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UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

63638

No. 23 of 1960

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE SUPREME COURT OF NEW SOUTH WALES

ADMIRALTY JURISDICTION No. 7 of 1952

B E T W E E N :

OVERSEAS TANKSHIP U.K. LIMITED
(Defendant)

Appellant

-- and --

MORTS DOCK & ENGINEERING CO.
LIMITED (Plaintiff)

Respondent

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RESPONDENT'S CASE

INTRODUCTORY

RECORD

1. This appeal has been brought pursuant to final leave to appeal to Her Majesty in Counsel granted by the Supreme Court of New South Wales by rule made the 31st. day of March 1960. p.531

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2. The appeal is brought from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal to that Court by Overseas Tankship (U.K.) Limited from a judgment of His Honour Mr. Justice Kinsella exercising the admiralty jurisdiction of the Supreme Court of New South Wales in an action in which that Company was the defendant and Morts Dock & Engineering Co. Ltd. was the plaintiff. p.528

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3. The action was heard on the 17th, 18th, 19th, 20th and 21st days of February and the 11th, 12th, 13th, 14th, 17th and 18th days of March 1958 and His Honour on the 23rd day of April 1958 gave his judgment which was for the Respondent against the Appellant and ordered that it be referred to the Registrar to assess the damages which the Respondent had sustained. p.481-500

4. The Respondent had in the action sought to p.2-3

RECORD

recover from the Appellant compensation for the damage which its property, known as the "Sheerlegs Wharf" and equipment thereon had suffered by reason of fire which broke out on the 1st November 1951 and for which it claimed that the Appellant was, in law, responsible.

5. The material allegations in the Respondent's Statement of Claim were :

- p.2 L.1 "3. On Tuesday the thirtieth day of October One thousand nine hundred and fifty-one the vessel 'Waggon Mound' was taking oil into her bunkers and in the process of bunkering oil a large quantity of oil was permitted to escape from the vessel into the waters of the Bay. This said oil was of a highly inflammable nature and floated on the surface of the water. 10
- p.2 L.12 5. On the first day of November One thousand nine hundred and fifty-one the said oil became ignited and the fire therefrom greatly damaged the plaintiff's wharf and the equipment machinery plant and tools which were on the wharf. 20
- p.2 L.27 8. In particular the plaintiff says that those in charge of the 'Waggon Mound' (being the servants and agents of the defendant) were negligent in that
- (a) They permitted re-fuelling operations to be carried out without taking proper or adequate precautions to prevent the escape of highly inflammable fuel or oil from the ship. 30
- (b) They permitted inflammable oil to escape from the ship in such large quantities that it was capable of being ignited.
- p.2 L.39 (c) Large quantities of highly inflammable oil having escaped from the ship at a time and place where by reason of the currents and tides it was likely to accumulate around the plaintiff's wharf they failed to take any steps to warn the plaintiff of the danger or to remove the accumulation of oil from the vicinity of the plaintiff's wharf or to 40

render the accumulation of oil near the plaintiff's wharf harmless."

6. In answer thereto the Appellant pleaded

10 "3. The defendant denies that the damage mentioned in the statement of claim was caused or contributed by to any negligence on the part of itself or its servants as alleged or at all and says that the said damage was solely caused by the negligence of the plaintiff or its servants. Save as hereinafter expressly admitted the defendant denies each and every allegation contained in the statement of claim. p.4 l.1

20 4. On the Thirtieth day of October One thousand nine hundred and fifty-one the S.S. 'Waggon Mound' moored to the Caltex Jetty, Ballast Point, Morts Bay, had completed bunkering with oil fuel, hereinafter called 'furnace oil' at about 4 a.m. 'Furnace oil' floating on water is not highly or easily inflammable and can be ignited only by some burning substance coming in contact therewith capable of acting as a wick. p.4 l.10

30 7. Prior to and at the time of the outbreak of the said fire the plaintiff by its servants and workmen was operating oxy-acetylene plant and other apparatus on its said wharf and on a ship lying alongside. p.4 l.27

40 8. The said fire was caused by the negligence of the said plaintiff its servants and workmen in and about the operations conducted on the said wharf and ship and in and about the care control and management of the workmen so employed and in and about the failure to prevent ignited materials falling from the said wharf, well knowing of the presence of oil beaneath and in the vicinity of the said wharf." p.4 l.31

So much of that defence as raised contributory negligence on the Respondent's part was expressly abandoned at the hearing.

RECORD

SUMMARY OF EVIDENCE

7. The Respondent is a company which at the relevant time carried on the business of ship building, repairing and general engineering at, inter alia, Morts Bay Balmain in the Port of Sydney. It was the owner of and in the course of its aforesaid business used a timber wharf about 400 feet in length and 40 feet wide and known as the "Sheerlegs Wharf" erected on the northern shore of Morts Bay and of a quantity of tools and equipment upon that wharf. In October and November 1951 a vessel known as the "Corrimal" was moored alongside the "Sheerlegs Wharf" and was and for some considerable time had been in the course of being refitted by the Respondent. At this time the mast of the "Corrimal" was lying on the Sheerlegs Wharf" and a number of the Respondent's employees were working upon this mast, and upon the vessel itself and in the course of their operations were using electric and oxy-acetylene welding equipment. A large number of other employees, both of the Respondent and of the owners of the "Corrimal" were working on the wharf and on and in the vessel. These operations were visible to persons in charge of vessel entering or moored in Morts Bay.
- 10
- p.1 LL.24-27
p.24
l.10-12
p.74
l.22
p.75 l.21
p.75 l.32
p.74
ll.25 to
p.75 l.10
8. The Appellant was at the relevant time the charterer by demise of the S.S. "Waggon Mound" an oil-burning vessel, which vessel was moored at the Caltex Wharf on the northern shore and at the head of Morts Bay and was at a distance of about 500-600 feet from the "Sheerlegs Wharf" from approximately 9.30 a.m. on the 29th October 1951 until 11.0 a.m. on the 30th October 1951 for the purpose of discharging gasoline products and of taking on bunkering oil.
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- p.1 ll.28-33
p.3
ll.31-32
p.7 LL.10-11
p.215
ll.14-18
p.215 l.20
9. During the early hours of the morning of the 30th of October 1951 a large quantity of bunkering oil was, through the carelessness and neglect of the officer of the "Waggon Mound" in charge of bunkering operations allowed to spill into the Bay. By 10.30 on the morning of the 30th October the oil had spread over a substantial part of Morts Bay, some of it, particularly along the foreshores adjacent to the Respondent's property and under the "Sheerlegs Wharf" being thickly concentrated. The Appellant did not take or caused to be taken any action to dissipate, disperse or otherwise
- 40
- p.230 l.25
p. 5 l.38
p.146 l.1

RECORD

deal with the oil which had escaped and the "Waggon Mound" unberthed and set sail at about 11.0 a.m. on the 30th October 1951. The Respondent's property was in such close proximity to the place where the oil was spilt that it was obviously likely that much of that oil would spread or be carried by wind and tide onto that property and particularly onto that part of it where the "Sheerlegs Wharf" was erected.

p.215 1.20

10 10. Upon the Respondent's works manager becoming aware on the morning of the 30th of October of the presence of such a substantial quantity of oil on the water and upon the foreshores in the vicinity of the Respondent's works he issued instructions to the Respondent's workmen that no welding or burning was to be carried on until further orders and thereupon enquired from the manager of the Caltex Oil Company at whose wharf the "Waggon Mound" was then still berthed whether the Respondent might safely continue with its industrial operations, in particular with those being carried on in the vicinity of the "Sheerlegs Wharf" and upon the "Corrimal". The results of the enquiries made by the Respondent's works manager coupled with his own beliefs as to the nature and inflammability in the open of furnace oil led him to believe that it was safe for the Respondent to continue with its operations on and in the vicinity of the "Sheerlegs Wharf" and on the "Corrimal" and the works manager gave instructions that such work was to be resumed but that all safety precautions were to be taken to prevent inflammable material from falling from the wharf and onto the oil.

p.83
11.36-7

p.85
11.28-30

p.85 1.32

40 11. Work continued as usual for the remainder of the 30th of October and until approximately 2 p.m. on the 1st of November 1951. During the whole of this period the condition and congestion of the oil around the foreshore and in particular around the "Sheerlegs Wharf" and the "Corrimal" remained much the same. At about 2 p.m. on the 1st of November 1951 the oil under or immediately adjacent to the "Sheerlegs Wharf" was ignited and a fire fed initially by the oil spread rapidly and burned with great intensity. Both the wharf itself and the "Corrimal" caught fire and considerable damage was done to the wharf and to the Respondent's equipment upon it.

p.128 1.21

p.129
11.32-40

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RECORD

p.490
11.6-9

12. The oil which the Appellant allowed to escape into the Bay was found by His Honour the learned Trial Judge to be ordinary furnace oil with a "flash point" in the range between 150°F. and 190°F. The "flash point" is usually calculated by what is known as the Pensky-Martin Test and is the temperature which a liquid (usually a petroleum product) must attain before the vapours which form in a completely closed vessel can be ignited momentarily by a naked flame. It is a measure of the inflammability of the oil.

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p.493
11.28-30

His Honour found on the evidence that furnace oil of this nature in the open, was generally regarded as safe; that in the light of knowledge at that time the Appellant's servants and agents reasonably so regarded it; and that the Appellant did not know and could not reasonably be expected to have known that it was capable of being set on fire when spread on water. His Honour did not find, and there was no evidence, that such oil was in fact, or was thought to be, safe from the risk of igniting or being set on fire when it congealed or was spread upon the foreshore, or structures on the foreshore by a receding tide.

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p.493
11.43-6

His Honour further found that the oil which escaped from the "Waggon Mound", and which was floating on the water, could have been ignited and could in the circumstances have been ignited only by a wick i.e. a substance floating on the oil partly submerged in the oil and partly above it which is lit and burns above the oil.

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p.491
11.45-50

13. His Honour made a specific finding as to the cause of the outbreak of the fire. His Honour found 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 (at the time of the outbreak of the fire it was low tide); 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.

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p.492
11.3-17

p.492
11.3-17

14. There was also evidence, and His Honour so found, that the spillage of oil caused damage to the Respondent quite apart from the damage which resulted from the fire. In particular the oil had got upon the Respondent's slipways (on the northern shore of Morts Bay, west of the "Sheerlegs Wharf") had congealed upon them and had interfered with the Respondent's use of the slips. It had also interfered, on the morning of the 30th October 1951 with the industrial operations being carried on in the vicinity of the "Sheerlegs Wharf" and on the "Corrimal" in that the work of a large number of men was suspended for a considerable time.

p.492
ll.21-27

REASONS FOR DECISION OF
TRIAL JUDGE AND OF FULL COURT

15. His Honour the learned trial judge in the course of his reasons for judgment said :

"For my formal determination of the issue of liability the proper direction to myself as a tribunal of fact is in my opinion to be derived from the judgment of Asquith L.J. in Thorogood v. Van den Bergh's Limited /1951/ 1 All E.R.682 in the course of which His Lordship said

p.498
l.35

'Warrington L.J. said in Polemis' Case - the result may be summarised as follows; The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent then the question whether the particular damages are recoverable depends only on the answer to the question whether they are the direct consequences of the Act.

Devlin J. has already reformed the process described in the first of these two sentences. Applying and rightly at this stage and for this purpose the test whether damage of some kind (for instance the necktie kind) can be reasonably anticipated as likely to result from the defendant's act he determines the quality of the act as negligent. It only remains for him to perform the process described in the second sentence of Warrington L.J. namely to decide whether the particular damages namely the damage actually sustained is recoverable. In answering this second question the foreseeability of the

p.499 l.1

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damage actually sustained is wholly irrelevant. Directness of causation is the sole criterion of recoverability. The actual damage may be wholly different in character magnitude or the detailed manner of its incidence from anything which could reasonably have been anticipated.'

p.499 1.22

Accordingly the first question I ask is "Does the evidence establish that the defendant's act caused damage to the plaintiff which the defendant could reasonably foresee?" To that my answer is "Yes", for leaving aside entirely the ultimate damage caused by the improbable fire, the defendant caused damage by fouling the plaintiff's slipways and interfering with its industrial operations, both of which results were clearly foreseeable. This establishes that the defendant was negligent. I therefore ask a second question: "Was the ultimate damage suffered by the plaintiff, that is to say damage by fire which was not reasonably foreseeable by the defendant, directly caused by the defendant's negligence?"

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p.499 1.32

For the reasons already expressed my answer is "Yes".

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On these answers the plaintiff must succeed."

16. The appeal from the judgment of His Honour Mr. Justice Kinsella was heard by a Full Court consisting of Owen, Maguire and Manning JJ. In his judgment with which Owen and Maguire JJ. concurred Manning J. said

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p.507 1.30

"The decision in In Re Polemis has stood for nearly forty years. In Thorogood v. Van den Bergh's and Jurgens Limited /1951/2 K.B. 537 Asquith L.J. said (page 555):

'Nor do I consider that the decision in In Re Polemis and Furness Withy & Co. Limited /1921/3 K.B. 560 has been overruled or its binding character so far as this Court is concerned in any degree shaken. The utmost that can be said is that certain of the Lords of Appeal in Ordinary have reserved the right to consider it, if and when, before the House of Lords, its authoritative character should come directly in issue. Meanwhile it stands.'

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In these circumstances I do not think that it would be proper for this Court to do other than regard the decision as an authority binding upon it. The decision in this case must depend upon the view to be taken of the effect of In Re Polemis and the manner in which the decision should be applied.

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In Re Polemis Banks L.J. refers to the damage in question as 'damage as a direct result of the negligence' (page 572): Warrington L.J. refers to the damage as being "the direct consequence of the act" (page 574): whilst Scrutton L.J. says that the damage is recoverable so long as it is 'in fact directly traceable to the negligent act and not due to the operation of independent causes having no connection with the negligent act except that they could not avoid its results'.

p.522 1.30

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I have been unable to find any statement which described what is meant by "direct" damage more clearly than the words used by Scrutton L.J. set out above.

p.523 1.6

Testing the matter by reference to Scrutton L.J.'s definition it seems to me that the fact that the fire was traceable to the spillage is established.

p.524 1.11

Two questions then remain, namely :

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1. Was it 'directly' traceable?
2. Was it due to the operation of independent causes having no connection with the negligent act except that they could not avoid its results?'

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In my opinion the question of what is 'direct' damage must be determined by a consideration of the circumstances as a whole rather than by a careful analysis of each link in the chain of events leading to the occurrence. The question is in reality one of causation and the general rule was expressed by Lord Wright in Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport 1942 A.C. 691 at 706.

p.525 1.46

'This choice of the real or efficient cause from out of the whole complex of the facts

p.526 1.4

RECORD

must be made by applying common sense standards. Causation is to be understood as the man in the street, and not as either the scientist or the meta-physician, would understand it. Cause here means what a business or seafaring man would take to be the cause without too microscopic an analysis but on a broad view.'

- p.526 1.15 This statement was adopted with approval by Starke J. in Piro v. W. Foster & Co. Limited 68 C.L.R. at 313 at 328. 10
- p.526 1.46 The question of what will amount to "independent causes" which have no connection with the negligent act is, to a large extent, interwoven with the problem of whether the damage is directly caused and the two problems do not require separate and independent consideration.
- p.527 1.1 I would adopt the statement contained in Salmond on Torts (12th Edn.) at page 723 as follows
- 'The central problem is, of course to determine the true scope of the term 'direct' as used by the Court. It can be said to be clear that, as so used, the term 'direct' cause cannot have its strict logical signification, as meaning the immediate or proximate cause, a cause so connected with a consequence that there is no intervening link in the chain of causation'. 20
- p.527 1.13 The questions I have posed, upon which the liability of the appellant depends, may therefore, in my opinion, be answered together and I have come to the conclusion that the verdict of the learned Trial Judge was correct. 30
- p.527 1.18
- Notwithstanding that, if regard is had separately to each individual occurrence in the chain of events that led to this fire, each occurrence was improbable and in one sense improbability was heaped upon improbability, I cannot escape from the conclusion that if an ordinary man in the street had been asked, as a matter of common sense, without detailed analysis of the circumstances, to state the cause of the fire at Morts Dock, he would unhesitatingly have assigned such cause to spillage of oil by the appellant's employees." 40
- p.527 1.29

THE SUBMISSIONS OF THE APPELLANT
BEFORE THE TRIAL JUDGE AND ON APPEAL
BEFORE THE FULL COURT

17. The Appellant's submissions before the Trial Judge were

(1) That there was no duty owed to the Respondent in respect of the injury it complained of as that damage was outside the area of potential danger. In elaboration of this argument it was submitted

10 (a) that the decision in In Re Polemis is not good law and

(b) that no damage was suffered by the Respondent other than was caused by the unforeseen fire so that the matter was covered by Bourhill v. Young [1943] A.C. 82 and In Re Polemis had no application.

20 (2) That the damage was too remote in that even if damage was caused to the Respondent other than fire damage the fire damage in respect of which the action was brought was not directly traceable to the careless act of the Appellant, but was due to the operation of extraneous causes unconnected with the Appellant's act.

18. His Honour the learned Trial Judge dealt with these submissions as follows :

As to 1(a) His Honour said

30 "I appreciate that the first of these submissions was made in order to preserve the right to renew it before a tribunal competent to review a decision of the Court of Appeal. Apart from the inherent authority of the decision of that Court the question is concluded, so far as this state is concerned, by the recent decision of the Full Bench in Malleys Limited v. Jones 55 S.R. 390 in which the validity of In Re Polemis was challenged." p.496 11.20-28

In dealing with 1(b) His Honour said

40 "It is inconsistent with the facts. I have already stated my finding that the oil fouled the plaintiff's slipways and caused interruption p.496 1.45

RECORD

p.497 1.1 to its operations and that those consequences were foreseeable to any reasonable person. Mr. Meares urged however that the plaintiff was not entitled to rely on this damage in as much as no claim is pressed in respect of it, nor has evidence been given on which compensation could be assessed, and that I should therefore exclude it from consideration. I am not able to agree. The plaintiff's failure to press a claim for this damage is not an admission that it was not actionable damage, or that it was in itself insignificant, - although it may well have been relatively insignificant in view of the very large amount claimed for damage by fire. 10

p.497 1.11 It follows, since foreseeable damage was caused to the plaintiff, that the defendant's careless act became impressed with the legal quality of negligence, and the case therefore is covered by the principals of In Re Polemis and not those laid down in Bourhill v. Young." 20

In dealing with the defendant's second submission His Honour said :

p.497 1.36 "The answer to this argument is that direct consequence is not necessarily an immediate consequence. Damage may be directly traceable to an original act although there has intervened a series of happenings no one of which could have brought about the ultimate damage but which in sequence or in combination caused or enabled the original act to result in that damage. In my opinion all the matters urged by Mr. Meares as extraneous or independent causes having no connection with the original act are in reality directly traceable to the original act by reason of the fact that they were all reasonably foreseeable by the careless actor. The probability of oil in heavy concentration remaining for a considerable time between the "Corrimal" and the wharf should have been apparent: That the oil would be subject to the influence of wind and tide and to the passage of harbour craft was obvious: Debris floating along the foreshores and under wharves is an ordinary incident of an industrial waterfront, and the possibility of inflammable material in the debris was reasonably foreseeable: The operation of refitting the ship at the wharf was 30 40

clearly in sight of the officers of the "Waggon Mound" involving the use of oxy-acetylene and other burning apparatus on the wharf and on the ship. I consider that these facts, since they should have been observed or reasonably anticipated by the defendant cannot be said to be independent causes intervening between the negligent act and the ultimate damage. On the contrary, they are steps through which the damage may be directly traced to the original negligent act."

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p.498 1.29

19. The submissions were maintained on appeal to the Full Court and the reasons given by that Court for rejecting them are set out in paragraph 16 above.

RESPONDENT'S SUBMISSIONS

20. The Respondent submits that the Appellant is liable to it for the damage caused by the fire because such damage was directly traceable to acts of the Appellant, which constituted against the Respondent either

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(a) negligence; or

(b) a public nuisance;

Negligence

21. The Appellant owed, to persons so closely and directly affected by its acts or omissions that it ought at the time of those acts or omissions to have had them in its contemplation as being so affected, a duty to take reasonable care to avoid spilling a large quantity of furnace oil onto the waters of Morts Bay. Donoghue v Stevenson [1932] A.C. 562. per Ld. Atkin at p.580.

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22. The same proposition may be stated as that the Appellant owed a duty to conduct the operation of bunkering with such reasonable care as would avoid the risk of injury to persons within that which the Appellant ought to have reasonably contemplated as the area of potential danger which would arise as the result of a spillage of a large quantity of furnace oil onto the waters of Morts Bay. Hay or Bourhill v. Young [1943] A.C. 92 per Ld. Thankerton at p.98.

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23. The Respondent was a person

- (i) that the Appellant ought reasonably to have had in contemplation, at the time of bunkering, as likely to be closely or directly affected by the spillage of a large quantity of furnace oil onto the waters of Morts Bay; or
- (2) within the area of potential danger which would arise as a result of the spillage by the Appellant of a large quantity of furnace oil onto the waters of Morts Bay. 10

because it was obviously likely that such oil would be carried by wind and tide into the Bay and would or might

- (a) pollute the Respondent's foreshores;
- (b) congeal upon and interfere with the use by the Respondent of its slipways;
- (c) interfere with and impede the use by the Respondent of its dry dock;
- (d) cause the Respondent to apprehend danger from fire should the oil become ignited and accordingly to cease its industrial operations either 20
 - (i) until such oil was removed, dissipated, or otherwise rendered harmless; or
 - (ii) enquiries and consideration indicated that it was safe to continue such operations;
- (e) adhere to piles of wharves (including the "Sheerlegs Wharf") and other structures on the foreshores with the rise and fall of the tide thus rendering such piles and other structures dangerous and more readily combustible in the event of fire 30
- (f) if ignited, burn with great heat and that any such fire would spread rapidly wherever such oil was congregated in sufficient quantities and do damage to wharves, vessels and installations

24. In fact the spillage did cause damage of the

nature described in paragraph 23 (a), (b), (c), (d)(ii), (e) and (f) above.

10 25. The Appellant therefore owed a duty to the Respondent to exercise reasonable care to avoid spilling a large quantity of furnace oil onto the waters of Morts Bay. The evidence was, and the Appellant before the trial judge and on appeal to the Full Court did not dispute, that it failed to exercise such reasonable care whereby the large quantity of furnace oil was spilled onto the waters of Morts Bay.

26. That failure to take reasonable care was the cause of the damage done by the fire which broke out on the 1st November 1951 and that damage is recoverable by the Respondent from the Appellant because

- 20 (i) it might reasonably have been foreseen to have been a likely or possible result of the negligent act;
- (ii) it was in fact directly traceable to the negligent act and not due to the operation of independent causes having no connection with the negligent act except that they could not avoid its results. In re Polemis and Furness Withy & Co. [1921] 3 K.B. 560.

Nuisance

30 27. A public nuisance is constituted by the discharge of oil into the sea in such circumstances that it is likely to be carried onto the shore to the prejudice and discomfort of, inter alia, any foreshore proprietor. Southport Corporation v. Esso Petroleum Co. Ltd. [1954] 2 Q.B. 182 per Denning L.J. at p. Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioner 83 C.L.R. 353 per Fullager J. at p.393.

28. The discharge by the Appellant of a large quantity of furnace oil into the waters of Morts Bay was such a public nuisance because:

- 40 (i) It was obviously likely that the effect of wind and tide would be to carry a substantial quantity of such oil onto and adjacent to the foreshores of the Bay
- (ii) For the reasons set out in paragraph 23 it was

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obviously likely that such oil, carried to the foreshores would prejudice the Respondent, a foreshore proprietor.

(iii) Such oil did in fact, in the manner set out in paragraph 14 prejudice the Respondent.

29. The act of discharging a large quantity of furnace oil into the waters of Morts Bay was the cause of the damage done by the fire which broke out on the 1st November 1951 because

- (a) it might reasonably have been foreseen to have been a likely or possible result of the discharge of the oil 10
- (b) it was in fact directly traceable to the discharge of the oil and not due to the operation of independent causes having no connection with the discharge of the oil except that they could not avoid its results.

GENERAL SUBMISSIONS ON DAMAGES

30. The damage was foreseeable

The Respondent submits that the findings of the trial judge set out in paragraph 12 above are not inconsistent with the view, which the Respondent submits is the proper view that :- 20

(i) While furnace oil floating on water is not likely to catch fire, yet it can, in certain circumstances, be ignited, and if it does catch fire it will burn rapidly and with intense heat and such fire is accordingly likely to escape and do damage to foreshore installations. Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners 83 C.L.R. 353 at pages 376-8, 384. 30

(ii) It was obvious that the oil would not all of it remain floating on the water, but that a quantity would congeal upon or remain attached to the piles of wharves and other structures on the foreshore and that

(a) oil so deposited might readily be ignited and

(b) any structure so coated or impregnated with 40

oil would burn much more readily, so that if any fire were to be started or break out it would spread more rapidly, be much more difficult to control and would do more damage, than would otherwise have been the case.

The Respondent submits that this, upon the evidence is what happened and that the Appellant is consequently liable for the damage so caused.

10 31. The damage was a direct result

Upon the assumption that the Appellant could not have foreseen damage to the Respondent by fire resulting from its wrongful act, the Respondent relies upon the decision in In re Polemis, Furness Withy & Co. [1921] 3 K.B. 560 for the proposition that such damage is none the less recoverable by the Respondent from the Appellant because

- 20 (i) the wrongful act of discharging furnace oil into the waters of Morts Bay was a direct cause of the fire damage; and
- (ii) nothing which occurred between the discharge of the oil and the outbreak of the fire amounted to an independent cause sufficient to "break the chain of causation between the Appellant's default and the Respondent's hurt".

32. The Respondent submits that the reasons for judgment given in In Re Polemis

- 30 (a) correctly interpret the law relating to the measure of damages in tort Smith v. L. & S.W. Railway Co. L.R. 6C.P.21; and
- (b) have for so long been acted upon that they ought not now to be departed from. Thorogood v. Van den Bergh & Jurgens Ltd. [1951] 2 K.B. 537. Malleys Ltd. v. Jones [1955] 55 S.R. (N.S.W.) 390; Dickson v. Commissioner for Railways (Qld) 1922 30 C.L.R. 579.

40 The proper test of what is the "direct cause" of damage in the application of the principle in In Re Polemis is that propounded by Lord Wright in Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport [1942] A.C. 691 at 706 and by

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Manning J. in the decision the subject of this appeal.

33. The Respondent further submits that the matters and circumstances relied upon by the Appellant as constituting intervening causes are not intervening causes but merely

- (i) factors present in the situation in which the wrongful act was committed
- (ii) ordinary incidents of or the results of ordinary incidents of the activities ordinarily and properly being carried on within the "area of potential danger" 10
- (iii) matters the occurrence of which were reasonably foreseeable by the Appellant
- (iv) matters the effect of which on the consequences of the Appellant's wrongful act were reasonably foreseeable by the Appellant

34. The Respondent accordingly submits that this appeal ought to be dismissed for the reasons that:-

R E A S O N S

- (1) The damage sustained by the Respondent was caused by the negligence of the Appellant. 20
- (2) The damage sustained by the Respondent arose out of a public nuisance caused by the Appellant.
- (3) The Appellant might reasonably have foreseen that its wrongful act could cause the damage complained of.
- (4) The Appellant's act was the direct cause of the damage complained of. 30

R. L. TAYLOR

RUSSELL BAINTON

No. 23 of 1960

IN THE PRIVY COUNCIL
ON APPEAL FROM
THE SUPREME COURT OF NEW SOUTH WALES
ADMIRALTY JURISDICTION No. 7 of 1952

B E T W E E N :

OVERSEAS TANKSHIP U.K. LIMITED
(Defendant) Appellant

-- and --

MORTS DOCK & ENGINEERING CO.
LIMITED (Plaintiff) Respondent

CASE for the RESPONDENT

LIGHT & FULTON,
24, John Street,
Bedford Row, W.C.1.
Solicitors for the Respondent.