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IN THE PRIVY COUNCIL No.23 of 1960

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :-

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

- and -

MORTS DOCK & ENGINEERING COMPANY LIMITED (Plaintiffs) Respondents

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal by leave of the Supreme Court of New South Wales, granted on the 31st March 1960, from the Order of the Full Court of the Supreme Court of New South Wales (Owen, Maguire and Manning JJ.) dated the 3rd December 1959, affirming the Judgment of Kinsella J. in the Supreme Court of New South Wales in Admiralty dated the 23rd April 1959, whereby judgment was entered in favour of the Respondents for damages to be assessed upon an enquiry by the Registrar. p.531; p.503 l.8-p.528 l.36 and (1959) 2 Ll.L.R.697.; p.481-p.500 l.11 and (1958) 1 Ll. L.R.575.

2. The issues arising upon this Appeal may be summarised as follows:

(i) Whether the Appellants are liable to the Respondents in negligence in respect of damage by fire sustained by the Respondents' wharf notwithstanding that it was not reasonably foreseeable that any such damage could or would result from the carelessness of the Appellants' servants in respect whereof the Respondents' claim is based.

(ii) What was the true ratio decidendi of the decision of the Court of Appeal in

In Re Polemis and Furness Withy & Co. (1921) 3 K.B. 560 (hereinafter referred to as "Re Polemis"), and whether the statements of principle in the judgments in Re Polemis are correct in law, and, if so, whether the said principles are applicable to the facts of the present case.

(iii) Whether the damage sustained by the Respondents' wharf was proximately caused by the alleged negligence of the Appellants' servants.

p.483 ll.1-3. 3. The Appellants were at all material times the Charterers by demise of s.s. "Wagon Mound" (hereinafter called "the Vessel"). The Respondents are shipbuilders and repairers, and were at all material times the Owners of a wooden wharf, known as "Sheerlegs
p.483 ll.20-23. Wharf" in Mort's Bay, Sydney Harbour. The present action was brought by the Respondents as Plaintiffs to recover damages from the Appellants in respect of damage by fire suffered by Sheerlegs Wharf and equipment thereon, when a quantity of furnace oil, which had escaped from the Vessel on to the waters of Mort's Bay on the 30th October 1951 as the result of carelessness on the part of the Appellants' servants, caught fire on the 1st November, 1951.

p.483 ll.3-8. 4. On the 30th October, 1951, the Vessel was bunkering at Caltex Wharf in Mort's Bay, adjoining Sheerlegs Wharf. In the
p.483 ll.3-15. course of the said bunkering a quantity of furnace oil overflowed the forepeak fuel tank of the Vessel at about 4 a.m. on the 30th October 1951 as a result of carelessness on the part of the Appellants' servants and found its way on to the surface of the waters of the Bay. In the course
p.483 ll.16-23. of the following two days the furnace oil
p.486 ll.4-7. spread and was carried by the wind and
and ll.18-27. tides beneath and around Sheerlegs Wharf and around the vessel "Corrimal" lying
p.483 ll.24-39. alongside Sheerlegs Wharf on which the Respondents were carrying out oxy-acetelyne and electric welding and cutting operations.
p.486 ll.23-26. The furnace oil also got on to and congealed
p.492 ll.21-28. on some of the Respondents' slipways adjoining Sheerlegs Wharf and interfered
p.492 ll.28-34. with the Respondents' use of these

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slipways, though the Respondents did not rely upon this fact in their pleadings and made no claim against the Appellants in this respect and adduced no evidence showing to what extent (if at all) the Respondents thereby sustained any damage. The aforesaid movement of the furnace oil after its escape from the Vessel appears to have been found by Kinsella J. to have been reasonably foreseeable. When the presence of the oil beneath and around Sheerlegs Wharf and around the "Corrimal" was first noticed by the Respondents' servants some time before 8 a.m. on the 30th October 1951 the said welding and cutting operations were suspended and were not resumed until some time after 10 a.m. on the same day when the Respondents' Works Manager had been assured by the Manager of Caltex Wharf (who was not a servant or agent of the Appellants) that it was safe to resume normal work. The said welding and cutting operations thereupon continued until the outbreak of the fire, which occurred between 1 p.m. and 2 p.m. on the 1st November 1951, about 60 hours or 2½ days after the escape of the oil from the Vessel, and severely damaged the Respondents' wharf.

p.496 l.48-p.497 l.4.
p.1-p.3 l.17
p.5 ll.1-16
p.483 ll.16-23
p.499 ll.27-30
p.486 ll.18-38
p.486 ll.28-38
p.486 l.39-p.487 l.6.

5. The concatenation of circumstances which resulted in the outbreak of the fire was found by Kinsella J. to have been as follows, and the Appellants did not seek to challenge this finding upon the appeal to the Full Court:

p.503 ll.38-39.

> "I find that the oil which caught fire was ordinary furnace oil with flash point of the order of 170°F.; that immediately before the outbreak of the fire there was floating in the oil underneath the wharf a piece of debris on which lay some smouldering cotton waste or rag which had been set afire by molten metal falling from the wharf; that the cotton waste or rag burst into flames; that it was close to a wooden pile coated with oil; that the flames from the cotton waste or rag set the floating oil afire either directly or by first setting fire to the wooden pile; that after the floating oil became ignited the flames spread rapidly over the surface of the oil and quickly developed into a conflagration which severely damaged the wharf."

p.492 ll.1-16.

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6. At the trial, a great deal of evidence was adduced on the subject of the fire hazard created by the material which had escaped from the Vessel on to the surface of the water in Mort's Bay. It is of significance, as the Appellants respectfully submit, that the Respondents themselves were at pains to prove by their witnesses that

p.488 ll.45-50. furnace oil on the surface of water was safe and that the Respondents sought to establish that the material which ignited

p.484 l.40-p.486 l.17. must have been petrol or some other substance

p.489 ll.1-40. of a more inflammable nature than ordinary furnace oil, such as furnace oil contaminated by petrol. Kinsella J. however found (and the Respondents did not challenge this finding before the Full Court) that the Respondents' case must be limited to escape

p.485 ll.43-48. of ordinary furnace oil and its consequences,

p.489 l.41-p.490 l.9. and that the fire was not caused, facilitated or aggravated by the escape of petrol or petrol-contaminated furnace oil or anything other than ordinary furnace oil. Having regard to the said findings, the Appellants respectfully submit that a crucial feature of the present case is the extent, if any, to which it was at any material time foreseeable that the presence of ordinary furnace oil on seawater constituted a fire hazard. As to this, the evidence (including, as already mentioned, the evidence of the Respondents' witnesses) was that furnace oil on seawater was not regarded by anyone as a fire hazard at the material time. The main

p.490 ll.22-40. witness who was called on this issue, who gave evidence on behalf of the Appellants, was one Hunter, Professor of Chemical Engineering at the University of Sydney who had considerable academic and practical experience of the ignition properties of oils, including oils on the surface of seawater. In connection with the present

p.490 ll.40-49. case he carried out more than 300 experiments on the ignition on seawater of furnace oil similar or identical with the furnace oil which had escaped from the Vessel. Professor Hunter's evidence as to his views on the liability of furnace oil to ignite in these circumstances before he had carried out the aforesaid experiments was summarised as follows by Kinsella J.:

p.493 ll.17-21. "This evidence I interpret to mean that

before he made his tests and, of course, before he knew of the subject fire, the Professor did not regard floating oil as a serious hazard in any circumstances...."

As the result, however, of carrying out the aforesaid experiments, and contrary to the view which he had previously held, Professor Hunter found that if furnace oil on seawater was of a thickness of about 1/8th inch or more, it was(for the purposes of the present case) capable of being ignited if (but only if) there was a burning wick floating in the oil, and probably only if the burning wick was fanned by a breeze of not more than 20 miles an hour. Professor Hunter defined a wick as a substance floating on oil partly submerged in the oil and partly above it which is lit and burns above the oil. The remote possibility of furnace oil igniting on seawater in the aforesaid manner had, however, not previously been appreciated, either by Professor Hunter or by any other witness who gave evidence, and Kinsella J. made the following finding of fact in this connection, which the Appellants respectfully submit is crucial and which the Respondents did not seek to challenge on appeal:

p.491 ll.1-24.

p.491 ll.24-34.

"I feel bound on the evidence to come to the conclusion that, prior to this fire, furnace oil in the open was generally regarded as safe, and that in the light of knowledge at that time the defendant's servants and agents reasonably so regarded it ..... The raison d'etre of furnace oil is, of course, that it shall burn, but I find the defendant did not know and could not reasonably be expected to have known that it was capable of being set afire when spread on water".

p.493 ll.28-46.

7. As regards the pollution by some of the oil from the Vessel of the Respondents' slipways Kinsella J. found as follows:

"I find also that the oil which escaped had done some damage to the property of the plaintiff before the fire occurred, in that it had got on the slipways and interfered with the plaintiff's use of the slips, and had caused a suspension of the

p.492 ll.21-34.

operations of burning and welding for some hours. The evidence of this damage is slight and no claim for compensation is made in respect of it. Nevertheless it does establish some damage, which may be insignificant in comparison with the magnitude of the damage by fire, but which nevertheless is damage which, beyond question, was a direct result of the escape of the oil."

The Appellants respectfully challenge the relevance in law of this finding for the reasons hereinafter set forth.

8. The Respondents' principal allegation in their Statement of Claim was that the

p.2 ll.27-38.

Appellants were liable in damages on the ground of their servants' negligence in permitting inflammable fuel or oil to escape from the Vessel. Subject to an alternative argument based upon nuisance, as mentioned hereinafter, the sole issue at the trial of the action was whether the effect of the aforesaid conduct of the Appellants' servants was to render the Appellants liable to the Respondents in negligence. However, towards the end of his final argument before

p.499 ll.42-44.

Kinsella J., the Respondents' Counsel sought to press the Respondents' claim alternatively in nuisance. Kinsella J. held that although

p.499 l.45-p.500 l.8.

this alternative cause of action was open to the Respondents upon their pleading, it was not necessary to decide whether or not the Respondents would have been entitled to succeed in nuisance if (contrary to the conclusion reached by the learned Judge) the Respondents were not entitled to succeed in negligence. Upon the hearing of the appeal before the Full Court the arguments on both sides were limited to the issue whether or not the Respondents were entitled to succeed in negligence and the judgment of the Full Court does not refer to any alternative claim in nuisance. The Appellants accordingly

pp.503 l.17-p.527 l.40.

respectfully submit that the Appellants' alleged liability in negligence is the only issue which arises upon the present appeal. If, however, the Respondents should seek to rely upon an alternative claim in nuisance upon the hearing of the present appeal and if (contrary to the Appellants' submission)

this contention is open to the Respondents, then the Appellants will respectfully submit that the Respondents cannot succeed in nuisance unless they can also succeed in negligence. In this connection the Appellants will, if necessary, respectfully rely in particular upon Southport Corporation v. Esso Petroleum Co. Ltd. (1954) 2 Q.B. 182 and (1956) A.C. 218.

9. The learned Trial Judge held that, notwithstanding his aforesaid finding that prior to this fire furnace oil spread on water was generally regarded as safe and that the Appellants did not know and could not reasonably be expected to have known that it was capable of being set afire, the Appellants were liable for the damage caused by the "improbable fire" on the basis of the principle of the decision in Re Polemis (which principle he considered himself bound to apply) on the ground that "the Defendant caused damage by fouling Plaintiff's slipways and interfering with its industrial operations, both of which results were clearly foreseeable." p.493 ll.28-46. p.496 ll.20-37 p.499 ll.27-30

10. The Full Court, (the judgment of which was delivered by Manning J.), also considered "that it would not be proper for this Court to do other than regard the decision (in Re Polemis) as an authority binding upon it", and held in substance that the principle of that decision was applicable to the facts of the present case. However, for the reasons stated in considerable detail in the judgment, which are too lengthy to set out herein in full, the Appellants respectfully submit that the Full Court clearly only reached this conclusion with considerable hesitation and doubt. In particular, the judgment draws attention to the grave difficulty of applying the decision in Re Polemis with any confidence to a particular set of facts and expressed the hope that this subject would be pronounced upon by the House of Lords or the Privy Council in the near future. So far as concerns the issue of whether or not the damage by fire was the "direct" consequence of the negligence of the Appellants' servants, the Full Court held that it could not "escape from the conclusion that if the ordinary man in the street had been asked, as p.507 ll.44-46. p.508 l.1-p.522 l.12. p.522 ll.1-12 p.527 ll.23-29

a matter of common sense, to state the cause of the fire at Mort's Dock, he would unhesitatingly have assigned such cause to the spillage of oil by the Appellants' employees".

11. For the reasons hereinafter referred to the Appellants respectfully submit that upon the facts of the present case the Appellants are not liable to the Respondents in negligence in respect of the damage by fire sustained by the Respondents' wharf and that in any event the escape of the furnace oil from the Vessel as the result of the carelessness of the Appellants' servants was not the proximate cause of the said fire.

12. The Appellants respectfully submit that the first point which falls to be considered upon this appeal is whether (apart from any question of remoteness of damage or causation) the Appellants were guilty of negligence in respect of damage to the Respondents' wharf by reason of the carelessness of the Appellants' servants in permitting furnace oil to escape from the vessel when (as was held by the learned Trial Judge) it was not foreseeable that permitting furnace oil to escape from the Vessel could result in any damage of the nature or character in respect whereof the Respondents' claim arises, viz. damage by fire to the Respondents' wharf. Having regard to the learned Trial Judge's unchallenged finding that damage of this nature or character could not have been foreseen, the Appellants respectfully submit that the Appellants were not guilty of negligence in respect of such damage. The Appellants respectfully adopt as part of their argument in this connection the discussion by Professor A.L. Goodhart in an article entitled "Liability for the Consequences of a 'Negligent Act'" (Cambridge Legal Essays, 1926, p.101) and his submission (at p.119) that "a tortfeasor should only be held liable for those consequences as to which he was actually negligent, i.e. as to those consequences which a reasonable man placed in his position would have foreseen as possible and would have avoided by due care. As to other consequences he was not negligent and

therefore not a tortfeasor". The Appellants further respectfully submit that in the premises the Respondents' Sheerlegs Wharf was outside the area of potential danger created by the careless act of the Appellants' servants: see Bourhill v. Young (1943) A.C. 92, particularly per Lord Thankerton at p.99; Woods v. Duncan (1946) A.C.401 per Lord Russell of Killowen at pp.426, 427 and per Lord Porter at pp.436, 437; and Bolton v. Stone (1951) A.C.850.

13. The Appellants further respectfully submit that even if, contrary to their contention in the foregoing Paragraph, the Appellants were guilty of negligence vis-a-vis the Respondents' Sheerlegs Wharf by reason of the carelessness of their servants in permitting the furnace oil to escape from the Vessel, then the damage by fire to the Respondents' wharf was too remote a consequence of such carelessness to sustain a claim for damages in law. It is respectfully submitted that in the present connection the principles governing remoteness of damage in tort are correctly stated in the following passages from the judgments of Pollock C.B. in Rigby v. Hewitt (1850) 5 Ex. 240 at p.243 (155 E.R. 103 at p.104) and in Greenland v. Chaplin (1850) 5 Ex. 243 at pp.247, 248 (155 E.R.104 at p.106):

> "I am, however, disposed not quite to acquiesce to the full extent in the proposition, that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances from such misconduct.."

and,

> "I am desirous that it may be understood that I entertain considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person could have anticipated."

The rule governing remoteness of damage in tort was re-stated in similar terms by Bovill C.J. and other members of the Court of Common Pleas in Sharp v. Powell (1872) L.R. 7 C.P. 253, and judgment was given for the defendant 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." The same principle, as the Appellants respectfully submit, is inherent in the well-known statement by Lord Dunedin in Fardon v. Harcourt-Rivington (1932) 146 L.T. 391 at p.392: "In other words, people must guard against reasonable probabilities but they are not bound to guard against fantastic possibilities". The limitation of damages recoverable in tort to the loss which might reasonably have been foreseen as a consequence of the wrongful act has also been endorsed in a number of other cases, notably Lynch v. Knight (1861) 9 H.L.C. 577 at p.600, (11 E.R. 854 at p.863) per Lord Wensleydale, Clark v. Chambers (1878) 3 Q.B.D. 327, at pp.336 to 338 per Cockburn C.J. and Manisty J., Cory v. France (1911) 1 K.B.114, per Vaughan Williams L.J. at p.122 and per Kennedy L.J. at p.133, and in Clinton v. J. Lyons & Co. Ltd. (1912) 3 K.B. 198, per Ridley J. at pp.203-205 and at pp.210-11 per Bray J. This view of the law was current among the writers of text-books before the decision of the Court of Appeal in Re Polemis in 1921: see Salmond on Torts, 1st Edn., pp.103 et seq., Pollock on the Law of Torts, 11th Edn., pp.39 et seq., and Mayne on Damages, 9th Edn., pp.45 et seq.

14. There is also a substantial body of authority, both before and after Re Polemis, to the effect 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 (156 E.R.645) at pp.354 and 151 respectively: The Notting Hill (1884) 9 P.D.105; The Argentino (1888) 13 P.D.191, (affirmed in (1889) 14 A.C.519); Cobb v. G.W.R. (1893) 1 Q.B. 459 at p.464, (affirmed (1894) A.C.419); H.M.S. "London" (1914) P.72; Hall v. Pim (1927) 33 Com.

Cas. 327 at p.336 per Lord Phillimore; The Metagama (1927) 29 Ll.L.R.253 per Lord Haldane at pp.253, 254; The Edison (1932) P.52 at pp.62 and 68 (affirmed on appeal sub. nom. Owners of Dredger Liesbosch v. Owners of Steamship Edison (1933) A.C. 449); The Arpad (1934) P.189 at p.216 Haynes v. Harwood (1934) 1 K.B. 146 at p.156; Domine v. Grimsdale (1937) 106 L.J. K.B. 386, at p.392; Hyett v. G.W.R. (1948) 1 K.B, 345 at p.347. The Appellants respectfully submit that it follows from these authorities that damages for negligence are only recoverable if the damage 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 the finding that damage by fire could not have been foreseen as a consequence of the negligence in allowing furnace oil to escape from the Vessel, the Appellants respectfully submit that the damage by fire sustained by the Respondents' wharf is too remote in law.

15. The judgments in Kinsella J. and of the Full Court in the present case were explicitly based upon the decision of the Court of Appeal in Re Polemis and upon the reasoning in that case to the effect that foreseeability of the damage actually sustained by the Plaintiff is irrelevant to the question of remoteness of damage in the law of tort. For the reasons set out in Paragraphs 16 and 17 hereof the Appellants respectfully submit that the reasoning underlying the decision in Re Polemis is wrong in law or, if right, that the decision is distinguishable from the present case.

p.495 l.37-p.499 l.39.

p.507 l.16-p.523 l.9.

16. In the Appellants' respectful submission the reasoning underlying the decision in Re Polemis is inconsistent with the dicta of Pollock C.B. in Rigby v. Hewitt and Greenland v. Chaplin (supra) which, before the decision in Re Polemis, had long been regarded as accurate in relation to the rule governing remoteness of damage in the law of tort: see Paragraph 13 hereof. It is further respectfully submitted that it is

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inconsistent with the decisions in Sharp v. Powell (supra), Blyth v. Birmingham Water-works Co. (1856) 11 Ex. 781 (156 E.R.1047) and Cox v. Burbidge (1863) 13 C.B. N.S. 430 (143 E.R.171). Further, it is inconsistent with the principle that a ~~negligent~~ careless act or omission does not constitute negligence unless it is reasonably foreseeable that it may result in the damage of which the plaintiff complains: see the Appellants' submissions in Paragraph 12 hereof and the judgment of the Full Court in the present case. Further, the Appellants respectfully submit that the reasoning in Re Polemis is not reconcilable with the principle that the rules as to remoteness of damage in tort are identical with those as to remoteness of damage in contract under the "first rule" in Hadley v. Baxendale (supra): see Paragraph 14 hereof and Mr. S.L. Porter (as he then was) in 5 Cambridge Law Journal 176 and Professor A.L. Goodhart in 68 L.Q.R. 514, and the judgment of the Full Court in the present case. The Appellants respectfully submit that the foregoing submissions are equally applicable to the decision of the Court of Appeal in Thorogood v. Van den Berghs (1951) 2 K.B. 537 to the extent to which the decision in that case is based upon Re Polemis, and that these submissions are not inconsistent with the decisions in Smith v. London and South Western Railway (1870) LR. 5 CP. 98, L.R.6 C.P.14, and H.M.S. London, (supra) the ratio decidendi whereof (as the Appellants respectfully submit) was that the damage complained of was of a nature and character which was at all times reasonably foreseeable. Alternatively, if the correct view of the facts of Smith v. London and South Western Railway (supra) is that the damage to the plaintiff's cottage could not have been foreseen, the Appellants will respectfully submit that the case was wrongly decided. The Appellants further desire respectfully to draw attention to the fact that, as pointed out in the judgment of the Full Court in the present case, the reasoning underlying the decision in Re Polemis has frequently been the subject of adverse comment: see Bourhill v. Young (supra) at p.106 per Lord MacMillan, Pollock on Torts

p.517 l.13-p.521 l.45.

p.513 ll.16-35.

p.508 ll.1-30.

(12th ed.) at p.vii, Sir Frederick Pollock in 38 LQR. 165, Mr. S.L. Porter (as he then was) in 5 Cambridge Law Journal 176, and Professor A.L. Goodhart in Cambridge Legal Essays (supra) and 68 LQR 514.

16. If, contrary to the Appellants' submission, the reasoning in Re Polemis is correct in law, then the Appellants respectfully submit that the decision is distinguishable from the present case, for the following reasons:

(i) The Claimants' claim in Re Polemis was for damages for breach of a time charter whereby the Respondents undertook to redeliver the vessel in the same good order and condition as when delivered, subject to (inter alia) the exception of "fire". The ratio of the decision is based upon the true construction and effect of an exceptions clause in a time charter, and the Appellants respectfully submit that the case is not an authority on the principles of liability in negligence.

(ii) In Re Polemis both the foreseeable and the actual consequence of the careless act complained of was damage to the ship by a falling plank without the intervention of any other cause. In the present case, the foreseeable consequences of the Appellants' servants' negligence in permitting the furnace oil to escape from the Vessel did not include damage by fire without the intervention of another cause, i.e. the remote possibility, which was not foreseeable, of the oil being capable of ignition and being in fact ignited from a source unconnected with the negligence of the Appellants' servants.

(iii) The foreseeable danger of damage to the Respondents' property in the present case, i.e. the danger of pollution to their slipways, was damage of a wholly different nature and character from the only damage complained of, viz. damage by fire. Furthermore, the Respondents did not plead or prove either that they in fact sustained any damage by pollution or that such damage was capable of assessment in terms of money.

In the premises the Appellants respectfully submit that the "pollution" damage (such as it was) which was found by Kinsella J. was not damage capable of bringing into operation the principle of Re Polemis, even if that principle be correct in law, or, alternatively, that this damage (if any) should be disregarded on the principle de minimis non curat lex.

17. If, contrary to the Appellants' contentions in the foregoing Paragraphs, the Appellants were negligent vis-a-vis the Respondents on the facts of the present case and if the damage to Sheerlegs Wharf was not too remote in law, then the Appellants respectfully submit that the negligence of theAppellants' servants in permitting the escape of furnace oil from the Vessel was not the "dominant" or "proximate" or "direct" cause of the fire. In this connection the Appellants respectfully refer to and rely upon the "extraordinary and unusual combination" of a series of improbabilities which are set out in the judgment of the Full Court. The Appellants respectfully submit that the Full Court was wrong in concluding that "the ordinary man in the street would unhesitatingly have assigned such cause (of the fire at Mort's Dock) to spillage of oil by the Appellants' employees." It is respectfully submitted that "the ordinary man in the street", applying common sense standards, would be unable to identify any one dominant or proximate or direct cause of the fire, but would conclude that the fire was an accidental occurrence resulting from an extraordinary and improbable coincidence of unrelated events. Alternatively, the Appellants respectfully submit that if any one of the long chain of events which culminated in the fire can be singled out as the dominant or proximate or direct cause of the fire, then the most important and effective of these events was the Respondents' own decision to resume the welding and cutting operations on the "Corrimal" notwithstanding the presence of the oil underneath the wharf and around this vessel and that the carrying on or the resumption of these operations was a novus actus interveniens.

p.523 ll.10-42.

p.527 ll.24-29.

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

REASONS

1. BECAUSE a careless act is not actionable in negligence unless it was reasonably foreseeable that the act would cause the particular damage of which the plaintiff complains, and the damage to the Respondents' wharf by fire was not a foreseeable consequence of the carelessness of the Appellants' servants in permitting furnace oil to escape from the vessel.

2. BECAUSE, alternatively, a careless act is not actionable in negligence unless it was reasonably foreseeable that the act would cause damage of the nature or character of the damage of which the plaintiff complains, and damage to the Respondents' wharf by fire was not damage of a nature or character which was foreseeable as a consequence of the said carelessness of the Appellants' servants.

3. BECAUSE a careless act is not actionable in negligence unless the damage of which the plaintiff complains was within the area of potential danger created by the act, and the damage to the Respondents' wharf was not within the area of potential danger created by the escape of furnace oil from the Vessel.

4. BECAUSE the rules relating to the ascertainment of damage which is recoverable in contract and tort are the same (subject to the qualification in the law of contract introduced by the "second rule" in Hadley v. Baxendale (supra)) and require that the damage in question must be the natural and foreseeable consequence of the act complained of, but the fire damage to the Respondents' wharf was not a natural or foreseeable consequence of the said carelessness of the Appellants' servants and was too remote.

5. BECAUSE the decision in Re Polemis (supra) was wrong and should not be followed.

6. BECAUSE the reasoning in the judgments in Re Polemis relating to the ascertainment of

damage which is recoverable in tort is not correct and should not be followed.

7. BECAUSE the decision in Re Polemis (supra) is distinguishable from the present case both on the facts and in respect of the cause of action in that case.

8. BECAUSE the Respondents did not plead or prove that the said carelessness of the Appellants' servants in fact caused damage to the Respondents and such damage (if any) was therefore irrelavant in law or should be disregarded on the principle de minimis non curat lex.

9. BECAUSE the escape of furnace oil from the Vessel was not the dominant or proximate or direct cause of the damage by fire to the Respondents' wharf.

10. BECAUSE the Respondents' decision to continue or resume cutting and welding operations on the "Corrimal" notwithstanding the presence of the furnace oil from the Vessel was the dominant or proximate or direct cause of the fire and constituted a novus actus interveniens.

11. BECAUSE it is not open to the Respondents at this stage to found their claim in nuisance alternatively or additionally to negligence and because on the facts of the case the Respondents cannot in any event succeed in nuisance if they cannot succeed in negligence.

12. BECAUSE the decisions of Kinsella J. and of the Full Court of the Supreme Court are wrong and should be reversed.

Ashton W. Roskill

Michael Kerr

No. 23 of 1960

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN:

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

- and -

MORTS DOCK & ENGINEERING COMPANY LIMITED (Plaintiffs) — Respondents

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CASE FOR THE APPELLANTS

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