

P.C.
G.D.T.C.G.

Judgment
10, 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 and No. 3001 of 1955

B E T W E E N

OVERSEAS TANKSHIP (U.K.) LIMITED (Defendants) Appellants

- and -

10 THE MILLER STEAMSHIP COMPANY PTY.
LIMITED and ANOTHER (Plaintiffs) Respondents

AND by Consolidated Order of the Supreme Court of New South
Wales 28th October 1963

B E T W E E N

THE MILLER STEAMSHIP COMPANY PTY.
LIMITED and ANOTHER (Plaintiffs) Appellants

- and -

OVERSEAS TANKSHIP (U.K.) LIMITED (Defendants) Respondents

CASE FOR RESPONDENTS

*The Miller Steamship Co. Pty. Ltd. and
R.W. Miller & Co. Pty. Ltd.*

20 1. These are appeals brought by leave of the
Supreme Court of New South Wales from a Judgment of
the Honourable Mr. Justice Walsh sitting in
Commercial Causes dated 10th October 1963 under
which His Honour entered a verdict for the Respondent
Miller Steamship Co. Pty. Limited in the sum of
£80,000 and a verdict for the Respondent R.W. Miller
& Co. Pty. Limited in the sum of £1,000 and directed
that judgment be entered accordingly.

Record
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PP8-11

30 2. (a) The circumstances out of which these
appeals arise are set forth in paragraphs 3 to 6
hereof.

(b) The contentions to be urged by the Respond-
ents are set forth in paragraphs 7 to 24 hereof.

3. The actions out of which these appeals arise
were brought by the Respondents against the Appellant in

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respect of damage by fire suffered on 1st November 1951 by two ships one owned by the first-named Respondent and the other owned by the second-named Respondent. Proceedings were originally commenced on behalf of each Respondent against the Appellant in the Admiralty Jurisdiction of the Supreme Court of New South Wales seeking to recover damages in respect of the loss occasioned by the fire; the proceedings in Admiralty were subsequently discontinued 10 and a Writ was issued by each Respondent against the Appellant out of the Common Law Jurisdiction of the Supreme Court of New South Wales claiming damages against the Appellant. On 26th May 1955 an Order was made for the transfer of the actions to the list of Commercial Causes and for their consolidation and the parties were ordered to file Particulars of Claim and Particulars of Defence in place of formal pleadings; it was also ordered that the hearing await the completion of the hearing of another suit instituted in the Admiralty Jurisdiction arising out of the same fire 20 which suit was ultimately disposed of on appeal in the Privy Council on 18th January 1961 (Overseas Tankship (U.K.) Limited v. Morts Dock & Engineering Company Limited: 1961 A.C. 388). In the Common Law Writs issued by the Respondents each named as defendants, in addition to the Appellant, Vacuum Oil Company Pty. Limited and Caltex Oil (Australia) Pty. Limited; prior to the commencement of the hearing of the consolidated actions agreement was reached between all parties that the claims against the said two oil companies would not be pressed and, at the hearing, a verdict was by consent entered in favour of each of the said two oil companies. The hearing of the consolidated actions against the remaining defendant, the present Appellant, commenced on 6th February 1963 and after a hearing lasting nineteen days judgment was reserved. By agreement between the parties the issues litigated during this hearing were confined to the question of liability, it having been agreed that the determination of the proper amount of damages to be awarded in the event of the Appellant being held liable should be deferred; no evidence was accordingly led during the

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hearing on the quantum of damages. Walsh J. Record
delivered his findings on liability on 8th April
1963 and after negotiations between the parties
on the quantum of damages the aforementioned
verdicts were entered in favour of the Respondents
in a further formal hearing on 10th October 1963.
An order had been made at an interlocutory stage
of the hearing that interest on any verdict and
judgment in favour of the Respondents should be
payable at the rate of 5% per annum from 25th May,
1959.

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4. The issues for trial were those appearing in
the Particulars of Claim and Particulars of Defence
filed by the parties as amended during the course
of the hearing. From these Particulars three
principal issues arose for the determination of
the Court, namely :

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- (a) Whether the Appellant was liable to the Respondents for committing a public nuisance causing special damage to the Respondents' ships;
- (b) Whether the Appellant was liable to the Respondents in negligence for the damage suffered by the Respondents' ships;
- (c) Whether the Appellant was liable to the Respondents under the rule in Rylands v. Fletcher (1868 L.R. 3 H.L. 330) for the damage suffered by the Respondents' ships.

5. Walsh J. held in relation to each of these three principal issues :

- (a) That the Appellant was liable for the fire damage to the ships caused by the public nuisance;
- (b) That the Appellant was not liable in negligence;
- (c) That the Appellant was not liable under the rule in Rylands v. Fletcher.

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The verdicts and judgments in favour of the Respondents were founded on His Honour's decision on the first of these three principal issues. It is from

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His Honour's finding on that issue that these appeals are brought and, in respect of His Honour's findings on the second and third of the three principal issues, the Respondents have cross-appealed seeking to support the damages awarded to them in the actions on any and each of the three principal issues.

6. The main facts and circumstances involved in the action are set out in the Reasons for Judgment of Walsh J. RESPONDENTS' CLAIM BASED ON PUBLIC NUISANCE CAUSING SPECIAL DAMAGE.

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7. The Respondents rely on the analysis and the conclusions of law set out in the Reasons for Judgment of Walsh J. in support of his finding in favour of the Respondents on the issue of public nuisance causing special damage.

8. At all material times S.S. "Wagon Mound", the oil tanker owned by the Appellant from which was discharged the oil which later ignited, was lying in the waters of the Port of Sydney; oil was discharged from the tanker into these waters and collected in Mort Bay in the vicinity of the ships owned by the Respondents, which were lying in the waters of Mort Bay. The place in Mort Bay where the oil collected and where the Respondents' ships were lying was in the waters of the Port of Sydney. Sydney Harbour Trust Act, 1900, (as amended), constituted a commission consisting of Sydney Harbour Trust Commissioners. The title of the Act commences

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"An Act to make better provision for and in connection with the management of the Port of Sydney".

It is enacted by Section 27 of the Act, inter alia:

"27. There shall be vested in the Commissioners upon trust for the purposes of this Act the bed and shores of the waters of the port ..."

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For the purposes of the Act "the port" is defined Record
in Section 3 as follows :-

"The Port" - So much of the Port of Sydney,
the rivers falling into it and their tributaries,
and the land on the margins thereof as is
covered at mean high water" -

10. The Maritime Services Act, 1935 (as amended) provided
for the constitution of a board styled "the Maritime
Services Board of New South Wales" and conferred and
imposed on such Board the powers authorities duties
functions and obligations of the Sydney Harbour Trust
Commissioners. Section 7(a) of this last mentioned
Act provides :

"7. On and from the appointed day the following
provisions shall, subject to this Act, have effect:

20 (a) All real and personal property and all right
and interest therein and all management and
control of any land or thing which, immedi-
ately before the appointed day, is vested in
or belongs to the Sydney Harbour Trust
Commissioners, shall vest in and belong to the
Board".

The appointed day within the meaning of this Act was
1st February 1936. The Board constituted under the
last mentioned Act is a body corporate comprising a
number of commissioners appointed by the Governor,
and has such powers as are necessary to enable it to
regulate and control in the public interest the waters
of the Port of Sydney and their use.

30 9. The Respondents submit that the public have a
right to use the waters of the Port of Sydney for the
navigation of vessels (including activities incidental
thereto) in a reasonable manner and for reasonable
purposes (Ibeagh v. Martin: 1 Q.B. 232 at 272-3:
Original Hartlepool Colliery Co. v. Gibb: (1877) 5
Ch.D. 713 at 720-3). On the evidence the use being
made by the Respondents of the waters of the Port of
Sydney for the purposes of tying up their ships therein
whilst repairs were effected to them was a reasonable
40 use incidental to navigation and was in the course of
the exercise by them of their ordinary rights as
members of the public in relation to the waters of the
Port of Sydney.

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10. The discharge by the Appellant as the owner of S.S. "Wagon Mound" of oil into the waters of the Port of Sydney was an unlawful act which amounted to a punishable offence under Section 3 of the Oil in Navigable Waters Act 1927, which act applies, inter alia, to the waters of the Port of Sydney. Section 3(1) of that Act is in the following terms:

"3. (1) If any oil is discharged, or allowed to escape, whether directly or indirectly, into any waters to which this Act applies from any vessel or from any place on land or from any apparatus used for the purpose of transferring oil from or to any vessel to or from any other vessel, or to or from any place, the owner or master of the vessel, from which the oil is discharged or allowed to escape, the occupier of the land, or the person having charge of the apparatus, as the case may be, shall be guilty of an offence and shall, in respect of each such offence, be liable on summary conviction to a penalty not exceeding One Hundred Pounds: 10
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"Provided that it shall be a good defence to proceedings for an offence under this section to prove -

- (a) if the proceedings are against the owner or master of a vessel that the escape of the oil was due to, or that it was necessary to discharge the oil by reason of, the vessel being in collision or the happening to the vessel of some damage or accident, and also, if the proceedings are in respect of the escape of oil, that all reasonable means were taken by the master to prevent the escape; and 30
- (b) if the proceedings are against any other person and are in respect of an escape of oil, that all reasonable means were taken by that person to prevent the escape."

Neither of the defences contemplated by the proviso to Section 3(1) was sought to be established by the Appellant in the present circumstances. The action of the Appellant in 40

so discharging oil was wrongful in itself and not merely wrongful by reason of the manner in which the Appellant performed an act which would otherwise be lawful were it not done in such manner. Record

11. The discharge of the oil amounted to a public nuisance. The Respondents rely on the finding of Walsh J. :

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10 "The oil affected adversely the rights of the users of the navigable waters and of the 'frontage', by setting up an inconvenience or annoyance (or 'noncumentum') to them in the exercise of their rights, and it was a source of damage or potential damage to their property. This occurred in two ways. The first was by the polluting of the waters with the oil, which was a source of inconvenience and of property damage to vessels using the waters and to occupiers of lands and of works on the foreshores. The second was by creating a fire danger greater than any danger of fire which otherwise in my
20 opinion, relevant in deciding whether a public nuisance was created."

The Respondents submit that in discharging the oil the Appellant was guilty of a public nuisance (Attorney-General v. P.Y.A. Colliery Ltd: (1957) 2 Q.B. 169 at 180-184; Southport Corporation v. Esso Petroleum Ltd. (1954) 2 Q.B. 182 at 196-197; Esso Petroleum Ltd. v. Southport Corporation 1956 A.C. 218 at 225, 242.) The Appellant was guilty of an Act which in itself unlawful and which occasioned sufficiently widespread
30 discomfort to amount to a public nuisance and would accordingly be guilty of the offence of public nuisance for which it could be punished by the criminal law regardless of the existence or otherwise of any particular damage to the Respondents; no question of foreseeability or otherwise of damage such as that suffered by the Respondents arises in determining the guilt of the Appellant of the offence of public nuisance. Nor does any qualitative element necessarily enter into the examination of the Appellant's actions
40 as amounting to a public nuisance the public nuisance was not solely one constituted by unreasonable or excessive user of the waterways which became wrongful because of the unreasonable or excessive quality of the user; the Appellant's user was in truth unreasonable or excessive user but it is sufficient to create a public nuisance to establish that the Appellant's

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act was wrongful in that it was unlawful (being in breach of the Oil in Navigable Waters Act) and that it occasioned inconvenience to the public in general.

12. The civil cause of action on which the Respondents' claim is founded involves proof merely of the fact of a public nuisance having been committed coupled with the direct causation thereby to the Respondents of damage of a substantial character (Benjamin v. Storr: 1874 L.R. 9 C.P. 400 at 406-7. Campbell v. Paddington Corporation (1911) 1. K.B. 869 at 879)

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The inadmissible nature of questions as to the foreseeability of damage is more readily apparent where the public nuisance relied upon is one which stems from an act wrongful in itself rather than an act wrongful merely because it is unreasonable. In the present case public nuisance has been established on the evidence and affirmatively found by Walsh J.

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It is also affirmatively established and so found that the Respondents suffered special or particular damage of the nature sufficient to found the civil cause of action (cf. Prosser on Torts, 2nd E., pp. 403-5) And it is also affirmatively established and so found that the damages was directly caused by the public nuisance. On a set of facts similar to those in the present case the Privy Council in Overseas Tankship (U.K.) Limited v. Morts Dock & Engineering Company Limited (1961 A.C. 388) accepted that the fire damage was directly caused by the discharge of the oil; it was only in the light of the direct but unforeseeable nature of this damage in the earlier case that it became necessary and proper for the Privy council to consider and overrule the cases stemming from Re Polemis (1921) 3 K.B. 560.)

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13. The Respondents submit that foreseeability of damage of the type in fact suffered by the Respondents is not a relevant ingredient in their civil cause of action based on public nuisance. To attempt to import the ingredient of foreseeability of damage involves an elision of the distinction in law between negligence and civil liability for public

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nuisance. Amongst the decisions in which Judges have recognised the existence of a liability for nuisance irrespective of negligence are:

Midwood & Co. Limited v. Manchester Corporation:
(1905) 2 K.B. 597 at 604/5.

Charing Cross Electricity Supply Company v. Hydraulic Power Company: (1914) 3 K.B. 772

Sedleigh & Denfield v. O'Callaghan: 1940 A.C. 880 at 897-904.

10 Read v. J. Lyons & Co. Limited: 1947 A.C. 156 at 182.

Jacobs v. London County Council: 1950 A.C. 361 at 374-6.

Farrell v. John Mowlem & Co. Limited: (1954) L.L.R. 437 at 440.

See also Clerk & Lindsell on Torts, 12th Ed., paragraph 1243.

20 14. It was specifically made clear by the Privy Council in Overseas Tankship (U.K.) Limited v. Morts Dock & Engineering Company Limited (1961) A.C. 388 at 427) that the absence of foreseeability of the damage did not necessarily preclude a cause of action in nuisance from succeeding.

15. The Respondents submit in any event that if it is held that foreseeability is an element in the civil cause of action based on public nuisance then that element is satisfied by the evidence before the Court in this action.

RESPONDENTS' CLAIM IN NEGLIGENCE

30 16. On the Respondent's claim in negligence Walsh J. stated his findings in summary in the following terms:

"(1) Reasonable people in the position of the officers of the "Wagon Mound" would regard furnace oil as very difficult to ignite upon water.

(2) Their personal experience would probably have been that this had very rarely happened.

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"(3) If they had given attention to the risk of fire from the spillage, they would have regarded it as a possibility, but one which could become an actuality only in very exceptional circumstances.

(4) They would have considered the chances of the required exceptional circumstances happening whilst the oil remained spread on the harbour waters, as being remote.

(5) 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. 10

(6) I find that the spillage of oil was brought about by the careless conduct of persons for whose acts the defendant would be responsible.

(7) I find that the spillage of oil was a cause of damage to the property of each of the plaintiffs. 20

(8) Having regard to those findings, and because of finding (5), I hold that the claim of each of the plaintiffs, framed in negligence, fails."

The Respondents submit that on the evidence His Honour ought to have held that the risk of fire was foreseeable by the Appellant's servants to a sufficient degree to render the Appellant liable to the Respondents in negligence for the damage which did in fact ensue from fire. 30

17. The Respondents submit that the previous case, Overseas Tankship (U.K.) Limited v. Morts Dock & Engineering Company Limited, was decided on a basis and on evidence significantly differing from those of the present case. In the previous case it was the welding operations of the employees of the plaintiff dock company which in fact ignited the oil, these operations having been continued with the express approval of responsible officers of the plaintiff dock company. In such circumstances the plaintiff 40

10 dock company necessarily presented its case on the basis that fuel oil on water did not create foreseeable fire risk; had the plaintiff dock company in that case done otherwise it would have been met with a defence of contributory negligence which, in New South Wales, provides a complete defence, there being no relevant statute allowing apportionment of blame. The earlier case accordingly was presented on the basis in which both parties joined, namely that fuel oil on water did not present a reasonably foreseeable risk of fire.

18. In the present case the careless act was that of a ship's engineer and the Respondents contend that the foreseeability in question is that of a reasonably prudent ship's engineer. (or perhaps ship's master). In determining what the engineer of S.S. "Wagon Mound" ought to have foreseen some significance attaches to the failure of the Appellant to call the engineer in question; nor did the Appellant call the Master of S.S. "Wagon Mound". The Appellant called no evidence from any ships' engineers or from any person qualified to depose as to the views of a reasonably prudent ships engineer. The Respondents are entitled to propound the inference that the engineer who actually committed the careless act was at least as conscious of fire danger as an ordinary ship's engineer; he not having been called by the Appellant and no attempt having been made to explain his absence the Respondents submit that they are entitled to have full weight given to the views of the ship's engineers called by them on this topic. The Respondents tendered evidence from two ship's engineers (as well as from ship's masters and other expert persons) for the purpose of establishing the foreseeability of the risk of fire. The evidence of the ship's engineers was the most important of all of the lines of evidence on foreseeability in that the specific act of carelessness in this case was that of an engineer officer. The Respondents submit that the evidence of the two ship's engineers (Commander McMahon and Mr. Lees) establishes a higher degree of foreseeability than that found by Walsh J. in his findings numbered (1) to (5) quoted in paragraph 16 above. Walsh J. referred to each in the following terms:

"Then there is a group of four sea-going witnesses, including two engineer officers. They are men of

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great experience and their evidence deserves close attention and respect. Commander McMahon served with the R.A.N. from 1914 to 1946, and was the chief engineer officer on several ships and had experience of furnace oil in many ships. He gave evidence as to what, from his experience, he would expect to find in a port such as Sydney, as to debris, as to docking operations, as to the dumping in the harbour of pieces of sacking and cotton waste and the like, and as to the tendency of spilt oil to coat the foreshores and wharves. He said that a spillage, of oil under the conditions put to him as those existing at the relevant time in Mort Bay 'would create a fire risk'. As to precautions which are in practice taken when bunkering is in progress, he stated: 'In all ships in which I have served, there has been a practice that every precaution should be taken - (Objected to) - when ships are re-fuelled, and that no naked lights are allowed within the vicinity of the fuelling taking place, no oxy-acetylene or electric welding operations shall continue in the vicinity. All these precautions are taken I might have mentioned - I overlooked it - some special precautions are taken regarding spillage of oil, the overflowing of tanks.'

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"I rejected evidence sought to be obtained from this witness, as to his opinion as to what, in 1951 would or should have been the knowledge or the expectancies of any competent engineering officer as to the risk of fire from a spillage of oil. The Commander said he had not seen any fire or oil on water caused by a burning 'wick'. He knew something of the Admiralty experiments in England, in the burning of oil on water as a defence against invasion."

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It is submitted that there was no justification for rejecting the evidence of this Witness.

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"Mr. Lees was at sea from 1920 to 1930. He held a chief engineer's ticket and has been an instructor of candidates for marine engineers' certificates. He served for a long time with the Commonwealth Department

10 "of Shipping & Transport as an engineer and ships' surveyor, and as an examiner of candidates for certificates of competency. He sat as an assessor in the New South Wales Court of Marine Inquiry. He gave some evidence as to the procedures adopted in bunkering, which is of importance in relation to my conclusion stated earlier that, in the present case, there was carelessness on the part of those on board the "Wagon Mound". On the question of fire risk, he said: 'Well, associated with oil there is always a fire hazard, no matter whether it spills overboard or inside the ship, anywhere, there is always a fire hazard with oil!'

20 "Q. I want you to direct your attention to furnace oil specially of a flash-point of 170 degrees, and I would ask you to cast your mind back to 1951 and prior to that. In 1951 and prior to that what would have been your views, or what were your views, as to the overflowing of furnace oil of flash-point about 170 degrees?
A. Just the same as what they are now. There is always a fire hazard. In fact, before you are bunkering, you make sure that all the mains are right, and your pumps are all right too, to prevent your fire hazard. You make sure of all that."

30 19. Apart from the evidence of these two engineers the Respondents submit that on the evidence on which Walsh J. relied (that of Captain Newton and Captain Forrest) coupled with the objective evidence of the requirements of Regulation 250 of the Port of Sydney Regulations, the risk of fire was foreseeable to a sufficient degree to attract legal liability for negligence to the careless act of the "Wagon Mound's" engineer officer. Regulation 250 provides, inter alia:

As to these Regulations Walsh J. stated:-

40 The Plaintiffs (i.e. the Respondents) sought to attribute knowledge of these to the officers of the "Wagon Mound" and thus to show that it was brought to their minds that the authorities considered that there was a fire hazard associated with mineral oil on water surfaces. In particular, Regulation 250, dealing with cutting and welding operations on vessels, states in paragraph G:

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"Special care shall be taken to prevent sparks, slag or hot metal particles coming into contact with mineral oil on water surfaces, particularly in the vicinity of the vessel."

I think that, to the officers of a ship which is in the port for some time, it is right to attribute knowledge of the Regulations or rather to say that the Defendant can be in no stronger position if the officers had not, in fact seen them. 10

Walsh J, then considered the provisions of certain other Regulations and held that these would tend to make the officers less apprehensive of the occurrence of a sequence of events which might make the oil on the water a fire risk.

He stated:

0414. Fires are not to be lit on wharf premises (except with permission) or on the water frontage of any public reserve (Regulation 113A and 113B). There is a prohibition against throwing things from vessels into the port (Regulation 120) and against throwing rubbish into the water or leaving it on a wharf (Regulation 139). There are some restrictions on doing smith work or boiler making or repairing spars or masts in wharves. (Regulation 144). Further measures to guard against wharf fires are contained in Regulations 158 and 159. 20 30

It is submitted that the Regulations referred to above in no way detract from the foreseeability of the risk of fire arising from the ignition of mineral oil on water surfaces, particularly in the vicinity of a vessel.

20. The Respondents submit that findings (1) to (5) of Walsh J, as quoted in paragraph 16 above are against the evidence and the weight of the evidence, particularly in the case of finding (5). The Respondents submit that the risk of fire was sufficiently foreseeable by those for whose acts the Appellant is responsible (and the 40

Respondents refer particularly to the engineer officer of S.S. "Wagon Mound") to render the Appellant liable in damages to the Respondents.

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10 21. The Respondents submit that in determining whether the risk of fire was foreseeable to a sufficient degree to attract legal liability for negligence the inquiry is not into the probability of the risk being created. It is submitted that the inquiry involves two steps; first, whether the risk (be it
20 great or small) is one which was in fact or which ought to have been recognised, this step not involving any considerations of duty on the part of the actor to third persons but only involving a consideration of his actual or imputed state of knowledge on the bare question as to the existence or absence of any element of risk whatever; second, if there is a recognisable risk, the inquiry broadens into an evaluation of whether or not the actor could,
30 consistently with his duty of reasonable care to avoid injury to his neighbour, properly disregard the risk. It is in the taking of the second step that differing types of situations necessitate differing degrees of imminence being imported. The more serious the nature of the damage involved if the foreseeable event should materialise, the lower will be the standard of likelihood recognised as requisite to establish negligence. The Respondents adopt as part of their argument on this point the comment of Professor Fleming in (1961) 39 Canadian Bar Review 489 at 510-511:

40 "A good deal of attention has been devoted to the debate whether the requisite foresight postulates 'probability' or mere 'possibility' or 'likelihood' of damage. Both are misleading, the first because the elliptical form of expression used conceals the very complex characteristic of the legal opinion of negligence; the second because it accords undue prominence to the relevant imminence of the risk. In truth, a determination of negligence involves a balancing of various factors: on the one hand the gravity and imminence of the recognisable risk; on the other the utility of the challenged conduct. Clearly, the question may not be reduced to one of mathematical probability alone, because the seriousness of the injury risk must at the very least be taken into account as well."

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The Respondents also refer to Thompson v. Bankstown Corporation (87 C.L.R. 619 at 645-6), in particular to the passage at 645:

"It has been emphasised repeatedly in recent years that where a duty of care exists, the degree of care which is reasonable varies directly with the risk involved; and the risk involved includes both the risk of an accident happening and the risk of serious injury if an accident should occur."

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22. Walsh J. applied to the facts the test indicated by Lord Reid in Carmarthenshire County Council v. Lewis (1955 A.C. 549 at 565). His Honour in findings (1) to (5) quoted in paragraph 16 above held in substance that the risk was recognisable but the prospect of the risk materialising into an actual fire was so slight that a reasonable man would feel justified in disregarding it. The Respondents submit that the prospect was not so slight as to be justifiably disregarded: the evidence which was ultimately accepted by Walsh J. in relation to the foreseeability of the damage falls within the limits ascertainable from the cases as being those which mark out the field of foreseeability as sufficient to amount to negligence. The particular events necessary to cause the risk to materialise into an actual fire need not themselves be shown to be reasonably foreseeable. The Respondents rely upon the statement contained in the joint judgment of Dixon C.J., Kitto, Taylor, Menzies and Windeyer JJ. in Chapman v. Hearse (106 C.L.R. 112 at 121-122):

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"But one thing is certain and that is that in order to establish the prior existence of a duty of care with respect to a plaintiff subsequently injured as the result of a sequence of events following a defendant's carelessness it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence. As far as we can see the test has never been authoritatively

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"stated in terms other than those which would permit of its general application and it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of."

10 The Respondents also refer in relation to this topic to a number of other decisions subsequent to the first "Wagon Mound" Case (1961 A.C. 388) :

Hilder v. Associated Portland Cement Manufacturers Limited: (1961) 1 W.L.R. 1434.

Smith v. Leech Brain & Co.: (1962) 2 Q.B. 405.

Hughes v. Lord Advocate: 1963 A.C. 837

Doughty v. Turner Manufacturing Co. Limited: (1964) 1 All E.R. 98.

Beavis v. Apthorpe: (1964) 80 W.N. (N.S.W.) 852.

Pusell v. Grabham: (1964) 80 W.N. (N.S.W.) 910.

20 Harrison v. South Clifton Mining Company Limited: (1964) 80 W.N. (N.S.W.) 1133.

RESPONDENTS' CLAIM UNDER RULE IN RYLANDS V. FLETCHER:

23. The Respondents submit that the Appellant is liable to them under the rule in Rylands v. Fletcher for the damage caused by the fire. The Appellant was in the relevant sense in occupation of its berth in the Port of Sydney. There was clearly an escape of oil from the tanker at this berth out into the waters of the port. The application of Rylands v. Fletcher to the present facts does not involve an extension of that case beyond the legitimate principal on which the House of Lords decided it. One essential condition of the application of the rule is that there must necessarily be an escape of something likely to do mischief if it escapes. In the present case the escape from the Appellant's ship from the berth occupied by it is even more consonant with the rule as originally laid down than the type of case contemplated by Lord Simonds in Read v. Lyons (1947 A.C.156 at 183):

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"It is possible that the rule should be extended to include the case where something has escaped from a pipe or whatever it may be which has been laid and maintained by the defendant by virtue of some right or franchise in the land of another."

The Respondents refer to :

Powell v. Fall: (1880) L.R. 5 Q.B.D. 597

Charing Cross Electricity Supply Co. v. Hydraulic Power Co.: (1914) 3 K.B. 772 10

Wing v. London General Omnibus Co.: (1909) 2 K.B. 652

Thompson v. Bankstown Corporation : (87C L.R. 619 at 644)

North-Western Utilities v. London Guarantee and Accident Co.: 1963 A.C. 108

24. The Respondents also submit that the other necessary ingredients for the application of the rule in Rylands v. Fletcher are present. These are, first that oil is a dangerous substance and, 20 second, that the use by the Appellant was non-natural.

(a) The Respondents submit that as to the first element, that of danger, the question is one of fact to be determined on the evidence. The overriding fact in the present case is that the events show that the oil was capable of being ignited by a relatively minor flame and that, having been ignited, it burnt 30 fiercely and in such a way as to cause serious damage. It is submitted that this is adequate to prove the danger in an absolute sense of the oil which the Appellant discharged. Alternatively, if the occurrence of the fire as a result of the action of the oil is not sufficient to prove the oil dangerous for the purposes of the rule, then the Respondents will rely on the evidence at the hearing as showing that the oil had sufficiently dangerous or polluting characteristics to bring it 40 within the rule.

(b) The element of non-natural user is also one Record
of fact to which the following tests should be
applied :

- (i) non-natural refers to anything
accumulated by human agency, or,
alternatively
- (ii) non-natural refers to any use out of
the ordinary and the special character
of the place of storage is irrelevant
to the determination of what is out of
the ordinary.

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The Special use in the present case was the use of
this berth for bunkering with a substance dangerous as
was the oil being bunkered. The frequency of such use
is not decisive of the point: the rule would clearly
apply to an escape of petrol from the bowzers of a
service station; in using his premises for pumping
petrol into cars, the service station proprietor is
making a special use distinct from the use made by an
ordinary car owner who garages his car at home with
petrol in its tank. Even assuming that it is an ordinary
use of the waters of the port for ships to carry and
burn fuel oil, it is a special use to engage in pumping
oil from one vessel to another in the process of
fuelling.

25. The Respondents therefore submit that these judg-
ments in their favour should be upheld for the following:

R E A S O N S

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(a) That the conclusion of Walsh J. that the
Appellant had been guilty of a public nuisance
causing to the Respondents special damage for which
they are entitled to the damages awarded to them are
well founded in fact and in law.

(b) That the finding of Walsh J. that the
Appellant was not liable for damages in negligence
was against the evidence and the weight of the
evidence.

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(c) That on the evidence stated by Walsh J. as
that on which he based his findings the risk of damage
by fire to the Respondents' ships was foreseeable to
a sufficient degree to render the Appellant liable for
damages in negligence for the careless act of its
servant.

Record

(d) That on the evidence Walsh J. ought to have held in relation to the rule in Rylands v. Fletcher that fuel oil was a dangerous thing and the finding that the Appellant was not in relation to that rule engaged in a non-natural use of the harbour or of the ship was against the evidence and the weight of the evidence.

(e) That the escape of the fuel oil from the Appellant's ship was sufficient to attract the operation of the Rule in Rylands v. Fletcher.

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DESMOND ACKNER

COUNSEL FOR THE RESPONDENTS

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
and No. 3001 of 1955

B E T W E E N :

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

-and-

THE MILLER STEAMSHIP COMPANY
PTY. LIMITED and ANOTHER
(Plaintiffs) Respondents

B E T W E E N :

THE MILLER STEAMSHIP COMPANY
PTY. LIMITED (Plaintiffs)
& ANOTHER Respondent

-and-

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

The Miller Steamship Co. Pty. Ltd.
CASE FOR RESPONDENTS *and*
R. W. Miller & Co. Pty. Ltd.

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