

P.C.
~~GD 1.6.6~~

90, 1966

IN THE PRIVY COUNCIL

No. 7 of 1964

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES
IN COMMERCIAL CAUSES

No. 3000 of 1955 & No. 3001 of 1955

B E T W E E N:

OVERSEAS TANKSHIP (U.K.) LIMITED (Defendant) Appellant

- and -

10 THE MILLER STEAMSHIP COMPANY PTY. LIMITED and
R. W. MILLER & CO. PTY. LIMITED (Plaintiffs) Respondents

And by Consolidation Order of the Supreme Court of
New South Wales 28th October 1963

B E T W E E N:

THE MILLER STEAMSHIP CO. PTY. LIMITED and
R. W. MILLER & CO. PTY. LIMITED (Plaintiffs) Appellants

- and -

OVERSEAS TANKSHIP (U.K.) LIMITED (Defendant) Respondent

C A S E FOR OVERSEAS TANKSHIP (U.K.) LIMITED

Record

20 1. This is an Appeal by Overseas Tankship (U.K.)
Limited and a Cross-Appeal by The Miller Steamship
Company Pty., Limited and R.W. Miller & Co., Pty.,
Limited. The Appeal and Cross-Appeal are brought by
leave of the Supreme Court of New South Wales, granted p.776
on 12th December, 1963, from the judgment of Walsh J. pp.10-11
in the Supreme Court of New South Wales in Commercial
Causes dated 10th October, 1963, wherein judgment
was entered against Overseas Tankship (U.K.) Limited
(hereinafter throughout this Case referred to as "the
Appellants") in favour of The Miller Steamship
Company Pty., Limited and R.W. Miller & Co., Pty.,
30 Limited (hereinafter throughout this Case together

P.C.

6.D.1.0.6

Record

Doc. No. 3
(Ll. Rep.
in pocket)

referred to as "the Respondents") for the sums of £80,000 and £1,000 respectively. The judgment of Walsh J. on the question of liability is reported in [1963] 1 Lloyd's Rep. 402.

2. The circumstances which gave rise to the present actions are the same as those which gave rise to earlier proceedings which came before the Judicial Committee of the Privy Council [Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Morris of Borth-y-Gest] in Overseas Tankship (U.K.) Limited v. Morts Dock and Engineering Company Limited [1961] A.C. 388, (hereinafter referred to as "Wagon Mound I"), namely the damage caused when a spillage of bunkering oil from s.s. "WAGON MOUND" (hereinafter called "the vessel") caught fire on the waters of Morts Bay, Sydney Harbour, on 1st November, 1951. The Plaintiffs in Wagon Mound I were the owners of a wooden wharf, known as Sheerlegs Wharf, which was damaged by the fire. Each of the Plaintiffs in the present action was the owner of a ship which at the material time was lying at Sheerlegs Wharf and which was damaged by the fire. The present actions were delayed pending the hearing of the proceedings in Wagon Mound I.

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
25 APR 1967
25 RUSSELL SQUARE
LONDON, W.C.1.

p.405

p.405

p.427

p.436

10

20

30

3. The Respondents sought to establish liability against the Appellants (1) in negligence, (2) in nuisance and (3) under the principles of Rylands v. Fletcher ((1868) L.R. 3 H.L. 330). Walsh J. held that the claim in nuisance lay in public nuisance, not in private nuisance, and that this claim succeeded. He further held that the claims in negligence and under the principles of Rylands v. Fletcher failed.

4. The principal issues arising on this appeal may be summarised as follows:-

(1) Whether the Appellants are liable in public nuisance for the damage by fire sustained by the Respondents when the only reasonably foreseeable result of the Appellants' act was damage to the public by pollution of the waters and foreshore of Morts Bay.

(2) Whether damages for physical injury (whether to the person or to chattels) caused by a user of a highway to a user of a highway are recoverable in public nuisance when they are not recoverable in negligence.

40

(3) Whether the damage by fire sustained by the Respondents is recoverable from the Appellants notwithstanding that such damage was not reasonably foreseeable or whether such damage is not recoverable because it is too remote in law.

Doc. No.3
(Il. Rep.
in pocket)

(4) Whether the Appellants' act was in law the cause of the damage sustained by the Respondents.

10 5. The Appellants were at all material times the charterers by demise of the vessel. At about 4 a.m. on 30th October, 1951, while the vessel was being bunkered at the Caltex Wharf, Mort's Bay, there occurred a spillage of a substantial quantity of bunkering oil from the vessel on to the waters of Mort's Bay. By 8 a.m. the oil on the water had spread and covered the water under and adjacent to Sheerlegs Wharf which is not far from the Caltex Wharf. The spillage was the result of careless conduct on the part of persons for whom the Appellants were responsible.

p.405

p.407

p.406

20 6. The Respondents The Miller Steamship Company Pty., Limited were the Owners of the s.s. "Corrimal" of 1140 tons gross which was at all material times lying alongside Sheerlegs Wharf where she had for some months been undergoing repairs. The Respondents R.W.Miller & Co., Pty., Limited were the Owners of the vessel "Audrey D" of 194 tons gross which was at all material times lying alongside the "Corrimal". On board the "Corrimal" and on Sheerlegs Wharf repair work was being carried out and this work included oxy-cutting and welding operations. At about 2 p.m. on 1st November, 1951, the oil on the water underneath and adjacent to Sheerlegs Wharf caught fire and the Respondents' vessels were thereby damaged.

pp.404-5

p.407

p.407

30 7. As to the actual outbreak of the fire, Walsh J., after hearing much scientific evidence, found that before the outbreak of the fire there was floating on the oil-covered water an object upon which was supported some piece of material, that the material caught fire and that from this source of heat the floating oil was vapourised and began to burn. He further found that the reason why the material caught fire was that a piece of molten metal fell from the wharf or from the "Corrimal" on to the material.

p.408

40 8. The Respondents' principal contention was that the Appellants were liable in negligence and, to this end, they called many witnesses on the issue of foreseeability of damage by fire such as in fact occurred.

Record

Doc. No. 3
(Ll. Rep.
in pocket)

Much of the trial was occupied with the evidence of these witnesses and with that of witnesses called in rebuttal by the Appellants relating to this issue. After detailed consideration of all the evidence on this issue Walsh J. found as follows:

p. 426

"I find that the occurrence of damage to the plaintiffs' property as a result of the spillage was not reasonably foreseeable by those for whose acts the defendant would be responsible".

Accordingly he held that the claim in negligence by the Respondents against the Appellants failed.

10

9. After holding that the Respondents' claim under the principles of Rylands v. Fletcher (supra, paragraph 3) failed, Walsh J. held that the Respondents were entitled to succeed in their claim in nuisance. Walsh J.'s reasoning may be summarised as follows:-

p. 427

(i) The claim lay in public nuisance and not in private nuisance.

p. 429

(ii) The presence of the oil on the waters of the harbour constituted a public nuisance because the spillage was a wrongful act adversely affecting "the rights of the users of the navigable waters and of the frontagers" in that it (a) polluted the waters and the foreshore, and (b) created a fire danger greater than any danger of fire which otherwise existed."

20

(iii) The Respondents suffered particular damage.

(iv) The damage claimed was not too remote because it was "direct".

30

p. 429

10. As to (ii) Walsh J. said that "one must look to the actual situation as it is now known, rather than to the then existing knowledge on the subject", that foreseeability of the type of damage (i.e. damage by fire) was not the material test whereby to determine whether the Appellants' act created a public nuisance and that it was legitimate to consider the matter "in the air".

p. 433

As to (iv) Walsh, J. held that foreseeability of the type of damage which in fact occurred (i.e. damage by fire) was not relevant and that the test was whether the nuisance was the direct cause of the

40

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

25 APR 1967

25 RUSSELL SQUARE
LONDON, W.C.1.

11. The Appellants respectfully submit that Walsh J. was correct in holding that no claim lay in private nuisance, but further submit that his reasoning under (ii) and (iv), above, was erroneous and not in accord with a basic principle of the law of tort to-day.

12. This principle is, it is submitted, that stated by Lord Macmillan in Read v. Lyons [1947] A.C. 156, at pages 170-171,

10 "Whatever may have been the law of England in early times I am of opinion that as the law now stands an allegation of negligence is in general necessary to the relevancy of an action of reparation for personal injuries".

(It is submitted that in this connection there is no difference of principle between reparation for personal injuries and damage to chattels). The Appellants submit that the same principle is expressed by Viscount Simonds in Wagon Mound I [1961] A.C., at pages 422-423,

20 "It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour".

30 The principle is, it is submitted, reflected in the recent decision of Diplock J. (as he then was) in Fowler v. Lanning [1959] 1 Q.B. 426 in which the learned judge held that a plaintiff in an action in trespass must prove the defendant's act to have been negligent or intentional. More recently, in Letang v. Cooper [1965] 1 Q.B. 232, the Court of Appeal have held that an action in trespass, brought in circumstances in which an action in negligence would also lie, was an action for breach of duty. It is submitted that the concept of breach by the defendant of the duty he owes to the plaintiff is, in general,
40 fundamental to an action in tort for damages for physical injury (whether to the person or to chattels) and that this concept is therefore fundamental to a claim for damages for such injury whether the claim be framed in negligence, in trespass or in public nuisance.

Record

The damage by fire to the Respondents' vessels was not reasonably foreseeable as a result of the spillage of the oil and, since no reasonably foreseeable damage to the Respondents resulted from the spillage, the Appellants broke no duty owed by them to the Respondents.

13. The principle stated by Lord Macmillan and Viscount Simonds applies, it is submitted, with particular force to actions brought, as in the present case, in respect of acts or omissions done by a user of a highway or by the owner or occupier of property adjoining a highway. The general principle applicable to such actions is, it is submitted, as stated by Lord Reid in Haley v. London Electricity Board [1964] 1 W.L.R. 479, at page 483,

10

"It appears to me that the ordinary principles of the common law must apply in streets as well as elsewhere, and that fundamentally they depend on what a reasonable man, careful of his neighbour's safety, would do having the knowledge which a reasonable man in the position of the defendant must be deemed to have".

20

14. In the Appellants' submission it is the law that a plaintiff cannot improve his position in a highway action by framing his case in trespass or in public nuisance rather than in negligence. In Southport Corporation v. Esso Petroleum Co. Ltd. [1956] A.C. 218 Devlin J. (as he then was) stated, at pages 225-226, in relation to the plaintiffs' claims in public nuisance and trespass,

30

"....it is well established that persons whose property adjoins the highway cannot complain of damage done by persons using the highway unless it is done negligently".

No criticism of this statement of principle was expressed either by the Court of Appeal ([1954] 2 Q.B. 182) or the House of Lords. (It is submitted in this connection that there is no distinction between persons whose property adjoins the highway and persons using the highway).

40

15. The principle was, it is submitted, expressed in general terms by Blackburn J. in Fletcher v. Rylands (1866) L.R. 1 Ex. 265, at page 286; by Lord Blackburn

10 in River Wear Commissioners v. Adamson (1875) 2 App.
Cas. 743, at page 767; was applied in Gaylor & Pope
Ltd. v. B. Davies & Son Ltd. /1924/ 2 K.B. 75; is
implicit in the decision of the Court of Appeal in
Maitland v. Raisbeck and Hewitt Ltd. /1944/ 1 K.B. 689,
per Lord Greene M.R., at pages 691-693; and was applied
in Parish v. Judd /1960/ 1 W.L.R. 867. In the Appellants'
submission, in so far as Wringe v. Cohen /1940/ 1 K.B.229
is inconsistent with this principle, it should be
confined to its special facts or should not be followed.
In the Appellants' further submission, Walsh J. was in
error in holding that negligence was not a necessary
concept in actions between users of a highway. At all
material times the Respondents and the Appellants were
both users of a highway and, it is submitted that the
Respondents, in framing their action in public nuisance,
cannot recover for the injury to their vessels any
damages other than such as would be recoverable in an
action framed in negligence, and that no damages in
negligence are here recoverable.

pp.427-8

20 16. The Appellants further submit (if necessary)
that the principle expressed above is of general applica-
tion in all actions in public nuisance for damages for
physical injury (whether to the person or to chattels).
They submit that in this connection the tort of public
nuisance should be considered in the light of its
history and the development of other torts relating to
physical injury. This matter was discussed by Professor
F.H. Newark in an article entitled "The Boundaries of
30 Nuisance" (1949) 65 Law Quarterly Review, page 480 et
seq., to which Lord Simonds paid tribute in Jacobs v.
London County Council /1950/ A.C.361, at page 374.
It is submitted that the action in public nuisance for
damages for physical injury arose by historical accident
and at a time before the development of the tort of
negligence, and that actions were brought in public nui-
sance where to-day the more appropriate action would
be in negligence. In the Appellants' submission the test
to determine the existence of a public nuisance is
40 whether the defendant has done an act from which it
is reasonably foreseeable that physical injury to the
public will result. Such tests was applied in Harrold
v. Watney /1898/ 2 Q.B. 320, per Vaughan Williams L.J.,
at page 325, and by Sankey J. (as he then was) in
Castle v. St. Augustine's Links (1922) 38 T.L.R. 615,
in which he held that the defendants were liable

Record

in public nuisance for maintaining a golf course from which it was foreseeably likely that golf balls would be hit on to the highway. The same test was, it is submitted, applied by the Court of Appeal in Dollman v. Hillman, Ltd. [1941] 1 All E. R. 355, in which Sir Wilfred Greene M.R. (as he then was), in considering whether the defendants created a public nuisance because meat fat was carried out of their shop on to the pavement on the feet of customers, stated, at page 359,

10

"Such a result was one, which, on the evidence, in my opinion, reasonably, ought to have been foreseen. That being so, if the result happens, it is right to say that the defendants caused the nuisance".

The Appellants respectfully submit that, on Walsh J.'s findings of fact, the only result of the spillage of the oil which ought reasonably to have been foreseen was pollution of the waters and foreshore of Mort's Bay and that, if and in so far as the spillage created a public nuisance, such nuisance was, and was only, a public nuisance by pollution and accordingly the Respondents are not entitled to recover in public nuisance for damage by fire.

20

17. A recent analysis of the tort of public nuisance was made by Denning L.J. (as he then was) in Morton v. Wheeler (an unreported decision of the Court of Appeal, the judgments in which were delivered on 31st January, 1956). The learned Lord Justice divided public nuisances into two broad categories:-

30

- (i) Obstructions other than obstructions which are also dangerous. Such obstructions, to be actionable, must be "wrongful" and they will not

10 be wrongful if created in the exercise of a right and are reasonable in all the circumstances. It is submitted that such cases as Benjamin v. Storr (1874) L.R. 9 C.P.450, Fritz v. Hobson (1886) 14 Ch. D.542 and Harper v. G.N.Hadden & Sons, Ltd. [1933] Ch. 298, are illustrations of this category of public nuisance. In so far, however, as the Appellants created a public nuisance, such nuisance did not obstruct the public's right of passage and the nuisance does not fall within the first of Denning L.J.'s categories but is within the second category.

- (ii) Acts alleged to be a public nuisance because they produce a risk of physical harm. With respect to such acts Denning L.J. stated (at page 3 of the transcript),

20 "When a man creates or continues a danger in or adjoining a public highway, he is guilty of a public nuisance, and no plea of reasonableness can excuse him. It can never be reasonable to create or continue a danger in or near a highway without taking adequate means to protect people passing along it. If a man sets up an obstruction in the road or digs a hole alongside it, in the exercise of a right that belongs to him, he must see to it that, in so doing, he does not create a danger. He must by lighting or warning or fences or other
30 reasonable means, safeguard the public. How are we to determine whether a state of affairs in or near a highway is a danger? This, I think, depends on whether injury may reasonably be foreseen."

The Appellants submit that the only injury to the public which might reasonably be foreseen was injury by pollution and that in so far as they created a public nuisance such nuisance was, and was only, a nuisance by pollution.

40 18. If the Appellants are wrong in their submissions that in law the test to determine the existence of a public nuisance of the type here under consideration depends upon foreseeability of injury, they submit that such a test should in law to-day be the appropriate test, having regard to the development of other torts

Record

involving claims for damage for physical injury. In British Road Services, Ltd. v. Slater /1964/ 1 W.L.R. 498, Lord Parker of Waddington L.C.J., it is submitted, expressed the modern development of the law when he said, at page 504,

"I feel that the present tendency of the law is not only to move further and further away from absolute liability but more and more to assimilate nuisance and negligence".

In Flower v. Lanning /1959/ 1 Q.B. 426 (supra, paragraph 12) Diplock J. stated that, even if he was wrong in his consideration of the early authorities, he was nevertheless prepared to extend the requirement that negligence should be proved to all actions in trespass, whether the trespass was committed on the highway or not. It is further respectfully submitted that it is anomalous if to-day a plaintiff can improve his position by framing his action in public nuisance when, on the same facts, an action in negligence would fail. Much weight was, it is submitted, attached to this consideration by the Court of Appeal in Letang v. Cooper /1965/ 1 Q.B. 232 (supra, paragraph 12) and by F.B. Adams J., who had to consider the relationship between negligence and public nuisance in Everett v. Martin /1953/ N.Z. L.R. 298. At page 305 the learned judge stated,

"In cases where the law of negligence will suffice to determine liability, I venture to think that the less one hears of nuisance, the better. It is well established that a duty rests on all users of the highway to exercise due care for the safety of others; and in regard to highway accidents arising out of the use of the highway and giving rise to claims for injury to persons or to chattels, the law of negligence is sufficient, and any liability which can legitimately be founded on nuisance can equally well, and I think more conveniently, be based on negligence. The breach, by act of omission, of the duty to exercise care is indeed the foundation of liability. I do not suggest that there is anything wrong in describing the injury as nuisance provided always that the conditions necessary to establish responsibility are kept in mind".

F. B. Adams J. held that the following proposition of the tribunal of first instance was wrong:-

"If a person takes anything liable to cause damage on to the highway, he is liable if in fact injury is suffered by anyone making reasonable use of the highway".

The Appellants submit that this proposition embodies the same approach as that adopted by Walsh J. and they respectfully submit that this approach of Walsh J. is wrong in law.

10 19. The Appellants further submit that even if, contrary to their contentions in the foregoing paragraphs, they are liable in public nuisance for the reasons stated by Walsh J., the damage suffered by the Respondents is too remote and is not recoverable in law. Walsh J. held that the appropriate test for determination of the question of remoteness of damage was whether the damage was a "direct" consequence of the Appellants' act. It is respectfully submitted that here Walsh J. was in error, and that in public nuisance, as in other torts, the appropriate test is whether or not damage of the type in fact suffered was reasonably foreseeable.

p.435

20 20. Walsh J. held that the argument on nuisance having been opened in Wagon Mound I "it was not the view of their Lordships that it was clear beyond argument that the foreseeability test was decisive of the claim in nuisance". It is respectfully submitted that in Wagon Mound I the Judicial Committee heard no argument on this matter other than the Respondents' opening submissions and expressly made no decision on the appeal in nuisance, which was remitted to the Full Court of New South Wales. In the Appellants' submission, however, the strong disapproval expressed in Wagon Mound I of a test of remoteness of damage in negligence based upon "direct" consequences is of equal application to other torts, including the tort of public nuisance. It is submitted that it would be anomalous for a different test to be applied to determine the question of remoteness of damage, dependent upon whether the cause of action is framed in public nuisance or negligence. It is further submitted that Sharp v. Powell (1872) L.R. 7 C.P. 253, is authority for the proposition that the test of remoteness of damage in public nuisance is whether it was foreseeable. In that case, from which citation was made with approval in the judgment in Wagon Mound I [1961] A.C., at page 418, judgment was given for the defendant in an action in public

p.434

Record

Doc. No. 3
(Ll. Rep.
in pocket)

nuisance on the ground that "the injury was not of such a character as the defendant could have contemplated as the ordinary or likely consequence to result from his permitting his van to be washed in the public street" ((1872) L.R. 7 C.P., at page 257). A similar test of remoteness of damage in public nuisance was, it is submitted, applied by Cockburn C.J. and Manisty J. in Clark v. Chambers (1878) 3 Q.B.D. 327, at pages 336-338. The limitation of damages recoverable in tort to the loss which might reasonably be foreseen as a consequence of the wrongful act has also been endorsed (in torts other than negligence) in a number of cases, notably, Lynch v. Knight (1861) 9 H.L.C. 577, per Lord Campbell L.C., at pages 591-592; per Lord Wensleydale, at page 600: Hoey v. Felton (1861) 11 C.B. (N.S.) 142, per Erle C.J. and Byles J. at page 146: Cox v. Burbidge (1863) 13 C.B. (N.S.) 430: In re London, Tilbury and Southend Railway Co. and Trustees of Gower's Walk Schools (1889) 24 Q.B.D. 326, per Lord Esher, at page 329: Clinton v. J. Lyons & Sons, Ltd. [1912] 3 K.B. 198.

10

20

p.432

21. Walsh J., in holding that the appropriate test was that of the "direct" consequences, referred (among other decisions) to Rickett v. Metropolitan Railway Company (1865) 5 B & S 156, in which the words used (at page 161) were "direct, natural and immediate consequence" and to Harper v. G.N. Hadden & Sons Ltd., [1933] Ch.298, in which Lord Hanworth M.R., at page 303, used the words "the direct, necessary, natural and immediate consequence of the wrongful act". Walsh J. considered that in these passages the words "natural consequences" were not being used as the equivalent of "foreseeable consequences". In so stating, it is respectfully submitted that Walsh J. was in error. The word "natural", in the context of remoteness of damage, was defined by Grove J. in Smith v. Green (1875) 1 C.P.D. 92, at page 96,

p.432

30

"Great difficulty, no doubt, arises from the use of the word "natural" in these cases. It is used by Lord Campbell and by Erle J. in Randall v. Raper (1858) E.B. & B. 84 and has been used in many cases: and it may not be very easy to substitute a better word for what is meant. Normal, or likely or probable of occurrences in the ordinary course of things would probably be the more correct expression".

40

22. In the Appellants' submission, where the word "natural" is used in judgments as a test for remoteness of damage it is so used as having the meaning equivalent (in modern terminology) of "foreseeable" and the principle is thereby recognised that the rule governing remoteness of damage in tort is the same as that prescribed for breach of contract by the "first rule" in Hadley v. Baxendale (1854) 9 Ex. 341, per Alderson B., at page 354. This principle received, it is submitted, the approval of the Judicial Committee in Wagon Mound I and has been stated in, among other cases, The Notting Hill (1884) 9 P.D. 105; The Argentino (1888) 13 P.D. 191 (affirmed on appeal /1889/ 14 App. Cas. 579); Hall v. Pim (1927) 33 Com. Cas. 324, per Lord Phillimore, at page 336; The Metagama (1927) 29 Ll.L.R. 253 per Lord Haldane, at pages 253-254; The Edison /1932/ P.52, per Scrutton L.J., at page 62; per Greer L.J., at page 68 (affirmed on appeal sub. nom. Owners of Dredger Liesbosch v. Owners of Steamship Edison /1933/ A.C. 449); The Arpad /1934/ P.189, per Greer L.J., at page 216; per Maugham L.J., at page 233; Haynes v. Harwood /1935/ 1 K.B. 146, per Greer L.J., at page 156. The Appellants respectfully submit that it follows from these authorities that damages in public nuisance are only recoverable if a loss of the type in question could reasonably have been foreseen as likely to arise "naturally, i.e. according to the usual course of things" (in the words of the "first rule" in Hadley v. Baxendale (supra)) from the act or omission complained of, and that such damage is otherwise too remote. In the present case, having regard to Walsh J's finding of fact on the foreseeability of the damage sustained by the Respondents, the Appellants submit that such damage was not the "natural" consequence of the Appellants' act and is accordingly too remote in law.

23. If, contrary to the foregoing submission, Walsh J. was right in holding that foreseeability was not relevant to the determination of whether the damage suffered by the Respondents was too remote, the Appellants respectfully submit that, on the facts leading to the outbreak of the fire as found by Walsh J., the fire was not the "direct" consequence of the spillage and that accordingly the damage suffered was too remote and is not recoverable in law. The

p.426

pp.406-7

Record

Doc. No. 3
(Ll. Rep. in pocket)
p. 426

p. 407

p. 426 and
p. 436

Appellants further, if necessary, submit that Walsh J., erred in law in holding that the spillage of oil was a cause of damage to the Respondents' property. It is submitted that, if any one of the long chain of events which culminated in the fire can be singled out as the dominate or proximate or direct cause of the fire, it was the resumption on October 30th, 1951, and the continuation thereafter of the oxy-cutting and welding operations at Sheerlegs Wharf notwithstanding the presence of the oil underneath and around the wharf. It is respectfully submitted that the conclusion of Walsh J. on this point, contrary to the contentions of the Appellants, was erroneous and that in law the cutting and welding operations, either by themselves or together with the other events which culminated in the fire, constituted novus actus interveniens.

10

pp. 415-426

p. 409

24. As to the Cross-Appeal on the Appellants' alleged liability in negligence, it is submitted that Walsh J. was right in holding that the Appellants were not liable and that his finding of fact on the question of "foreseeability" should not be disturbed. The Appellants submit that, this being essentially a jury question, an appellate tribunal would be slow to interfere with the learned trial Judge's finding of fact. Walsh J. had the advantage of hearing the witnesses and, it is respectfully submitted, gave full consideration to their evidence. It is further submitted that Walsh J.'s approach in law shows no error. In assessing whose foresight was relevant for the determination of this issue Walsh J. stated,

20

30

"But in the circumstances of the present case, since the conduct which is in question is that of the officers in charge of a ship, and since it is what they might reasonably have foreseen which is in question, I think the inquiry must be directed to what would reasonably have been

40

foreseen by reasonable men of that class, and not to what might have been the foresight of the man in the Clapham omnibus or in the Bondi omnibus. One certainly should not direct the inquiry to what would have been in the contemplation of academic scientists, but to what would have been in the contemplation of a ship's master and engineers. The inquiry, in my opinion, is not to be necessarily limited to looking at the knowledge and experience which the officers of the Wagon Mound themselves actually had. Rather, one must try to determine what would have been in the contemplation of men of their class and calling, endowed with a reasonable amount of relevant knowledge and experience or, as it is sometimes put, in the contemplation of a hypothetical "reasonable observer", of their class and calling. One must endeavour, I think, to attribute to the hypothetical observer, not only a reasonable amount of knowledge and experience, but also a normal or average make-up, lying between the extremes of over-confidence or rashness, and extreme cautiousness. See per Lord MacMillan in Glasgow Corporation v. Muir and Others, [1943] A.C.448 at p.457".

The test to determine what will attract liability in negligence was, it is submitted, stated by Lord Atkin in Donoghue v. Stevenson [1932] A.C.562, at page 580,

".....You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour"

This matter received the detailed consideration of the House of Lords in Bolton v. Stone [1951] A.C. 850. Lord Porter, at page 858, stated,

"It is not enough that the event should be such as can reasonably be foreseen; the further result that injury is likely to follow must also be such as a reasonable man would contemplate before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it".

Record

Doc. No. 3
(Ll. Rep.
in pocket)

Lord Normand, at page 861, stated,

"It is therefore not enough for the plaintiff to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on the road; she must go further and say that they ought, as reasonable men, to have foreseen the probability of such an occurrence".

The same principle was, it is submitted, stated by Lord Oaksey, at page 863, and by Lord Radcliffe, at page 868. This principle was also expressed in Fardon v. Harcourt-Rivington (1932) 146 L.T. 391, per Lord Dunedin, at page 392; Haynes v. Harwood [1935] 1 K.B. 146, per Greer L.J., at page 156; Bourhill v. Young [1943] A.C. 92, per Lord Macmillan, at page 109; Glasgow Corporation v. Muir [1943] A.C. 448, per Lord Thankerton, at page 454. It is submitted that Walsh J. did not misdirect himself in considering this question and that, applying the principles set out in the foregoing authorities, he was correct in holding that the Appellants were not liable to the Respondents in negligence.

10

20

p.426

25. As to the Cross-Appeal on the issue of liability under the principles of Rylands v. Fletcher Walsh J. held that (i) the principles of the decision only applied where there was an escape from the land of the defendant and not where, as here, the escape was from a ship, (ii) there was not in this case a "non-natural" use of the harbour or of the vessel. Walsh J. further said that, although he preferred to express no opinion on this point, the oil in question might not be a "dangerous thing". The Appellants would respectfully support the grounds upon which Walsh J. rejected the Respondents' claim under the principles of Rylands v. Fletcher.

30

26. As to the requirements that the escape must be from land, the Appellants submit that there is inherent in the decision of Rylands v. Fletcher itself the requirement that the escape must be from land and that in Read v. Lyons [1947] A.C. 156 the House of Lords emphasised this aspect of the matter (per Viscount Simon, at page 168; per Lord Macmillan, at pages 173-4; per Lord Simonds, at page 181, per Lord Uthwatt, at page 186).

40

27. As to the "non-natural" user, the Appellants

submit that Walsh J., who visited Mort's Bay during the trial, made no error of law in his approach to this aspect of the matter and that his finding in this respect should not be disturbed. Walsh J., correctly relied, it is submitted, upon Eastern Asia Navigation Co., Ltd. v. Fremantle Harbour Trust Commissioners (1951) 83 C.L.R. 353, in which Latham C.J., at page 388 and Kitto J., at page 396-7, held that bringing bunkering oil to a berth in a harbour was a natural and ordinary use of that harbour within the principles of Rylands v. Fletcher. The Appellants further submit that Lewis J. was right when, in his judgment in Howard v. Furness, Houlder Argentine Lines, Ltd. (1936) 41 Com. Cas. 156, at page 168, he doubted whether generating steam in a vessel was a non-natural user. This doubt was shared by Viscount Simon in Read v. Lyons (supra, paragraph 26), at page 168, and it is submitted that there is no difference of principle, in considering what is a natural user, between the case of a vessel generating steam and that of a vessel bunkering, as in the present case.

28. It is further submitted that the bunkering oil in question in this case was not a "dangerous thing" within the principles of Rylands v. Fletcher. In Read v. Lyons Lord Simonds said of Rylands v. Fletcher, at page 181,

".....I think it is of great importance to remember that the subject-matter of that action was the rights of adjoining landowners and, though the doctrine of strict liability there enforced was illustrated by reference to the responsibility of the man who keeps beasts, yet the defendant was held liable only because he allowed, or did not prevent, the escape from his land on to the land of the plaintiff of something which he had brought on to his own land, and which he knew or should have known was liable to do mischief if it escaped from it. I agree with the late MacKinnon L.J. that this and nothing else is the basis of the celebrated judgment of Blackburn J., and I think it is no less the basis of Lord Cairns' opinion".

It is submitted that the test to determine whether a thing is or is not "dangerous" is whether it can reasonably be foreseen that it will "do mischief" if it escapes. On the facts found by Walsh J., it is submitted that danger was not here

Record

reasonably foreseeable as a consequence of the escape of the oil in question and accordingly that the oil does not fall within the principles of Rylands v. Fletcher.

29. In the Appellants' further submission the damage sustained by the Respondents, not being reasonably foreseeable, is in law too remote to be recoverable under the principles of Rylands v. Fletcher. In his judgment in Fletcher v. Rylands (1866) L.R. 1 Ex. 265, Blackburn J. said, at page 279,

10

"We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape".

It is submitted that in using the words "natural consequence" Blackburn J. was using them in the same sense as they were used by Alderson B. in Hadley v. Baxendale (supra) and subsequently by Grove J. in Smith v. Green (supra) and that the damage sustained in the present case by the Respondents was not, in that sense, a natural consequence of the spillage, because it was not reasonably foreseeable.

20

The Appellants respectfully submit that this Appeal should be allowed for the following amongst other

30

R E A S O N S

- (1) BECAUSE since no damage to the Respondents' vessels which was reasonably foreseeable resulted from the spillage of the oil, the Appellants broke no duty owed by them to the Respondents.
- (2) BECAUSE in an action framed in public nuisance for damages for physical injury (whether to the person or to chattels) the existence of a public nuisance depends upon whether physical injury to the public is reasonably foreseeable and the only reasonably foreseeable physical injury to the public, including the Respondents, resulting from the spillage of the oil was physical injury by pollution and was not physical injury by fire.

40

- (3) BECAUSE if and in so far as the Appellants created a public nuisance, such public nuisance was only by pollution of the waters and foreshore of Mort's Bay because no injury to the public otherwise than by such pollution was reasonably foreseeable as a result of the spillage of the oil and no damage by pollution was sustained by or claimed by the Respondents.
- 10 (4) BECAUSE damage by fire to the Respondents' vessels was not reasonably foreseeable as a result of the spillage and accordingly in this respect the Appellants created no public nuisance and broke no duty owed by them to the Respondents.
- 20 (5) BECAUSE the Respondents' claim against the Appellants in respect of the fire damage was a claim for damages for injury to chattels by a user of a highway against a user of a highway and in such claim no damages other than damages which would be recoverable in negligence are in law recoverable, and no damages in negligence were here recoverable in respect of such damage.
- (6) BECAUSE the test to determine remoteness of damage in tort, including public nuisance, is whether or not damage of the type in fact sustained was reasonably foreseeable and the fire damage to the Respondents' vessels was not damage of a type which was reasonably foreseeable.
- 30 (7) BECAUSE the rules relating to remoteness are the same in contract and in tort (subject to such qualification as is introduced in the law of contract by the "second rule" in Hadley v. Baxendale (supra)) and require that such damage must be the natural and foreseeable consequence of the act complained of, but the fire damage to the Respondents' vessels was not a natural or foreseeable consequence of the spillage of the oil and was too remote to be recoverable in law.
- 40 (8) BECAUSE the fire which caused the damage to the Respondents' vessels was not the direct consequence of the spillage of the oil.
- (9) BECAUSE the spillage of the oil was not the cause in law of the fire damage to the Respondents' vessels.

Record

- (10) BECAUSE between the spillage of the oil and the outbreak of the fire there was novus actus interveniens.
- (11) BECAUSE the decision of Walsh J. on the liability of the Appellants in public nuisance was wrong and should be reversed.

AND the Appellants respectfully submit that the Cross Appeal should be dismissed for the following amongst other

R E A S O N S

10

(12) BECAUSE Walsh J. did not misdirect himself in law on the alleged liability of the Appellants to the Respondents in negligence.

(13) BECAUSE the findings of fact of Walsh J. upon the alleged liability in negligence of the Appellants to the Respondents were right and should not be disturbed on appeal.

(14) BECAUSE the spillage of the oil from the vessel was not an escape from land within the principles of Rylands v. Fletcher.

20

(15) BECAUSE there was no "non-natural" user by the Appellants of the vessel or of the harbour within the principles of Rylands v. Fletcher.

(16) BECAUSE the oil spilled from the vessel was not a "dangerous thing" within the principles of Rylands v. Fletcher.

(17) BECAUSE a plaintiff cannot recover under the principles of Rylands v. Fletcher in respect of damage which was not reasonably foreseeable and the fire damage to the Respondents' vessels was not reasonably foreseeable.

30

(18) BECAUSE the spillage of the oil was not the cause in law of the fire damage to the Respondents' vessels.

(19) BECAUSE between the spillage of the oil and the outbreak of the fire there was novus actus interveniens.

(20) BECAUSE the judgment of Walsh J. upon the alleged liability of the Appellants to the Respondents in negligence and under the principles of Rylands v. Fletcher was right and should be upheld. .

ASHTON ROSKILL

BRIAN DAVENPORT

No. 7 of 1964
IN THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES
IN COMMERCIAL CAUSES

No. 3000 of 1955 & No. 3001 of 1955

B E T W E E N

OVERSEAS TANKSHIP (U.K.) LIMITED
(Defendant) Appellant

- and -

THE MILLER STEAMSHIP COMPANY PTY. LIMITED
and R.W.MILLER & CO. PTY. LIMITED
(Plaintiffs) Responden

And by Consolidation Order of the Suprem
Court of New South Wales 28th October 196

B E T W E E N:

THE MILLER STEAMSHIP CO. PTY. LIMITED an
R.W.MILLER & CO. PTY. LIMITED
(Plaintiffs) Appellant

- and -

OVERSEAS TANKSHIP (U.K.) LIMITED
(Defendant) Responden

C A S E FOR OVERSEAS TANKSHIP (U.K.)
LIMITED

WILLIAM A. CRUMP & SON,
2/3 Crosby Square,
Bishopsgate,
London, E.C.3.