

The Distillers Company (Bio-Chemicals) Limited - - *Appellant*

v.

Laura Anne Thompson by Arthur Leslie Thompson
her next friend - - - - - *Respondent*

The Distillers Company Bio-Chemicals (Australia) Pty. Limited
Respondent Pro Forma

FROM

**THE COURT OF APPEAL OF THE SUPREME COURT OF
NEW SOUTH WALES**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 19TH JANUARY 1971

Present at the Hearing:

LORD REID
LORD MORRIS OF BORTH-Y-GEST
LORD UPJOHN
LORD DONOVAN
LORD PEARSON

[*Delivered by* LORD PEARSON]

The question at issue in this appeal is whether, on certain assumptions as to the law and the facts, the plaintiff has as against the appellants "a cause of action which arose within the jurisdiction" of the Supreme Court of New South Wales within the meaning of section 18 (4) of the Common Law Procedure Act of New South Wales, No. 21 of 1899, as amended. That Act will be referred to as "the Act of 1899".

The appellants are the first defendants, The Distillers Company (Bio-Chemicals) Limited, who are an English Company and not in any sense resident in New South Wales. The plaintiff has proceeded against them by virtue of section 18 of the Act of 1899. Subsections (1), (2) and (3) of that section provide for the issue of a writ of summons, and for service of the writ or notice of it, in an action against a person not resident within the jurisdiction of the Court. Subsection (4) provides as follows:

"(4) If the defendant does not appear to the writ of summons within the time prescribed, a Judge, upon being satisfied:

(a) that there is a cause of action which arose within the jurisdiction or in respect of the breach of a contract made within the jurisdiction; and

(b) that service of the writ or notice thereof, as the case may be, was duly effected or that the writ or the notice thereof came to the defendant's knowledge,

may, if he thinks fit, by order, permit the plaintiff to proceed to sign final or interlocutory judgment in such manner and subject to such conditions as may be prescribed or as he in all the circumstances may deem fit."

The English Company, under Order IX rule 6 of the General Rules of the Supreme Court of New South Wales, filed a notice of conditional appearance and applied for the writ or the service of it to be set aside on the ground that the Court had no jurisdiction to entertain the action. Taylor J. dismissed the application, and his decision was affirmed on appeal by the Court of Appeal of New South Wales.

It is to be noted that, whereas section 18 of the Act of 1899 confers a discretion on the Court, no question relating to discretion arises in this appeal. The application raised simply a question of law, dependent on the construction of section 18 (4) (a), and was dealt with by Taylor J. and the Court of Appeal on that footing.

The assumptions as to the law and the facts, on which this appeal is to be decided, have to be gathered from the judgments of Taylor J. and the Court of Appeal. No declaration or other pleading was delivered. Some facts were set out in affidavits, but these were by no means complete and had to be supplemented by agreed information conveyed by counsel to the Courts. The principal assumptions are set out by Taylor J. as follows:

“The English company is incorporated in Great Britain where it has its registered office and carries on business. As part of its activities it manufactures pharmaceutical preparations. Some of its preparations contain Thalidomide, a substance which the English company obtains in bulk from German manufacturers. The company's products are sold in Australia but not by it. The second-named defendant (called the Australian company) markets and sells the products in Australia. It secures them by orders received in England by the English company which packs and ships the goods and forwards the invoices and shipping documents to the Australian company. One of the products manufactured by the English company and distributed in Australia by the Australian company was a sedative and sleep-inducing drug, the principal ingredient of which is Thalidomide, this was marketed under the name Distival. It is sold in tablet form and is put up by the English company in phials containing 24 tablets. The phial is contained inside a small package in which is a printed document relating to its use. The tablets, the phial, the printed document and the package are supplied as a unit by the English company to the Australian company. All carry the name of the English company as the manufacturer of the drug and there is no reference to the Australian company. They are sold to the Australian company in the form in which they are to reach the ultimate consumer. The printed matter that goes with the unit describes the drug as a harmless, safe and effective sedative with no side effects. Its use is not limited in any way and it is said to be particularly suitable for young children and the aged.

“The plaintiff, an infant, sues by her next friend, her father. Her mother says that in August, 1961 when she was pregnant with the plaintiff her doctor prescribed for her Distival, and this she took. Her child, the plaintiff, was born on 10th April 1962 without arms and with defective eyesight. It is the plaintiff's case that her birth with these disabilities is due to the fact that her mother took the preparation Distival during her pregnancy. It is claimed on her behalf that the drug Thalidomide has a harmful effect on the foetus of an unborn child during the first three months of pregnancy and that as a result she was born malformed and with defective vision.

“No declaration has yet been filed, but correspondence between the solicitors indicates that the plaintiff's case against the first defendant is based on negligence as the manufacturer and supplier of Distival.

“The second-named defendant, the Australian company, is sued as the distributor of the preparation Distival in New South Wales. There is no proved connection between the Australian and English companies other than that the English company is the registered holder of 933 of the 1000 issued shares in the Australian company.

“The question of whether or not the plaintiff is able to sue for injury received prior to her birth and questions of whether or not a duty not to injure her could be owed to her in the circumstances indicated above were not debated before me. Mr. Ash, Q.C. for the English company made it clear that he made no concession on either of these matters, but did not wish them decided in these proceedings. I was accordingly invited to determine the question of jurisdiction on the basis that the plaintiff is the proper person to bring this action.”

Some additional points can be taken from the judgments in the Court of Appeal.

Sir Gordon Wallace P. said “The procedure in this case seems to involve an assumption that the plaintiff has a valid cause of action based on the principles enunciated in *Donoghue v. Stevenson* [1932] A.C. 562 and in cases relating to the liability of manufacturers (e.g. *Grant v. Australian Knitting Mills Ltd.* [1936] A.C. 85) but no decision to be given by this Court on the present appeal must be taken as support for such assumption.”

Asprey J.A. said that Distival is obtainable in New South Wales only upon its retail sale through chemists upon the prescription of medical practitioners. He also said “The English Company knew of the dangerous qualities of the thalidomide which it purchased in bulk from the German manufacturer and incorporated it in its own preparation known as Distival.” Presumably this should be understood as covering constructive as well as actual knowledge. For commercial as well as moral reasons it seems highly improbable that the English Company would supply Distival for sale without any warning of the danger if they had actual knowledge of it. An allegation that they ought to have known of the danger would be more plausible and would raise a question of fact to be decided on the evidence.

The judgment of Holmes J.A. contains further information as to the nature of the plaintiff's case. He said

“In correspondence between the solicitors for the parties it has been stated that the plaintiff's declaration which is to be filed in this proceeding ‘will be framed in negligence’. This matter was further stated in the course of the argument before us by counsel as follows:

“It would be our submission at the moment that the obligation or the duty in the defendant did not arise until the plaintiff's mother came to purchase and it was at that stage that she became as it were the neighbour of the first defendant and the obligation was then imposed on the first defendant to warn the mother of the dangers involved in taking this drug and that their failure to do so was an omission on their part. That occurred at the time of purchase. That was in New South Wales. In those circumstances the cause of action arose then on the basis that it was the last act.”

Holmes J.A. also said:

“This is not a case of careless manufacture. The Distival in this case for all one knows or is ever likely to know was no different from the other Distival manufactured by the appellant. Indeed it is not put that there was an act, neglect, or default in the manufacture of the Distival, but that the breach of duty by the manufacturer was

the failure to warn the pregnant purchaser. This was the breach of duty which was, it is said, causally connected with the damage to the plaintiff. The failure to warn the plaintiff's mother took place in New South Wales, and indeed on the facts of this case it simply could not have taken place anywhere else."

Next to be considered is the question of principle—what is required in order to show, for the purpose of section 18 (4) (a) of the Act of 1899, "that there is a cause of action which arose within the jurisdiction."

There seem to be three possible theories:

- (i) that the "cause of action" must be the whole cause of action, so that every part of it, every ingredient of it, must have occurred within the jurisdiction;
- (ii) that it is necessary and sufficient that the last ingredient of the cause of action, the event which completes a cause of action and brings it into being, has occurred within the jurisdiction; and
- (iii) that the act on the part of the defendant which gives the plaintiff his cause of complaint must have occurred within the jurisdiction.

There is an authoritative case which in spite of its antiquity is important and apposite. That is the case of *Jackson v. Spittall* (1870) L.R. 5 C.P. 542 decided under sections 18 and 19 of the English Common Law Procedure Act 1852. Section 18 of the Act of 1899 is very similar in subject-matter and wording to sections 18 and 19 of the English Act of 1852. Counsel has stated that these two sections of the English Act of 1852 were in effect adopted by the New South Wales Common Law Procedure Act 1853, which was repealed and evidently to some extent re-enacted in the Act of 1899. At any rate the wording of section 18 (4) (a) of the Act of 1899—"that there is a cause of action which arose within the jurisdiction or in respect of the breach of a contract made within the jurisdiction"—is identical with that of the corresponding provision of the English Act of 1852.

The history is peculiar. There had been previous decisions, under Acts defining the jurisdiction of local courts e.g. county courts, to the effect that the cause of action meant the whole cause of action and the local court did not have jurisdiction unless either the defendant resided or carried on business in the area or the whole, i.e. every part, of the cause of action had occurred in the area. *Borthwick v. Walton* (1855) 15 C.B. 501. Both the Court of Exchequer in *Sichel v. Borch* (1864) 2 H & C 954 and the Court of Queen's Bench in *Allhusen and Another v. Malgarejo* (1868) L.R. 3 Q.B. 340 gave the same construction to the phrase "cause of action" in sections 18 and 19 of the English Act of 1852. But in *Jackson v. Spittall* Brett J, giving the judgment of the Court of Common Pleas, carefully examined the previous decisions, including some that were earlier than *Sichel v. Borch*, and considered the state of the law at the time when the English Act of 1852 was passed, and referred to the growing needs of a commercial community, and construed sections 18 and 19 of that Act. The conclusion was that the phrase "cause of action" in these sections did not mean the whole cause of action but meant "the act on the part of the defendant which gives the plaintiff his cause of complaint". After that the Court of Exchequer expressed differing opinions in *Durham v. Spence* (1870) L.R. 6 Ex. 46 and the Court of Queen's Bench adhered to their former opinion in *Cherry v. Thompson* (1872) L.R. 7 Q.B. 573. Then when the question arose again in *Vaughan v. Weldon* (1874) L.R. 10 C.P. 47 there was a conference of judges and it was decided for the sake of uniformity to adopt the decision of the Court of Common Pleas in *Jackson v. Spittall*. In view of this history the decision in *Jackson v. Spittall* must be regarded as highly authoritative, and in any case the reasoning of Brett J. is

convincing. Their Lordships agree with the view, expressed directly by Sir Gordon Wallace P, and perhaps inferentially by Asprey J., that *Jackson v. Spittall* was correctly decided.

That rules out No. (i) of the three possible theories set out above—the theory that “cause of action” means the whole cause of action and the courts of a country do not have jurisdiction unless all the ingredients of the cause of action occurred within the country (unless the defendant happens to be present in the country). In any case that theory is too restrictive for the needs of modern times. The defendant has no major grievance if he is sued in the country where most of the ingredients of the cause of action against him took place. In such a case, if the theory No. (i) were accepted, the plaintiff, if lacking time and money for following the defendant to the defendant’s country and suing him there, would be deprived of any remedy.

No. (ii) of the three possible theories—*viz.* that it is necessary and sufficient that the last ingredient of the cause of action, the event which completes it and brings it into being, has occurred within the jurisdiction—seems to their Lordships to be wrong as a theory. The last event might happen in a particular case to be the determining factor on its own merits, by reason of its inherent importance, but not because it is the last event. Decisions under statutes of limitation are not applicable. The question in that context being when did the cause of action accrue so that the plaintiff became able to sue, the answer is that the cause of action accrued when it became complete, as the plaintiff could not sue before then. But when the question is which country’s courts should have jurisdiction to try the action, the approach should be different: the search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor. In *Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo)* [1949] A.C. 326 at p. 338 Lord Porter said “Primarily the jurisdiction of the courts in this country is territorial in the sense that the contract or tort sued upon must have some connection with this country or the defendant must be served here”. In the case in *Victoria Lewis Construction Company Pty. Limited v. M. Tichauer S/A* (1966) V.R. 341 the Court’s decision was “that the questions to be litigated in this action are much more closely concerned with Victoria than with France and that the action is one which properly belongs to the courts of this State”. In a negligence case the happening of damage to the plaintiff is a necessary ingredient in the cause of action, and it is the last event completing the cause of action. But the place where it happens may be quite fortuitous and should not by itself be the sole determinant of jurisdiction. One example would be this: suppose that a defendant carries on business in New South Wales and there he manufactures and distributes Distival and sells a packet of it to the plaintiff’s mother without warning of the danger: the defendant very soon afterwards gives up his business and retires to live in another country or State: the plaintiff’s mother after purchasing the packet goes on holiday to any country in the world, say South Africa, and there consumes the Distival whereby (it is assumed) the damage to the plaintiff is caused: the plaintiff’s mother returns to her home in New South Wales. On those facts, if the theory were right, the Courts of New South Wales would have no jurisdiction and the Courts of South Africa (if there was a South African Statute containing provisions similar to section 18 (4) (a) of the Act of 1899) would have jurisdiction to entertain the action, though perhaps in the exercise of their discretion they might decline to entertain it. That is the result of the theory in such a case, and it is not a sensible result: the jurisdiction is wrongly allocated. It is manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did the wrong. It is at any rate not manifestly just

or reasonable that the defendant should have to answer for his wrongdoing in any country in the world to which the plaintiff (or the plaintiff's mother in a case such as this) may have happened to go before the damage occurred. It is not the right approach to say that, because there was no complete tort until the damage occurred, therefore the cause of action arose wherever the damage happened to occur. The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?

Theory No. (iii) is that the cause of action arose within the jurisdiction if the act on the part of the defendant, which gives the plaintiff his cause of complaint has occurred within the jurisdiction. That is the rule laid down in *Jackson v. Spittall*, which is an authoritative case, and the rule is inherently reasonable, as the defendant is called upon to answer for his wrong in the courts of the country where he did the wrong. The rule does not, however, provide a simple answer for all cases. In *Jackson v. Spittall* (supra) the wrongdoing was a breach of contract and there was no difficulty in determining where it occurred. The Court did not have to consider where the wrongful act should be considered to have taken place in an action for negligence. The defendant does not merely by behaving negligently give the plaintiff any cause for complaint in law. The plaintiff has such a cause for complaint if the defendant's negligence has caused damage to the plaintiff. In the great majority of cases the place where the defendant is negligent is the same as the place where the negligence causes damage to the plaintiff. For instance the defendant while driving his car negligently runs into and injures the plaintiff. But in some cases, particularly those in which the principle of *Donoghue v. Stevenson* [1932] A.C. 562 is relied upon, there may be a separation in time and place between the negligent behaviour of the defendant and the resulting damage to the plaintiff. *George Monro Ltd. v. American Cyanamid and Chemical Corporation* [1944] K.B. 432 *Cordova Land Co. Ltd. v. Black Diamond Steamship Corporation* [1966] 1 W.L.R. 793 and *Lewis Construction Co. Pty. Ltd. v. M. Tichauer S/A* (1966) V.R. 341 afford illustrations of this situation and of the problem of deciding where in substance the wrongdoing occurred. On the one hand X is the country where the defendant was negligent and on the other hand Y is the country in which the defendant's negligence caused the plaintiff to be hurt. The problem is a difficult one and there is no need to express any opinion on it in the present case.

In the present case on the assumptions made for the purpose of testing jurisdiction there was negligence by the English Company in New South Wales causing injury to the plaintiff in New South Wales. So far as appears, the goods were not defective or incorrectly manufactured. The negligence was in failure to give a warning that the goods would be dangerous if taken by an expectant mother in the first three months of pregnancy. That warning might have been given by putting a warning notice on each package as it was made up in England. It could also have been given by communication to persons in New South Wales—the medical practitioners, the wholesale and retail chemists, patients and purchasers. The plaintiff is entitled to complain of the lack of such communication in New South Wales as negligence by the defendant in New South Wales causing injury to the plaintiff there. That is the act (which must include omission) on the part of the English Company which has given the plaintiff a cause of complaint in law. The cause of action arose within the jurisdiction.

For the reasons which have been given their Lordships are of opinion that the decision of Taylor J. and the Court of Appeal was right and should be affirmed. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.



In the Privy Council

**THE DISTILLERS COMPANY
(BIO-CHEMICALS) LIMITED**

v.

LAURA ANNE THOMPSON

by

ARTHUR LESLIE THOMPSON

her next friend

**THE DISTILLERS COMPANY
BIO-CHEMICALS (AUSTRALIA)
PTY. LIMITED**

DELIVERED BY
LORD PEARSON