms that the risk was that children would "meddle with the boat at the risk of some physical injury" ([1998] 1 Lloyd's Rep. 439) or whether the Court of Appeal was right in saying that the only foreseeable risk was of "children who were drawn to the boat climbing upon it and being injured by the rotten planking giving was beneath them": per Roch LJ at [1998] 1 WLR 1555. Was the wider risk, which would include within its description the accident which actually happened, reasonably foreseeable?"

17. The judge's findings under Issue (1) as to the necessity for the defendants to provide supervision on the journey are the subject of the Respondent's Notice. Mr Jay QC for the defendants accepts, as was accepted below, that they owed a duty of care in the Ministry's capacity as carrier to transport the claimant safely. However, he submits that, the mere fact of foreseeability that members of the off-duty party might be drunk on their return did not elevate or supplement the duty to carry them safely into a duty to safeguard them from the consequences of their own foolhardiness if they neglected obvious dangers and one of them climbed on to the tailboard.

18. Mr Jay submits that this is a case where, outside the military context, no duty to supervise would be held to arise from the voluntary provision of transport (together with a driver) for a party of men on a night out together, the appropriate analogy being an employer providing free transport with a driver for a works outing. That being so, neither policy nor logic dictate the imposition of such a duty upon the defendants simply by reason of the military status of the parties concerned or the form or content of military regulations applying to them by reason of that status.

Although the driver was on duty, the others were not: they were simply on a night out. There was no evidence or history of similar accidents and the claimant's actions were voluntary and unexpected.

19. In those circumstances, Mr Jay submits that the principle properly applicable may be derived from the decision of this court in *Barrett -v- Ministry of Defence* [1995] 1 WLR 1217, a case concerned with the drunkenness and subsequent death of an off-duty naval airman. The case differed in that the claim was based upon the alleged negligent failure of the defendant to enforce disciplinary regulations against drunkenness so as to protect the deceased against his own known proclivity for alcohol abuse. The court held the deceased alone to have been responsible for his own actions in drinking to the point of his collapse and that no duty was owed to him in this respect. However, the Ministry was held liable on the basis that, following his collapse, service personnel voluntarily assumed a duty of care by acting as the deceased's quasi-rescuer and were negligent in that capacity. In relation to the original drunkenness of the deceased, the court emphasised that foresight of harm alone was not sufficient to create a duty to guard him against his own folly. The passage relied on is that in which Beldam LJ stated at p.1224D-G:

"The plaintiff argued for the extension of a duty to take care for the safety of the deceased from analogous categories of relationship in which an obligation to use reasonable care already existed. For example, employer and employee, pupil and schoolmaster, and occupier and visitor. It was said that the defendant's control over the environment in which the deceased was serving and the provision of duty-free liquor coupled with a failure to enforce disciplinary rules and orders were sufficient factors to render it fair just and reasonable to extend the duty to take reasonable care found in the analogous circumstances. The characteristic which distinguishes those relationships is reliance expressed or implied in the relationship which the party to whom the duty is owed is entitled to place on the other party to make provision for his safety. I can see no reason why it should not be fair just and reasonable for the law to leave the responsible adult to assume responsibility of his own actions in consuming alcoholic drink ... . To dilute self-responsibility and to blame one adult for another's lack of self-control is neither just nor reasonable and in the development of the law of negligence an increment too far."

20. In relation to the relevance of the military context and Army Regulations, Beldam LJ stated earlier in his judgment at p.1223E:

"In my view the judge was wrong to equate Queen's Regulations and Standing Orders with guidance give in the Highway Code or in pamphlets relating to safety in factories. The purpose of Queen's Regulations and Standing Orders is to preserve good order and discipline in the Service and to ensure that personnel remain fit for duty and, while on duty, obey commands and, off duty, do not misbehave, bringing the service into disrepute. All regulations which encourage self-discipline, if obeyed, will incidentally encourage service personnel to take greater pride in their own behaviour but in no sense are the Regulations and Orders intended to lay down standards or to give advice in the exercise of reasonable care

for the safety of men when off duty drinking in bars,"
21. Mr Jay relies also on *Sacco -v- Chief Constable* (Court of Appeal, Unreported, 15th May 1998) a case which concerned a seventeen-year-old youth who had been arrested during a drunken brawl. He kicked open the door of the police van in which he was being transported and jumped out while it was moving at about twenty-five mph striking his head on the road. His case was put on the basis first that the door should have better secured and second, that an officer should have been assigned to sit him in the rear of the van. The case did not ultimately turn upon those matters and the appeal largely concerned the admission of fresh evidence. However, Mr Jay relies on the observation of Beldam LJ to the effect that "even a child would know what a risk he was taking" (i.e. by deliberately jumping out of a moving van) and the summary of the position by Schiemann LJ thus:
"He seems to me to be the author of his own misfortune. He did something which he knew, or must have known, was dangerous. Insofar as his appreciation of the dangers involved was lessened by his intake of alcohol, that was also his fault."
Mr Jay submits that we in turn should apply that broad principle.
22. Finally, Mr Jay relies upon *Ratcliffe -v-McConnell* [1999] 1 WLR 670, in which the claimant was a nineteen year old student who was seriously injured when he dived into an open air swimming pool belonging to his college, access thereto having been prohibited. He was accompanied by friends and had been drinking, though he was not drunk. This court held that the college's duty in its capacity of occupier (under the Occupier's Liability Act 1984) did not include the duty to safeguard the claimant from the consequences of his own folly. Stuart-Smith LJ observed at p.685:
"It is unfortunate that a number of high-spirited young men will take serious risks with their own safety and do things that they know are forbidden, Often they are disinhibited by drink and the encouragement of friends. It is the danger and the fact that it is forbidden that provides the thrill. But if the risk materialises they cannot blame others for their rashness."

ISSUE (1)

23. Although the subject of the Respondents' Notice, it is plainly convenient to consider Issue (1) first. Mr Jay has not sought to challenge any of the judge's findings of fact on which he based his conclusion that supervision was necessary, either in relation to the primary findings of fact as I have recounted them in this judgment, or as to the foreseeability of the particular types of action on the part of the soldiers set out at paragraph 10 above. Nor does Mr Jay challenge the judge's finding (see paragraph 11 above) that there was a risk that the group might encourage each other into the commission of foolish acts. It is upon the basis of those findings that the existence of the duty falls to be considered.
24. I am prepared to accept (without deciding) for the purposes of this appeal, that no special considerations arise in this case by reason simply of the fact that the claimant was a soldier, his employers were the Ministry of Defence and their relationship was governed by Queen's Regulations, Regulation 5.2A1 of which

required Lance-Sergeant Mayoh and Lance-Corporals Fear and Jones, to maintain discipline over the other soldiers, including the claimant. I am further prepared to ignore (though I am by no means clear it is correct to do so) the fact that under the Joint Service Road Transport Regulations Lance-Sergeant Mayoh was, as the `Senior Passenger', in charge of all the passengers in the lorry. No doubt the primary purpose of the Regulations I have quoted earlier is to impose obligations in the interests of the Army, its discipline and efficient functioning, rather than to lay down a duty of care for the benefit or protection of individual servicemen affected (c.f. the observations of Beldam LJ quoted at paragraph 20 above.). Finally, I am prepared to accept as an appropriate analogy from civilian life that of a works outing arranged for a group of young and boisterous employees, for whom the employer supplies transport and a driver. However, if the analogy is to be accurate, it should encompass (a) an employer who provides not a charabanc or mini-bus, but a lorry with a tailgate, a large open space above it, and a driver with no view into the back of the lorry nor any other means of `keeping an eye' on those travelling in it; (b) a situation where senior management has encouraged and provided for the outing to take place, but has given no instructions for supervision by a senior employee or other person in a position to exercise a disciplinary or moderating influence upon the young men in the back of the lorry, who may be expected to be in high spirits and influenced by drink on the journey home. Put in that way (and it seems to me an appropriate way in which to put it) it does not seem to me that Mr Jay's analogy assists him.

25. Mr Jay has rightly emphasised that reasonable foreseeability alone is not the touchstone of liability, it is also necessary to show that it is fair, just and reasonable for a duty of care to be imposed. He has also rightly emphasised that, in the ordinary way and in most situations, an adult (and these young men were adults) is not entitled to pray in aid his own drunkenness as giving rise to a duty or responsibility in others to exercise special care. However, that is not an invariable rule; nor is it one which it is fair just and reasonable to apply in circumstances where an obligation of care is assumed or impliedly undertaken in respect of a person who it is appreciated is likely to be drunk. In this case, as the judge held, in providing transport for the evening out, it was, or should have been, expressly anticipated that the participants would be returning in an inebriated state and likely to be in high spirits. Accordingly, in those circumstances, there was a particular duty to ensure that the transport `package' provided was reasonably safe to avoid the possibility of injury from rowdy behaviour in the back of the lorry. Given the size of the gap above the tailgate which raised the possibility of someone falling from the lorry, and given the inability of the driver to keep an eye on what was going on behind, the package was plainly deficient if someone was not appointed in a supervisory role. While Lance-Sergeant Mayoh may to an extent have assumed a supervisory role, he did not seek to exercise it in the back of the lorry; he had not been instructed by his Company Commander to do so, nor did it apparently occur to him to delegate the task to another fit to discharge it. In my

opinion, the judge was right to find that supervision should have been provided and that it was not provided. In the light of his unchallenged finding that, if supervision had been provided, the accident would not have happened, I now turn to consider Issue 2.

ISSUE 2

26. Adopting the approach of Lord Hoffman in *Jolly -v- Sutton LBC* the short point under this heading is whether (a) the judge was right in saying that the foreseeable risk of injury against which it was the defendant's duty to guard was limited to injury (whether slight or serious) caused by someone stumbling or falling in the course of standing up or moving about in the back of the lorry, or other activity of a `restive and foolish' nature including sitting on the tailgate, but that such duty stopped short of anticipating the `foolhardy, reckless and voluntary' conduct of the claimant in standing on the tailgate in an effort to climb on the roof, or (b) Mr Braithwaite is correct that the foreseeable risk is appropriately put in more general terms, namely that it was foreseeable that injury (whether slight or serious) would occur as a result of the drunken and rowdy behaviour of the passengers, including the danger that someone would fall from the vehicle as a result, such wider risk being apt to include within its description the accident which actually happened.

27. I have no doubt that, in the circumstances of this case, Mr Braithwaite's is the appropriate formulation. Although, when focusing upon the precise nature of the risk which was foreseeable, the judge effectively found it in the terms just stated, he also went on to observe that, when a group of tipsy and drunken comrades are together after a night out, there is a risk that they may encourage each other into the commission of foolish acts. That seems to me precisely what appears to have happened in this case. Whereas the judge took the view that it was not reasonably foreseeable that someone would `go so far along the road of folly' as to stand on the tailgate and try to climb on the roof, it seems to me (adopting the words of Lord Hoffman in *Jolly*) that the conduct so described was no more than particulars within a genus of behaviour which was foreseeable. If that is right, then the injury came within the scope of the duty of care.

28. In coming to this conclusion I have gained little assistance from the facts of other cases. Nor do I think that, as urged by Mr Jay, the court should be hesitant to apply in this case principles enunciated in *Hughes* (in relation to an inanimate object which could act unpredictably) and in *Jolly* (in relation to children, who are notoriously unpredictable in their behaviour and unwitting of the possible dangers when playing with alluring but dangerous objects). I accept that an adult is generally to be treated as appreciative of the dangers created by his own actions and thus is likely to be held responsible for those actions when pursuing a dangerous course of conduct. Nonetheless, the law recognises that there may be circumstances where by reason of drunkenness or other factors foreseeably likely to affect an adult's appreciation of danger, he may act in a childish or reckless fashion, and that in appropriate circumstances there may exist a duty on others to make allowance for those actions and to take precautions for the perpetrator's safety. I consider this to be just such a case, and would reverse the finding of the

judge so far as Issue 2 is concerned.

CONTRIBUTORY NEGLIGENCE

29. Finally, on the basis of success under Issues 1 and 2, the claimant appeals against the judge's assessment of 75% contributory negligence upon his part. Mr Braithwaite made short submissions in this respect. However, he failed to persuade me that the judge was other than right in regarding the claimant as largely the author of his own misfortune. On any view his actions were foolish and dangerous in the extreme. He had already sought to discourage Lance-Corporal Fear from pursuing a similar course. It is not known what led to a change of heart on the claimant's own part. However, no sensible (nor indeed any) reason has been advanced for that change of heart. In my view there are no grounds to interfere with the judge's apportionment.

CONCLUSION

30. I would allow the appeal and give judgment for the claimant for damages to be assessed on the basis of 25% of full liability, together with an order that the defendants pay the claimant's costs of the action, including the costs of this appeal, to be assessed on the standard basis.

MR JUSTICE STEEL: I agree

LORD JUSTICE KENNEDY: I also agree

Order: Appeal allowed damages to be assessed on basis of 25% of full damages liability. Defendants pay Claimants costs of action including appeal, to be assessed on standard basis.

(Order does not form part of the approved judgment)