Jean who?
(or Good Lord, your place has gone up in flames!)
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ABSTRACT
Captain Olsen had his ship berthed in Sydney Harbour for less than 26 hours yet this resulted in court proceedings spanning fourteen-and-a-half-years. On the fortieth anniversary, this article fills in the factual background to the incident that led to two of the leading cases in the 20th Century law of negligence.

[1] It is doubted that the young Laurence Street paid much attention to the small — one column inch — news item on page 5 of the Sydney Morning Herald (SMH) of Friday, 2 November 1951. Except for the city editor squeezing it in alongside the day’s “Law List” it might have never come to his attention at all, let alone impart some lasting memory to the newly-admitted member of the NSW Bar. There was nothing remarkable in Edward Ankar Olsen being fined £25 with costs of £4/14 s for being the Master of a vessel from which oil had escaped into Sydney Harbour on Tuesday, 30 October 1951.

[2] The beak, AE Hodgson SM in the Central Summons Court, heard evidence from Captain David Craven, a Maritime Services Board harbour inspector, that the oil had escaped from Captain Olsen’s ship, berthed at Ballast Point, Mort’s Bay. JA Easton of counsel, entering a guilty plea on behalf of Captain Olsen who was not present in court, said a valve had stuck. Notwithstanding Street’s previous naval service, a merchant shipping mishap of minor dimension was small beer — *de minimis non curat lex*.

[3] Other items were more likely to engage the attention of Street. Sir John Latham having announced his retirement as Chief Justice of the High Court of Australia, speculation was rife in legal circles regarding his successor. Suggested candidates were the Prime Minister RG Menzies (still smarting over the defeat of the Communist Party Dissolution Bill and suffering badly in popularity — in 1951 it looked as though the winner of the 1949 Federal election might prove to be a one-term wonder), Sir
Owen Dixon (then a puisne justice already on the High Court and one-time pupil-master of Menzies), and a Sydney silk, GE Barwick KC.

[4] It was Sir Owen who got the nod and among those gracing the swearing-in ceremony at Sydney on 21 April 1952 was Street’s father, Sir Kenneth Street, Chief Justice of NSW. Barwick KC had his turn twelve years later when, again in Sydney, a successor to Sir Kenneth as Chief Justice of NSW, Sir Leslie Herron, was present at Sir Garfield Barwick’s swearing-in ceremony. Both Chief Justices of the High Court referred to the compliment paid to them personally and to the High Court by the presence of the respective Chief Justices of NSW.

[5] The earlier resentment of the position occupied by the High Court and the recognition of that resentment were now all but gone. Previously, direct appeal to the Privy Council was available but, because of the enormous expense involved, was rarely utilised. Upon Federation, the interposition of the High Court as a superior appellate court at close hand was viewed at the time with disfavour and apprehension by the State tribunals, an added sense of care being brought to their decisions by the existence of the High Court. Piddington¹, appointed to, but never sitting on, the High Court, quoted the flippant assessment of Pring J — “We can’t be always wrong” — when judgment after judgment of the NSW Supreme Court were reversed, and recalled the anecdote attributed to Sir Julian Salomons QC, the one-time appointed Chief Justice of NSW, who had also resigned his office before he exercised it — Salomons had suggested a formula for the conclusion of all State judgments in these terms:

We are unanimously of the opinion that judgment ought to be entered for (let us say) the plaintiff, but to save the trouble and expense to the parties of an appeal to the High Court, we order judgment to be entered for the defendant.²

[6] Following three decades behind his father, the by-now Sir Laurence Street, Chief Justice of NSW, would attend at Canberra upon the retirement of Barwick CJ (1981), the swearing-in (1981) and later retirement of Gibbs CJ (1987), and the swearing-in of Mason CJ (1987).
Returning to our 1951 newspaper readers, other news included Morse Code as the favourite for the Melbourne Cup, and Hollywood actress Jean Parker in a dark and very modest white polka-dot “bikini”, who caused a stir at Bondi when beach inspector Bill Willis ordered her off the beach. Thanks to her agent the incident made the New York World Telegram under the headline “Is that a bything suit, myte?” Of course, the Sydney Telegraph brought us a photograph of Miss Parker in aforementioned bikini so we could judge for ourselves the indecency of it all. The NSW Bar was planning a new building for chambers and the airline pilots had succeeded in obtaining immediate salary increases of between 25 and 33%. Margaret Whitlam’s father, WR Dovey KC had scored a bon mot when, before the Licensing Commission hearing regarding the publican who made a loss while operating the Moree Hotel, he quipped that it was a first. Holden motor cars were more prevalent in the stolen car statistics and a GMH spokesman (they didn’t have spokespersons back then) attributed this to the good taste of the thieves. Otherwise there was little capable of inducing any of the young bloods at the Bar to purchase a Bristol 403 sports coupe (£3113 including tax from John Crouch Motors P/L) or to place an advance order for the exciting new Jaguar XK-120 expected to arrive in Australia in the New Year.

We note concern for the coming summer. Already a hot, dry spell had seen an early start to the bushfire season with lives lost and property damage through several major fires on the outskirts of Sydney. There were also fires within the metropolitan area including several wharf fires suspected of having been lit by a “firebug”. In this context the SMH page 3 report, including a photograph, headlined “Men leap for life when blazing oil engulfs ship” was of small moment.

Eighty workmen had jumped for their lives from the 1100-ton collier Corrimal on the afternoon of Thursday, 1 November, when a fire engulfed the Shearlegs wharf and spread to the ship.

The conflagration was not unexpected. Workmen interviewed by the SMH said the oil had been lying around the wharf for weeks. “We have been expecting a fire here,” said one, while another told the newspaper that “It had to come sooner or later with so much oil about.” Ray Cameron, a fitter’s chargehand of Balmain, said he was
working on the boat deck near the bridge when he heard someone say casually, “That oil slick is on fire at last.” A few seconds afterwards, the wharf and ship were an inferno. There were fears that the flames might spread to the nearby Caltex oil installation. Damage was estimated at £50 000 after 12-foot-high flames raced along the wharf.

[11] The sea-borne oil burned slowly for a few minutes, then burst into a wall of flames which swept through the timber wharf lying six feet above the water. The heat exploded steel “bottles” of acetylene gas being used by workmen on the wharf and on the Corrimal, with pieces of the shattered containers falling back onto the wharf and the ship like shrapnel and fragments piercing the steel sides of the ship. Those men on the Corrimal able to do so jumped to the wharf and fled through blinding smoke with flames only a few feet behind and dozens of them, oblivious to cuts and scratches, scaled a six-foot iron fence topped with barbed wire. Others on the Corrimal, unable to escape to the wharf, jumped to the lighter, the Audrey D, which was unloading equipment alongside the Corrimal. The master of the Audrey D, Captain David Bloxham of Pyrmont, and the crew were offloading a new funnel for the Corrimal when the fire swept over the collier and caught the wooden mast of the Audrey D. The crew cleared the lines and two passing tugs took her in tow, mast ablaze, down-harbour to the Goat Island fire-float base.

[12] Three fire-floats from the Goat Island base went to the dock to assist sixty firemen from eight brigades fighting the fire. The flames charred a section approximately 200 feet long by 50 feet wide of the timber wharf and destroyed seven welding sets valued at £600 each on the wharf and twisted and buckled steel estimated to value thousands of pounds. Fortunately the firemen on the wharf and the fire-floats prevented the fire spreading to a nearby store containing machinery worth £1 000 000.

[13] The Corrimal was undergoing a major refit by her coal merchant owners, RW Miller & Coy, which had commenced in February and was to have been completed by the end of the year. NJ Middleton, the Marine Superintendent for RW Miller, said “The fire almost destroyed all the work we have put into her since February.”
The day that Captain Olsen pleaded guilty *in absentia* also saw the announcement of Street’s engagement to Miss Susan Gai Watt. There was an engagement party that night at her parents’ Point Piper residence. And the absent Captain Olsen? He wasn’t at the engagement party. Time and tide and the demands of twentieth century commerce wait for no man. Captain Olsen and his ship SS *Wagon Mound* had weighed anchor and departed Sydney Harbour at 11.56 am on Tuesday, 30 October, almost two hours behind schedule and two days before his case was heard by Mr Hodgson, and fifty hours before the fire that engulfed and destroyed the Shearlegs wharf and the ships *Corrimal* and *Audrey D*. The aftermath of Captain Olsen’s stay of less than 26 hours in Sydney harbour was to remain before the courts for the next fourteen-and-a-half year, and involve two appeals to the Privy Council and a total of 84 gilt-edged pages of the *Lloyd’s Law Reports* — 54 hearing days in the five times it went to court.

The case first came on for hearing in 1958 before Kinsella J (sitting in Admiralty), when the owners of the destroyed wharf proceeded against Captain Olsen’s principals. Mr Cullen-Ward, the chief bunkering officer of the Vacuum Oil Coy, was permitted to testify regarding the escape of petrol from the *Wagon Mound*. At this early stage in the proceedings the plaintiff did not want to surrender the possibility that in fact the fire was the result of a petrol spillage rather than oil. Later, upon hearing further testimony regarding the quantity of escaped petrol (“insignificant” according to the fourth mate of the *Wagon Mound*, Mr McMahon), and expert testimony relating to the volatility of petrol, Kinsella J made a finding of fact that the petrol leakage was irrelevant because the amount was insignificant and also that, in the 72 hours which had elapsed between the petrol leaking (on the morning of 29 October) and the fire, the petrol would have evaporated. Thus the plaintiff was confined to the escaping oil as causation for its suffered damage. The leaking petrol was never thereafter raised again.

Additionally, Cullen-Ward testified that he saw bunkering oil escaping from the ship’s forepeak tank, the hatch of which was open at 4 am on Tuesday, 30 October.
Next, Captain Craven, the informant in the criminal proceedings against Captain Olsen six years earlier, told of boarding the Wagon Mound at 10.30 am on 30 October and of the furnace oil he saw — a heavy black oil on the deck and sides of the ship and on the water that was not a fire hazard. The master (Captain Olsen) told Craven that he would leave authority with his agents to act on his behalf in any proceedings relating to permitting the oil to escape. Captain Olsen’s agent was Mr Durack, the manager of the Caltex Oil installation at Mort’s Bay.

Mr Parkin was the next witness. He was the manager of the plaintiff company Mort’s Dock and Engineering Coy Ltd. He had arrived at work at 8 am on the morning of 30 October, whereupon he saw large quantities of heavy oil, on the water and congealed on the sides of the ships and the wharf piles. He was sufficiently concerned about the outbreak of fire that he ordered the cessation of welding until further order and telephoned Mr Durack, the Caltex manager, on BW 8471. Mr Durack came over to the plaintiff’s premises at about 10 am and had assured him that further work, including welding, was safe. Reassured, Mr Parkin directed the resumption of work which thereafter continued through the Tuesday, Wednesday and Thursday. Parkin continued his testimony: he was in his office at about 2 pm on Thursday, 1 November when Mr Durack telephoned. Mr Durack was seeking permission to return to the worksite and wished to bring along another person to inspect the damage to the plaintiff’s premises. At this stage it appears that Mr Durack fully accepted responsibility for the damage, which was confined to fouling and congealed oil. Continuing, Mr Parkin told the court that before he could respond to Durack’s request, Mr Durack exclaimed over the telephone: “Good Lord, your place has gone up in flames!”

In regard to the assurance given by Mr Durack to Mr Parkin, in 1951 Durack’s experience was confined to refined oils. His assurance in respect of bunkering oil was of little value. John Venn in his book *The Logic of Chance* wrote:

as regards the man whose veracity is one-half, we are (as Mr Monro has very ingeniously suggested) only too well acquainted with such witnesses, though under a somewhat different name; for this is really nothing else than the case
of a person confidently answering a question about a subject matter of which he knows nothing, and can therefore only give a mere guess.

[20] The Sydney Harbour Master, Captain Murcheson, who was overseas at the material time, would have advised against the resumption of work had he been consulted because of his previous experience with such fires of oil floating on water. However, the then Acting Harbour Master, Captain Simpson, was not perturbed about the fire risk from the spillage when it was reported to him by Captain Craven.

[21] Other witnesses were Hodgkiss, O’Toole and McGiffen, employees of the plaintiff, whose testimony suggested that the morning of 30 October was extraordinary in that the presence of very thick and dark oil, hitherto unknown, was seen. This testimony seems to belie the contemporary accounts given to the SMH on the afternoon of 1 November 1951 which suggest the floating oil originated long before any mishap involving the Wagon Mound. None of the dozen or so employees, seven of whom were named and had given their addresses, who spoke to the SMH were called to give evidence.

[22] It may well be that the defendant, also liable for other ships refuelling at the Caltex terminal, did not seek to show that the Wagon Mound was not responsible. On the other hand, the testimony of Parkin and Hodgkiss was not disputed by the defendant and their evidence suggested that the presence of the oil on the morning of 30 October was an untoward event.

[23] History records that Kinsella J found for the plaintiff. Thereafter the plaintiff was the successful respondent on appeal before Owen, Maguire and Manning JJ sitting in banco in the NSW Supreme Court, the judgment of the court being delivered by Manning J in an opinion that was to draw praise from the Privy Council, notwithstanding its decision to recommend to Her Majesty that the defendant’s appeal be allowed. Perhaps the plaintiff would have preferred that the Privy Council demonstrate its confidence in Manning J by upholding his decision.
[24] Thereafter in other actions before the NSW Supreme Court the words (in liquidation) were appended to the plaintiff’s name.

[25] It was the decision of another party, the owner of the Corrimal, that sought to relitigate the case in an action which was to become known as the Wagon Mound (No 2). In 1963, before Walsh J (later of the High Court), the plaintiff lost its negligence action notwithstanding the calling of expert testimony in relation to the foreseeability of an outbreak of fire involving furnace oil, but succeeded in nuisance. However, the Privy Council upheld the plaintiff’s appeal on the facts found by Walsh J — a different finding of facts from the first Wagon Mound case. The Privy Council upheld both appeals and decided that the defendant was liable in negligence but not in nuisance.

[26] Appearing for the plaintiff before Walsh J were a number of counsel, including LW Street. Street did not appear before the Privy Council in the successful appeal, that perhaps being a “perk” reserved for senior counsel. It was one of Street’s last cases before he himself took silk in late 1963. By the time of the Privy Council hearing in 1966, Street J had already been appointed to the NSW Supreme Court bench. The whole Wagon Mound saga had spanned the duration of Laurence Street’s career as a member of the NSW junior Bar and still had several years to run.

[27] And the Wagon Mound? According to Professor Tony Weir, this ship, built during the Second World War in Mobile, Alabama and named after a little-known battle in the French and Indian wars which took place at what is now Wagon Mound, New Mexico, continued to ply the seas under the new name of Caltex Stockholm.

[28] Mort’s Bay is today the home port of the J Fenwick & Co P/L tug Manly Cove, which took part in the salvage of the Goldean Falcon off Port Hacking in August 1986. In litigation before Carruthers J sitting in the Admiralty Division of the NSW Supreme Court, counsel for the plaintiff non-Guild members of the crews participating in the salvage was AW Street’, the son of Sir Laurence Street.
[29] And the Melbourne Cup? *Morse Code* starting at 4/1 fell in the straight and did not finish. *Delta* at 10/1 was the winner.


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1 A member of the Victorian Bar.
2 Material used here has been taken from the *Sydney Morning Herald*, October to November, 1951, and the *Daily Telegraph*, 1 and 2 November 1951, and the *Lloyd’s Law Reports*.
2 *Ibid*.
6 *A Casebook on Tort* (3rd ed, 1974).
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