Jolley v. Sutton London Borough Council [2000] UKHL 31 (18 May 2000)

HOUSE OF LORDS

Lord Browne-Wilkinson Lord Mackay of Clashfern Lord Steyn Lord Hoffmann Lord Hobhouse of Woodborough

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

JOLLEY (A.P.)

(APPELLANTS)

v.

SUTTON LONDON BOROUGH COUNCIL

(RESONDENTS)

ON 18 MAY 2000

LORD BROWNE-WILKINSON

My Lords,

I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Steyn. For the reasons which he gives I would allow this appeal and remit the case to the Court of Appeal to consider any issue relating to the quantum of damages which that court is prepared to entertain.

LORD MACKAY OF CLASHFERN

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Steyn and Lord Hoffmann. For the reasons which they have given I too would allow the appeal.

LORD STEYN

My Lords,

On 8 April 1990, in the grounds of a block of council flats owned and occupied by the London Borough of Sutton, Justin Jolley, then a schoolboy aged 14, sustained serious spinal injuries in an accident. It arose when a small abandoned cabin cruiser, which had been left lying in the grounds of the block of flats, fell on Justin as he lay underneath it while attempting to repair and paint it. As a result he is now a paraplegic. He claimed damages in tort from the council. At trial the claim was primarily based on a breach of the Occupiers' Liability Acts 1957 and 1984. After a seven day trial in 1998 Mr. Geoffrey Brice, Q.C., a Deputy High Court Judge, gave judgment for Justin but reduced the damages by 25 per cent. by virtue of a finding of contributory negligence. The judge awarded damages in the sum of £621,710, together with interest: *Jolley v. London Borough of Sutton* [1998] 1 Lloyd's Rep. 433. The council appealed. The Court of Appeal unanimously reversed the judge's conclusions on the merits and entered judgment for the council: *Jolley v. Sutton L.B.C.* [1998] 1 WLR 1546.

The uncontroversial background

The uncontroversial background can be taken from the Statement of Facts and Issues. The council own and occupy the common parts of a block of council flats known as Hayling Court at North Cheam in Surrey. In 1987 a boat was brought on a trailer to the grounds of Hayling Court. It was placed on a grassed area where children played. The boat was abandoned. It was exposed to the elements and became derelict and rotten. It was neither covered nor fenced around. The trailer was by the side of the boat. In December 1988 the council placed a sticker on the boat which was in a form used for abandoned cars. It read "Danger do not touch this vehicle unless you are the owner" and stated that it would be removed within seven days unless claimed by its owner. Complaints about the boat were made to the council by residents of the block of flats. In the early Summer of 1989 when he was 13 Justin and a friend, Karl Warnham, saw the boat when they were walking past the flats. In February 1990 the two boys returned to the boat, planning to repair it and take it to Cornwall to sail it. Justin was by then 14 years old. They swivelled the boat round, and lifted the front end of the boat onto the trailer so as to be able to get under the boat to repair the hull. The trailer supports made holes in the wooden structure of the boat. Accordingly, the boys pulled the boat off the trailer. In order to repair the holes in the hull, Justin took a car jack and some wood from his home and the boys jacked the front of the abandoned boat up some 2 ½ feet. In that position the boys painted part of the boat, and attempted to repair holes with wood, nails and glue. On one occasion one of the boys put his foot through the structure. Justin and Karl had worked on the boat on about five occasions over some six weeks from February 1990 until the date of the accident. On 8 April 1990 Justin and Karl were underneath the jacked up boat working on it. After a while Justin noticed that Karl had crawled out from under the boat. Justin remained. The boat seemed to rock above him. He tried to get out from under the boat but before

he could do so it came down onto him and caused him to suffer a broken back and consequent paraplegia. The immediate cause of the collapse was that the boat toppled off the jack and other material upon which it was propped. It was not established that the derelict or rotten condition of the boat was causative of the collapse.

The judgment at first instance

In a careful and detailed judgment the judge analysed the evidence and made detailed findings of fact. He then quoted the relevant statutory provisions. Section 2(2) of the Occupiers' Liability Act 1957 defines the "common duty of care" as:

> "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there".

Sub-section (3) provides:

> "The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases -
> (*a*) an occupier must be prepared for children to be less careful than adults . . ."

The judge observed that it has long been established that children are or may be attracted to meddle with objects on premises or property which constitute a danger when meddled with. He stated in very general terms that the occupier is under a duty to protect a child from danger caused by meddling with such an object by taking reasonable steps in the circumstances including, where appropriate, removing the object altogether so as to avoid the prospect of injury. He cited the well known case of *Hughes v. Lord Advocate* [1963] AC 837, as well as a number of other decisions, illustrative of traps or allurements causing harm to children leading to liability by occupiers.

The judge then recorded his conclusions [1998] 1 Lloyd's Rep. 433, 439-440:

> "Did the boat present a trap or allurement to the plaintiff and Karl and one which presented a danger of physical injury to them? If so, was this state of affairs reasonably foreseeable to the defendants such that they ought to have taken measure in good time to protect boys such as the plaintiff from such danger? One must keep well in mind that this case is concerned with boys aged 13 and 14. The boat was on a grassed area outside a block of council flats in an area where there were abandoned cars. I have no doubt that the presence of the boat was something which one ought to anticipate would be an attraction to children of differing ages. Younger children might simply play on it and in its rotting condition might suffer injury, perhaps of a quite

> minor nature. Mr. Palmer stressed that these two boys were not so much playing with the boat as working on it. I do not believe any such distinction assists the defendants. Play can take the form of mimicking adult behaviour. It was reasonably foreseeable that children including those of the age of the plaintiff would meddle with the boat at risk of some physical injury. So far as this type of accident was concerned, it is really only likely to occur if the child was a young teenage boy with strength and ability to raise the boat and prop it up. Abandoned cars were clearly treated by the defendants as a potential source of danger and this abandoned boat must also have fallen into that category. Although the warning DANGER contained on the stickers is not conclusive as to whether a particular object presented a danger it is at least a pointer in that direction
> "There was no reason in fact or in law preventing the defendants from removing and disposing of the boat well before the accident (as actually occurred after it). As owners and occupiers of the Hayling Court estate they were entitled to remove and dispose of abandoned motor cars and an abandoned boat. Further they had statutory powers as a local authority under section 6 of the Refuse Disposal (Amenity) Act 1978 to remove and dispose of this abandoned boat. I find that is what the defendants ought to have done, not merely because the boat was an eyesore but because it was a trap or allurement to children."

The judge summed up his conclusion as follows:

> "I find that the type of accident and injury which occurred in this case was reasonably foreseeable (albeit that it involved significant meddling with the boat by two young teenage boys and that the injuries proved to be very severe) and that the actions of the plaintiff and/or Karl did not amount to a novus actus. Accordingly, I find the defendants in breach of their duty to the plaintiff as occupiers and (subject to the point on contributory negligence considered below) liable to the plaintiff for the injury, loss and damage which he has sustained."

I have set out these findings of fact at length because the interpretation of the judge's finding became controversial during the hearing of the appeal in the House.

The judgments of the Court of Appeal

The leading judgment in the Court of Appeal was given by Lord Woolf M.R. He cited extensively from the decision in the Privy Council in *Overseas Tank (U.K.) Limited v. Morts Docks and Engineering Company Limited (The Wagon Mound)* [1961] AC 388 ("The Wagon Mound No. 1") and *Hughes v. Lord Advocate* [1963] AC 837. Lord Woolf M.R. then explained his reasons for disagreeing with the judge, [1998] 1 WLR 1546, 1553H-1554E:

> "The judge attached importance to the presence of the boat as being both an allurement and a trap. While this can be of significance in some cases it is only part of the background to this case. There can be no dispute that, if this boat was left in this position, children would be attracted by it and would play with it. This was conceded. It was also a trap in the sense that it was not immediately apparent that it was in a rotten condition, that is in a condition where it could prove dangerous because a child could find that a plank or planks gave way. It was a combination of these two features that made it the duty of the council to have the boat removed. They failed to do this and in that respect they were negligent. However, these features, the attractiveness of the boat to children and its dangerous condition, were not established to be part of the causes of the accident. The immediate cause of the accident was that the two boys jacked and propped the boat up so that they could work underneath it and did so in a way that meant that the boat was unstable and could and did fall on the plaintiff.
>
> "The question which has to be asked is: was this accident in the words of Lord Pearce 'of a different type and kind from anything that a defender could have foreseen?' In answering this question it is necessary to have well in mind that the council should have appreciated that it is difficult to anticipate what children will do when playing with a boat of this sort. Boats, like cars, if they were left 'abandoned' in an area where children have access, will certainly attract children to play with them. But what the plaintiff was engaged on was an activity very different from normal play.
>
> "Even making full allowance for the unpredictability of children's behaviour, I am driven to conclude that it was not reasonably foreseeable that an accident could occur as a result of the boys deciding to work under a propped up boat. Nor could any reasonably similar accident have been foreseen. Ironically the state of the boat was so poor that it made it less likely that it would be repairable or that boys would embark on doing the necessary repairs. The photographs of the boat and the evidence of Mr. Hall indicate that it was a fairly heavy structure. It would be by no means easy for the boat to be moved or raised. In deciding whether the accident was foreseeable it is important not only to consider the precise accident which occurred but the class of accident."

Roch L.J. at p. 1555 agreed with the reasons of Lord Woolf M.R. and in a separate judgment held that "Had the boat been sound then no reason for its removal would have existed." Judge L.J. observed, at p. 1556A:

> "If a result of its unsafe condition a child had been injured while doing so the subsequent claim for damages would have succeeded. Whether it would have succeeded on the basis of an injury resulting from the mere presence of the boat - as opposed to its unsafe condition - is a separate question which does not arise for decision."

It will be necessary to examine these observations in the light of the judge's findings.

The interpretation of the judgment at first instance

My Lords, the judge, [1998] 1 Lloyd's Rep. 433, 439, carefully distinguished between the two possible sources of danger presented by the boat, namely -

(1)

> "younger children may simply play on it and in its rotting condition might suffer injury . . ."

(2)

> ". . . if the child was a young teenage boy with strength and ability to raise the boat and prop it up."

He said one must keep well in mind that the case was concerned with boys aged 13 and 14. He was considering the second source of danger. He then found that "the type of accident . . . which occurred in this case was reasonably foreseeable." By the type of accident which occurred he obviously meant the collapse of the propped up boat. But for the sustained argument of counsel for the London Borough of Sutton I would have regarded any contrary interpretation as unarguable. Having heard the arguments I remain of the view that the judge's findings are crystal clear and to the effect I have described. This is, however, not the end of the matter. Counsel for the borough submitted in the alternative that the judge erred in concluding that an accident of the type which occurred was foreseeable. He invited the House to conclude that the Court of Appeal was entitled to reverse the findings of the judge.

An analysis of the judgments in the Court of Appeal

In the Court of Appeal the council made an express but limited concession. The council accepted before the Court of Appeal "that it had been negligent, the negligence being a failure to remove the boat with its rotten planking, and that such negligence created the risk of the children climbing upon the boat and being injured by the rotten planking giving way beneath." This was the only basis on which the council accepted that there was a duty to remove the boat. This limited concession seems to have had a considerable influence. In opening the appeal in the House counsel for Justin treated the concession as a trump card. It is no doubt the way in which counsel for Justin resisted the appeal in the Court of Appeal. In truth the concession did not go to the heart of the case. But it tended to divert attention from the real issue. It may explain why Lord Woolf M.R. did not expressly address the judge's findings that an accident of the type, which in fact occurred, was reasonably foreseeable. He therefore did not directly explain why on the evidence this finding was not open to the judge. But in view of the observations of Lord Woolf M.R., at p. 1554, that the boat was "a fairly heavy structure" and

that it would be "by no means easy for the boat to be moved or raised" I accept that by implication he must have approached the matter on the basis that the judge made a finding which was not open to him. While Roch L.J. agreed with Lord Woolf M.R. he also gave reasons of his own. But nowhere in his judgment did he mention the judge's critical finding. The judgment of Judge L.J. states, at p. 1556, that the mere presence of the boat - as opposed to its unsafe condition is "a separate question which does not arise." This was a misapprehension.

One therefore has this troublesome situation. In regard to the central finding by the judge that an accident of the type, which in fact occurred, was reasonably foreseeable, the reasons given in the Court of Appeal are less than satisfactory. If the conclusion of the Court of Appeal is to be sustained it can only be on the basis of the judgment of Lord Woolf M.R. Counsel for the borough. invited the House to read the transcript of the evidence of Mr Hall. He said that this evidence supports the conclusions of Lord Woolf M.R. Lord Woolf M.R. referred to Mr. Hall in support of the view that the boat was a fairly heavy structure which it would not be easy to move or raise. That statement I would accept. But I would record that in agreement with your Lordships I was not prepared to accede to counsel's invitation to read the transcript of the evidence of Mr. Hall. It would have been wrong to do so without reading all the relevant evidence. And the council had an opportunity to put relevant evidence before the House in the statement of facts and issues. In any event, the point of difference between the judge and Lord Woolf M.R. was a matter of impression. The judge said that in the case of teenagers play can take the form of mimicking adult behaviour. Lord Woolf M.R. thought that propping up the boat and working on it was "an activity very different from normal play." On this difference of view the transcript could not help.

Was the Court of Appeal entitled to disturb the judge's finding?

The difficulty facing counsel for the borough. was that the Court of Appeal never squarely addressed the question whether the judge's critical finding was open to him on the evidence. For my part the judge's reasons for that finding are convincing in the context of teenage boys attracted by an obviously abandoned boat. And I do not regard what they did as so very different from normal play. The judge's observation that play can take the form of mimicking adult behaviour is a perceptive one. It is true, of course, that one is not dealing with a challenge to an issue of primary fact. The issue whether an accident of the particular type was reasonably foreseeable is technically a secondary fact but perhaps it is more illuminating to call it an informed opinion by the judge in the light of all the circumstances of the case. In my view it was an opinion which is justified by the particular circumstances of the case. Counsel has not persuaded me that the judge's view was wrong. And I would hold that the Court of Appeal was not entitled to disturb the judge's findings of fact.

Novus actus interventiens

Lord Woolf M.R. had held that his conclusion could also be justified on the grounds that one boys' own acts broke the chain of causation. Counsel for the borough accepted that, if in the circumstances of this case he failed on the primary issue, he could not succeed on this closely linked point. This concession was rightly made.

The law

Very little needs to be said about the law. The decision in this case has turned on the detailed findings of fact at first instance on 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 with 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 outcomes of cases in this branch of the law is a misuse of the only proper use of precedent, viz to identify the relevant rule to apply to the facts as found.

Secondly, Lord Woolf M.R. made an observation casting doubt on part of Lord Reid's speech in *Hughes v. Lord Advocate* [1963] AC 837. The defendants left a manhole uncovered and protected only by a tent and paraffin lamp. A child climbed down the hole. When he came out he kicked over one of the lamps. It fell into the hole and caused an explosion. The child was burned. The Court of Session held that there was no liability. The House of Lords reversed the decision of the Court of Session. In the present case Lord Woolf M.R., [1998] 1 WLR 1546, 1551H-1552C cited the following parts of the speech of Lord Reid, at pp. 845 and 847:

> "So we have (first) a duty owned by the workmen, (secondly) the fact that if they had done as they ought to have done there would have been no accident, and (thirdly) 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 defender's fault caused the accident and there could be a case where the intrusion of a new and unexpected factor could be regarded as the 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"* [Emphasis supplied by Lord Woolf M.R.] "This accident was caused by a known source of danger, but caused in a way which could not have been foreseen and in my judgment, that affords no defence."

Lord Woolf M.R. observed that he had difficulty in reconciling these remarks with the approach in *The Wagon Mound (No. 1)* [1961] AC 388. It is true that in *The Wagon Mound (No. 1)* Viscount Simonds at one stage observed, at p. 425E:

> "If, as admittedly it is, B's liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened - the damage in suit?"

But this is to take one sentence in the judgment in *The Wagon Mound (No. 1)* out of context. Viscount Simonds was in no way suggesting that the precise *manner* of which the injury occurred nor its *extent* had to be foreseeable. And Lord Reid was saying no more. The speech of Lord Reid in *Hughes v. Lord Advocate* [1963] AC 837 is in harmony with the other judgments. It is not in conflict with *The Wagon Mound (No. 1)*. The scope of the two modifiers - the precise manner in which the injury came about and its extent - is not definitively answered by either *The Wagon Mound (No. 1)* or *Hughes v. Lord Advocate*. It requires determination in the context of an intense focus on the circumstances of each case: see *John Fleming, The Law of Torts*, 9th ed., (1998), pp. 240-243.

Conclusion

My Lords, I would restore the wise decision of Mr. Geoffrey Brice, Q.C., the Deputy High Court judge. I would allow the appeal. I would further remit the case to the Court of Appeal to enable it to consider what course it should adopt on any application in regard to the determination of any issue relating to quantum of damages.

LORD HOFFMANN

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn and I gratefully adopt his statement of the facts. The issue in this appeal is a very narrow one. The council admits that it was the occupier of the grassed area near the flats where the plaintiff lived, that plaintiff was allowed to play there and that he was accordingly a "visitor" upon its land within the meaning of the Occupiers' Liability Act 1957: see section 1(2). The council therefore owed the plaintiff the "common duty of care" defined in section 2(2) of the Act:

> "…a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

By way of further explanation, section 1(3) says that the relevant circumstances will include "the degree of care, and want of care, which would ordinarily be looked for in such a visitor" so that, for example, in proper cases: "…an occupier must be prepared for children to be less careful than adults…"

It is also agreed that the plaintiff must show that the injury which he suffered fell within the scope of the council's duty and that in cases of physical injury, the scope of the duty is determined by whether or not the injury fell within a description which could be said to have been reasonably foreseeable. *Donoghue v. Stevenson* [1932] AC 562 of course established the general principle that reasonable foreseeability of physical injury to another generates a duty of care. The further proposition that reasonable foreseeability also governs the question of whether the injury comes within the scope of that duty had to wait until *Overseas Tankship (U.K.) Ltd v. Morts Dock and Engineering Co. Ltd (The Wagon Mound)* [1961] AC 388 *("The Wagon Mound No. 1"*) for authoritative recognition. Until then, there was a view that the determination of liability involved a two-stage process. The existence of a duty depended upon whether injury of some kind was foreseeable. Once such a duty had been established, the defendant was liable for any injury which had been "directly caused" by an act in breach of that duty, whether such injury was reasonably foreseeable or not. But the present law is that unless the injury is of a description which was reasonably foreseeable, it is (according to taste) "outside the scope of the duty" or "too remote."

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 by a combination of both. The House of Lords decided that the injury which actually materialised fell within this description, notwithstanding that it involved an unanticipated explosion of the lamp and consequent injuries of unexpected severity. Like my noble and learned friend Lord Steyn, I can see no inconsistency between anything said in *The Wagon Mound No.1* and the speech of Lord Reid in *Hughes v. Lord Advocate*. The two cases were dealing with altogether different questions. In the former, it was agreed that damage by burning was not damage of a description which could reasonably be said to have been foreseeable. The plaintiffs argued that they were nevertheless entitled to recover by the two-stage process I have described. It was this argument which was rejected. *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 therefore 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) of whether the

Court of Appeal were 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 way beneath them": per Roch L.J. at [1998] 1 W.L.R. 1555. Was the wider risk, which would include within its description the accident which actually happened, reasonably foreseeable?

My Lords, although this is in end the question of fact, the courts are not without guidance. "Reasonably foreseeable" is not a fixed point on the scale of probability. As Lord Reid explained in *Overseas Tankship (U.K.) Ltd v. Miller Steamship Co. Pty (The Wagon Mound No. 2*). [1967] 2 A.C. 617, 642 other factors have to be considered in deciding whether a given probability of injury generates a duty to take steps to eliminate the risk. In that case, the matters which the Privy Council took into account were whether avoiding the risk would have involved the defendant in undue cost or required him to abstain from some otherwise reasonable activity. In *Bolton v. Stone* [1951] AC 850 there was a foreseeable risk that someone might one day be hit by a cricket ball but avoiding this risk would have required the club to incur very large expense or stop playing cricket. The House of Lords decided that the risk was not such that a reasonable man should have taken either of these steps to eliminate it. On the other hand, in *The Wagon Mound No. 2,* the risk was caused by the fact that the defendant's ship had, without any need or excuse, discharged oil into Sydney Harbour. The risk of the oil catching fire would have been regarded as extremely small. But, said Lord Reid, at p. 642:

> ". . . it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g., that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it."

My Lords, in this calculation it seems to me that the concession by the council is of significance. The council admit that they should have removed the boat. True, they makes this concession solely on the ground that there was a risk that children would suffer minor injuries if the rotten planking gave way beneath them. But the concession shows that if there were a wider risk, the council would have had to incur no additional expense to eliminate it. They would only have had to do what they admit they should have done anyway. On the principle as stated by Lord Reid, the wider risk would also fall within the scope of the council's duty unless it was different in kind from that which should have been foreseen (like the fire and pollution risks in *The Wagon Mound No. 1*) *and* either wholly unforeseeable (as the fire risk was assumed to be in *The Wagon Mound No. 1)* or so remote that it could be "brushed aside as far-fetched": see Lord Reid at p. 643 of *The Wagon Mound No.2*.

I agree with my noble and learned friend Lord Steyn and the judge that one cannot so describe the risk that children coming upon an abandoned boat and

trailer would suffer injury in some way other than by falling through the planks. Mr. de Navarro says that apart from its rotten planking, the boat was simply a heavy object like any other. It was no more likely to cause injury to the children than any other heavy object they might be able to get hold of. He draws the analogy of a man who negligently leaves a loaded gun where children play with it and one child injures another by dropping it on his toe. The injury does not fall within the scope of the risk created by the fact that it is a gun rather than some other heavy but innocuous object. So Roch L.J. said, [1998] 1 WLR 1546, 1555: "had the boat been sound, then no reason for its removal would have existed."

I think that in a case like this, analogies from other imaginary facts are seldom helpful. Likewise analogies from real facts in other cases: I entirely agree with my noble and learned friend Lord Steyn in deploring the citation of cases which do nothing to illuminate any principle but are said to constitute analogous facts. In the present case, the rotten condition of the boat had a significance beyond the particular danger it created. It proclaimed the boat and its trailer as abandoned, *res nullius*, there for the taking, to make of them whatever use the rich fantasy life of children might suggest.

In the Court of Appeal, Lord Woolf M.R. observed, at p. 1553, that there seemed to be no case of which counsel were aware "where want of care on the part of a defendant was established but a plaintiff who was a child had failed to succeed because the circumstances of the accident were not foreseeable." I would suggest that this is for a combination of three reasons: first, because a finding or admission of want of care on the part of the defendant establishes that it would have cost the defendant no more trouble to avoid the injury which happened than he should in any case have taken; secondly, because in such circumstances the defendants will be liable for the materialisation of even relatively small risks of a different kind, and thirdly, because it has been repeatedly said in cases about children that their ingenuity in finding unexpected ways of doing mischief to themselves and others should never be underestimated. For these reasons, I think that the judge's broad description of the risk as being that children would "meddle with the boat at the risk of some physical injury" was the correct one to adopt on the facts of this case. The actual injury fell within that description and I would therefore allow the appeal.

LORD HOBHOUSE OF WOODBOROUGH

My Lords,

In agreement with the speech delivered by my noble and learned friend Lord Hoffmann and for the reasons he has given, I too would allow this appeal.

I agree that the matter should now be remitted to the Court of Appeal as proposed.