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IN THE PRIVY COUNCIL No. 12 of 1969

ON APPEAL

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

BETWEEN:

THE DISTILLERS COMPANY (BIO-CHEMICALS) LIMITED *(First Defendants)* — *Appellants*

and

LAURA ANNE THOMPSON BY ARTHUR LESLIE THOMPSON HER NEXT FRIEND *(Plaintiff)* — *Respondent*

and

THE DISTILLERS COMPANY (BIO-CHEMICALS) (AUSTRALIA) PTY. LIMITED *(Second Defendants)* — *Respondents Pro Forma*

CASE FOR THE RESPONDENT LAURA ANNE THOMPSON

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Cannon Street,
London, E.C.4.

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CASE FOR THE RESPONDENT LAURA ANNE THOMPSON

RECORD

1. This is an Appeal brought by leave granted on the 17th March 1969 by the Court of Appeal of New South Wales from a decision of that Court given on 4th September 1968 dismissing an appeal by the Appellant from an order of Mr. Justice Taylor of the Supreme Court of New South Wales made on the 9th day of November 1967. p. 52. p. 24. p. 20.

2. By that order Mr. Justice Taylor dismissed an application to strike out the Writ of Summons herein against the Appellant or to set aside the service of the Writ upon the Appellant and ordered that the Appellant pay the costs of such application.

3. The Respondent had issued and served a Writ of Summons against the Appellant and against The Distillers Company Bio-Chemicals (Australia) Pty. Limited to which Writ the Appellant had entered a conditional appearance and thereafter made the application to strike out the Writ which application is the subject of this appeal. The Distillers Company Bio-Chemicals (Australia) Pty. Limited entered an appearance. p. 1.

4. The facts upon which the application before Mr. Justice Taylor was decided appear from His Honour's judgment and are as follows:—

p. 13, l. 3. "The English company (meaning thereby the Appellant) 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 as 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."

5. His Honour also said:—

"The English company on the evidence before me supplied as safe, a drug which in fact was harmful and which injured the Plaintiff. All this took place in New South Wales . . . .". p. 20, l. 2.

6. His Honour did not and was not asked to consider whether the Respondent being an unborn child at the date of consumption of the Distival by her mother was able to sue in respect of the injury suffered by her or whether a duty was owed by the Appellant to the Respondent and was invited to determine the question of jurisdiction on the basis that the Respondent was the proper person to bring this action, and that the Appellant owed a duty to the Respondent in accordance with the principles enunciated in *Donoghue v. Stevenson* (1932 A.C. 562). p. 14, l. 19.

7. The relevant statutory provision is Section 18 of the Common Law Procedure Act of New South Wales 1899 (as amended) which provides as follows:—

"18. (1) In any action against a Defendant who—

(a) being a corporation is not resident incorporated or registered within the jurisdiction of the Court and is not registered under Part VI of the Companies Act, 1936, as amended by subsequent Acts; or

(b) being any other person is not resident within the jurisdiction of the Court,

the Plaintiff may issue a writ of summons in the form prescribed.

(2) Either the writ of summons or a notice thereof in the form prescribed shall be served upon the Defendant as may be prescribed.

(3) Until otherwise prescribed the writ of summons shall be served in the following cases:—

(a) where the writ of summons may be served under the provisions of the Service and Execution of Process Act 1901 (as amended by subsequent Acts) of the

Parliament of the Commonwealth.

(b) where the Defendant is a British subject or being a corporation is incorporated in the United Kingdom or in Australia or in any of the other realms and territories of Her Majesty the Queen.

(c) where the Defendant is in the United Kingdom or in Australia or in any of the other realms and territories of Her Majesty the Queen.

(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."

p. 3, l. 10. 8. The Appellant is not and was not at any relevant time a corporation resident incorporated or registered within the jurisdiction of the Supreme Court of New South Wales nor registered under Part VI of the Companies Act 1936 as amended by subsequent Acts.

9. There has been no contractual relationship between the Respondent and the Appellant and the basis of jurisdiction, if any, must therefore be that "there is a cause of action which arose within the jurisdiction".

10. The Respondent contends that the cause of action upon which the Respondent relies namely a claim in negligence against the Appellant arose in New South Wales.

11. The Respondent contends that the duty of care owed by the Appellant to the Respondent as one whose mother was an ultimate consumer of the Appellant's product was breached when the Distival was either supplied to the Respondent's mother or taken by her in New South Wales.

p. 16, l. 1. 12. Mr. Justice Taylor held that in an action based upon negligence it is for the plaintiff to show that the wrongful act, default or omission of the defendant relied upon was done or omitted within the territorial jurisdiction of the Court where the writ was issued.

p. 16, L. 1. 13. His Honour came to this view after expressing his opinion that there was no practical difference between the meaning of the expression "cause of action" in Section 18 (4) and "tort

committed within the jurisdiction" in R.S.C. Order XI R 1. That rule having been considered in the case of *George Munro Limited v. American Cyanamid and Chemical Corporation* (1944 1 K.B. 432) His Honour said of that case:— p. 15, l. 36.

> "The case, as I read it, decided only that where the wrongful act of the defendant which was relied upon as negligence took place outside the jurisdiction of the British Court leave should not be given if the only element of the tort that took place in Great Britain was the damage."

14. Although His Honour went on to find, as appears below, p. 20, l. 4. that in this case the act or omission was committed or omitted within the territorial jurisdiction of the Court where the writ was issued the Respondent contends that it is not correct to say that there is no practical difference between the meaning of the phrases, "the cause of action arose" and "the tort was committed" and that it is not necessary for jurisdiction to be found in the Supreme Court of New South Wales that the act or omission be committed or omitted within the jurisdiction.

15. However, despite this contention, it was argued before p. 16, l. 26. Mr. Justice Taylor that accepting the correctness of the view referred to in paragraph 12 above in fact the acts and omissions relied upon were committed and omitted within the jurisdiction. It was submitted that upon the principles established by *Donoghue v. Stevenson* (1932 A.C. 562) and *Grant v. Australian Knitting Mills* (1936 A.C. 85) the Appellant was under a duty to the Plaintiff to take care that its product did not injure her. This duty arose from the fact that the Appellant put out its p. 16, l. 17. product so as to reach the ultimate consumer in the form in which it was packed and clearly contemplated that it might be used by a person in the position of the Respondent's mother.

16. In considering whether the Plaintiff's cause of action p. 16, l. 4. arose in New South Wales, Mr. Justice Taylor was of the opinion that it was of assistance to determine when it arose.

17. From the opinions expressed in the case of *Watson v. Fram Reinforced Concrete Company (Scotland) Limited & Ors* (1960 S.C. 92; 1960 S. L.T. 321), His Honour considered that the Respondent's cause of action arose when she was injured by her mother consuming the Appellant's product. p. 19, l. 17.

18. His Honour said, speaking of the Appellant:— p. 19, l. 29.

> "It committed the wrongful act, so far as this Plaintiff is concerned, in supplying or causing to be supplied the dangerous substance to the Plaintiff's mother which injured her"

and pointed out; p. 19, l. 32.

"the fact that the supplying was done by an Australian Company is an immaterial circumstance. To hold otherwise would be to ignore the principles established by *Donoghue v. Stevenson* as to the liability of the manufacturer to the ultimate consumer despite the intervention of retailers".

p. 19, l. 44. 19. His Honour concluded therefore that there had been in New South Wales that "concurrence of breach of duty and damage which is the ground to any action based on negligence".

20. The Respondent submits that the views thus expressed by His Honour are correct subject to the contention referred to above that the test enunciated by His Honour places too high a burden upon the Respondent.

p. 28, l. 10. 21. Mr. Justice Wallace (the President of the Court of Appeal) considered that the reasoning of Mr. Justice Taylor as appearing at page 19 line 39 to page 20 line 6 was correct and thought that the appeal could be dealt with by the application of the principles stated in *Donoghue v. Stevenson* (supra) complemented by the observations of Lord Wright in *Grant v. Australian Knitting Mills.* (supra)

p. 32, l. 6. 22. The President approved of the use made by Mr. Justice Taylor of *Watson v. Winget Limited*, also known as *Watson v. Fram Reinforced Concrete Company (Scotland) Limited & Ors*) (supra) and quoted the following additional passages from the speech of Lord Reid: At page 325 of the Scots Law Times, His

p. 32, l. 11. Lordship said:

"If in a *Donoghue v. Stevenson* case time begins to run from the date when the manufacturer sells the defective article there will be many cases where the right of action of a person injured by the defect will have been cut off before the injury takes place:"

p. 32, l. 18. and at page 327 His Lordship said:

"The ground of any action based on negligence is the concurrence of breach of duty and damages, and I cannot see how there can be that concurrence unless the duty still exists and is breached when the damage occurs".

p. 32, l. 38. 23. His Honour then referred to Lord Wright's observations in *Grant v. Australian Knitting Mills* (supra at p104-5) wherein he referred to the fact that the duty only becomes vested by

p. 33, l. 32. the fact of actual use by a particular person and expressed his view that the Appellant's duty "vested" in a relevant sense when the "Distival" tablets were handed by the chemist to the Plaintiff's mother for consumption and she swallowed one or more of them.

p. 33, l. 43. His Honour said:—

"I am of the opinion that the first named Defendant (meaning thereby the Appellant) breached a continuing and subsisting duty to the Plaintiff's mother (or the Plaintiff) in New South Wales and caused the injury in New South Wales resulting from such breach. In other words duty, breach and injury all existed or occurred in New South Wales and so in the fullest sense, the cause of action arose here".

24. It is submitted that the above quotation is a correct statement of the law.

25. Mr. Justice Asprey (a member of the Court of Appeal) considered the meaning of the word "arose" in the context of Section 18 (4). After considering the cases of *George Munro Limited v. American Cyanamid and Chemical Corporation* (1944 K.B. 432); *Bata v. Bata* (1948 W.N. 366) *Cordova Land Company Limited v. Black Diamond Steamship Corporation* (1966 1 W.L.R. 793) and *Kroch v. Rossell et Cie* (1937 1 All E.R. 725) His Honour considered that when as in Order XI Rule 1 (ee) in relation to "an action" a "tort committed" is spoken of, not only the breach of duty but the damage must take place within the jurisdiction. All matters which are requisite for the cause of action must occur within the jurisdiction.

p. 39, l. 38.
p. 40, l. 4.
p. 41, l. 21.
p. 41, l. 28.
p. 41, l. 21.
p. 42, l. 29.

26. His Honour however rejected the submission that there was no essential difference between the words of the English Order XI Rule 1 (ee) and Section 18 (4) (a) of the Common Law Procedure Act. His Honour said:—

p. 42, l. 36.
p. 43, l. 14.

"In my view, the concept of a cause of action, founded on the tort of negligence arising within the jurisdiction of a state is quite different from the notion of the commission of that tort within the same jurisdiction. 'To arise' in this context is, to my way of thinking, 'to come into existence'."

27. His Honour points out that a cause of action in the field of negligence is only inchoate at the stage when the breach of duty takes place. It comes into existence when, as a consequence of the breach, actual loss or damage results.

p. 43, l. 21.

28. It is submitted that His Honour is correct when he says that the potential or contingent duty in the type of negligence action discussed in *Donoghue v. Stevenson* (supra) and *Grant v. Australian Knitting Mills* (supra) vests and its breach becomes actionable when a particular person uses or consumes the product with resultant injury. His Honour said:—

p. 43, l. 43.
p. 43, l. 46.

"It is at this stage, and thus at the place of occurrence of the damage, that it can be said that the cause of action 'arose'."

29. It is submitted that the meaning attributed to the wording "a cause of action which arose within the jurisdiction" by Mr. Justice Asprey is supported by, inter alia, the cases of
p. 44, l. 2. *Jackson v. Spittall* L.R. 5 C.P. 542, *Vaughan v. Weldon* L.R. 10 C.P. 47 and *Durham v. Spence* L.R. 6 Exch. 46, decided upon similar words in Section 18 of the Common Law Procedure Act 1852.

p. 47, l. 12. 30. Mr. Justice Holmes (a member of the Court of Appeal) pointed out that this was not a case of careless manufacture but one in which the breach of duty alleged was the failure to warn the pregnant purchaser. This failure took place in New South
p. 47, l. 25. Wales and His Honour said:—

"could not have taken place anywhere else".

p. 47, l. 26. 31. From this fact, His Honour concluded that the Plaintiff could only have been within the neighbour principle of *Donoghue v. Stevenson* (supra) in New South Wales.

p. 47, l. 36. 32. In these circumstances, His Honour considered that although the Appellant did not come within the territorial jurisdiction of New South Wales but simply allowed its harmful product to come into the jurisdiction without due warning to the purchaser nonetheless all the elements of the cause of action, duty, breach of duty and damage occurred in New South Wales.

33. It is submitted:—

(a) that even if it be necessary that all the elements of the tort occur in New South Wales in order to found jurisdiction that all such elements have so occurred,

(b) that it is not necessary for all the elements of the tort to occur in New South Wales,

and

(c) that the elements of the tort which did occur in New South Wales are sufficient for it properly to be said that the cause of action arose in New South Wales.

34. The Respondent further submits that even if there is no practical difference between the meaning of the expression "cause of action arose" in Section 18 (4) and "tort committed within the jurisdiction" in R.S.C. Order XI Rule 1, it is nonetheless only necessary for the Respondent to show that damage occurred within the jurisdiction.

35. It is submitted that *Munro's* case (supra) in so far as it is to be understood as deciding that damage alone occurring within the jurisdiction is not sufficient for it to be said that the tort was committed there was wrongly decided and ought not to be followed.

36. Damage is of the gist of the action in negligence

(Williams v. Milotin 97 C.L.R. 463) and to hold that the occurrence of the damage alone within the jurisdiction is insufficient to allow it to be said that the tort was committed there is inconsistent with the reasoning in such cases as *Bata v. Bata* (supra) where defamatory material written abroad was published in England and it was held that the tort of libel was committed in England.

37. *Munro's* case (supra) was an unsatisfactory case in that each of the judgments criticises the material upon which the question for the Court was posed for decision and also because the jurisdiction being exercised was a discretionary one.

38. It is submitted that the statement in Cheshire Private International Law 5th Ed. at p. 282 that:—

> "A tort must be committed before it can be said where it was committed . . . no act or default is tortious until all the things necessary to give the Plaintiff a cause of action have occurred. If of the three facts necessary to give a cause of action, only two have occurred, there is a tort in embryo, but not a complete tort. The third fact has still to occur, and it would seem that the place in which its occurrence completes the tort constitutes the locus delecti".

is a correct statement of the law and should be adopted as such.

The Respondent respectfully submits that this appeal should be dismissed with costs for the following amongst other

REASONS

A. Because all the essential elements of the tort occurred in New South Wales.

B. Because the cause of action against the Appellant arose within the jurisdiction of the Supreme Court of New South Wales.

C. Because the judgments of Mr. Justice Taylor and of the members of the Court of Appeal were right and ought to be affirmed.

P. M. WOODWARD. M. W. CAMPBELL.