Judgment
3,
1971

IN THE PRIVY COUNCIL No. 12 of 1969

ON APPEAL

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

B E T W E E N:

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

and

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

and

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

RECORD OF PROCEEDINGS

WILKINSON KIMBERS & STADDON
Hale Court,
Lincoln's Inn,
London, W.C.2.

Solicitors for Appellants

YOUNG, JONES & ~~CO.~~ PATTERSON
2, Suffolk Lane,
Cannon Street,
London, E.C.4.

Solicitors for Respondent.

3, 1971

IN THE PRIVY COUNCIL No. 12 of 1969

ON APPEAL FROM

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

B E T W E E N:

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

and

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

and

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

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

DOCUMENTS NOT INCLUDED IN RECORD

No.	Description of Document	Date
1.	Writ of Summons	26th July 1966
2.	Concurrent Writ of Summons	26th July 1966
3.	Appearance on behalf of Distillers Company Bio-Chemicals (Australia) Pty. Limited	4th August 1966
4.	Conditional Appearance on behalf of Distillers Company (Bio-Chemicals) Limited	9th December 1966
5.	Notice of Motion by Defendant for leave to appeal to Her Majesty in Council	11th September 1968
6.	Affidavit of Edward John Culey in Support of Notice of Motion for leave to appeal to Her Majesty in Council	11th September 1968
7.	Certificate of the Prothonotary of the Supreme Court of New South Wales of settlement of index and fulfilment of conditions	13th December 1968

In the Supreme Court of New South Wales

No. 1

Summons

14th December 1966.

No. 1

SUMMONS

IN THE SUPREME COURT

OF NEW SOUTH WALES No. 6165 of 1966

Between:

LAURA ANNE THOMPSON by ARTHUR LESLIE THOMPSON her Next Friend Plaintiff

and

THE DISTILLERS COMPANY (BIOCHEMICALS) LIMITED and THE DISTILLERS COMPANY BIOCHEMICALS (AUSTRALIA) PTY. LIMITED Defendants

LET the abovenamed Plaintiff, her solicitor, agent or next friend attend before His Honour the Judge, sitting in Public Chambers at the Supreme Court House, Sydney on Tuesday the Seventh day of February 1967 at the hour of ten o'clock in the forenoon or so soon thereafter as the business of the Court permits to show cause why an order should not be made setting aside the Writ herein as against the first named Defendant and alternatively why an order should not be made setting aside service of the Writ herein upon the first named Defendant and alternatively why an order should not be made that all proceedings herein as against the first named defendant be permanently stayed and why the plaintiff should not pay the costs of and incidental to this summons and why such further or other order as to the Court seems meet should not be made upon the grounds appearing in and by the affidavit of Derek Jack Hayman sworn the 2nd day of December 1966

DATED this fourteenth day of December 1966.

A. J. WILDE (L.S.)

Chief Clerk.

In the Supreme Court of New South Wales

No. 2

Affidavit of Derek Jack Hayman with Annexures "A" and "B"

2nd December 1966

No. 2

AFFIDAVIT OF DEREK JACK HAYMAN.

IN THE SUPREME COURT

OF NEW SOUTH WALES No. 6165 of 1966

Between:

LAURA ANNE THOMPSON by ARTHUR LESLIE THOMPSON her next friend — Plaintiff

and

THE DISTILLERS COMPANY (BIOCHEMICALS) LIMITED and THE DISTILLERS COMPANY BIOCHEMICALS (AUSTRALIA) PTY. LIMITED — Defendants

On this second day of December one thousand nine hundred and sixty six DEREK JACK HAYMAN of Steepholm, 11 The Mount, Fetcham, Surrey, England, Company Director being duly sworn makes oath and says as follows :-

1. I am the Managing Director of The Distillers Company (Biochemicals) Limited the firstnamed Defendant herein. I was Sales Director from 20th July 1954 to 24th March 1961 when I became Managing Director.

2. The Writ herein does not disclose the nature of the Plaintiff's claim.

3. I am informed by Edward John Culey and verily believe that on or about the Tenth day of November last Messrs. Allen Allen & Hemsley, Solicitors, wrote on our behalf to the solicitors for the Plaintiff, a letter a true copy whereof is hereunto annexed and marked with the letter "A" to which a reply a true copy whereof is hereunto annexed and marked with the letter "B" was received.

4. The firstnamed Defendant has not at any time entered into any contract with the Plaintiff nor as far as I am aware with any person or persons on her behalf nor to the

best of my knowledge and belief has it ever had any dealings or transactions of any kind with her or with anyone on her behalf.

5. I am not aware of any fact or circumstances involving any relationship between the firstnamed Defendant and the Plaintiff or creating any duty or obligation by the firstnamed Defendant towards the Plaintiff.

6. The first named Defendant is a company incorporated in England having its registered office in England and has at all times carried on business in England. The said Defendant does not nor has it ever carried on business in Australia nor has it had any registered office in Australia.

7. The said first named Defendant at all relevant times manufactured (inter alia) antibiotics and did fabricate pharmaceutical preparations in England. In so far as the drug thalidomide is concerned it was at all times manufactured in Germany and obtained in bulk from the German manufacturer by the first named Defendant which in turn in England fabricated pharmaceutical preparations (tablets and liquid suspensions) containing thalidomide which were sold in England.

8. In relation to the Australian market, my recollection is that such antibiotics and pharmaceutical preparations as were respectively manufactured and fabricated in England as aforesaid by the first named Defendant were sold in England by the first named Defendant to an Australian company as purchaser for sale by that company to wholesalers and retailers for the Australian market.

9. To the best of my recollection the procedure invariably followed in relation to the sales by the firstnamed Defendant of the said antibiotics and pharmaceutical preparations to such an Australian company was for the said goods to be ordered, usually by mail or cable, by such Australian company, the said order to be accepted in England and fulfilled by the shipment of the said goods and the forwarding of an invoice and appropriate shipping documents to such

In the Supreme Court of New South Wales

No. 2

Affidavit of Derek Jack Hayman with Annexures "A" and "B"

2nd December 1966 (continued)

Australian company.

10. The first named Defendant has no place of business in Australia nor has it ever had one nor has it ever directly or by any servant or agent or in any other way distributed or marketed any of its products within the Commonwealth of Australia.

SWORN by the deponent DEREK JACK HAYMAN on the day first before mentioned at 39 Jermyn Street London SW1 England Before me: } D.J. HAYMAN

G.J. Anderson

A Commissioner for Oaths.

Annexure "A" to Affidavit of D.J.Hayman

WHB/EJC

10th November, 1966.

Messrs. McDonell & Moffitt,
Solicitors,
6 Wynyard Street,
SYDNEY N.S.W.

Dear Sirs,

The Distillers Company (Bio-Chemicals) Ltd. and Anor. ats Thompson.

We have received instructions from England to act for the firstnamed defendant in this matter. We act also for the secondnamed defendant.

As you are aware the Writ discloses no cause of action and our client, apart from a brief newspaper report, has no knowledge of the nature of the allegations which it is proposed to make on behalf of the plaintiff.

The firstnamed defendant does not carry on business in this country and, as at present advised, we propose in due course to make an appropriate application to the Court on the

basis that there is no jurisdiction to entertain the plaintiffs claim against that defendant. However, so that we might give the matter adequate consideration would you be good enough to inform us, as a matter of urgency, of the nature of the claim which the plaintiff proposes to make - i.e., the cause or causes of action and short particulars thereof. Would you also be good enough to advise us of the date or dates when the act or acts alleged against the first named defendant were committed.

We would be glad to have your early reply.

Yours faithfully,

THIS is the annexure marked "A" referred to in the Affidavit of DEREK JACK HAYMAN sworn herein the second day of December 1966, Before me :

G.J. Anderson,
A Commissioner for Oaths.

Annexure "B" to Affidavit of D.J. Hayman

McDONNELL & MOFFITT
Solicitors Reference: 3.

Bank of New Zealand Chambers ,
George and Wynyard Streets,
SYDNEY

16th November, 1966.

Messrs. Allen Allen & Hemsley,
Solicitors,
P. & O. Building,
55 Hunter Street,
SYDNEY N.S.W.

Dear Sirs,

Re: Thompson v. The Distillers Company (Bio-Chemicals) Ltd. & Anor.

We refer to your letter of the 10th November. Without in any way limiting the Plaintiff, we supply for your assistance the following. In

In the Supreme Court of New South Wales

No. 2

Affidavit of DEREK JACK HAYMAN with Annexures "A" and "B"

2nd December 1966 (continued)

her Declaration to be filed herein, which will be framed in negligence, the Plaintiff will allege that her mother purchased and consumed in Australia, while she was pregnant with the Plaintiff, a substance known as Thalidomide or Distaval manufactured by the firstnamed Defendant and distributed by the secondnamed Defendant. The Plaintiff will further allege that the said substance caused her to be born with certain deformities.

The Plaintiff is not able, at this stage, to say when the said substance was manufactured by the firstnamed Defendant, but says that her mother purchased the same in or about the month of August, 1961. No doubt the Defendants would be aware of the date of manufacture of the various batches of the substance distributed in this country at about that time.

Yours truly,
McDONELL & MOFFITT

Per: DAVID L PATTEN.

THIS is the annexure marked "B" referred to in the Affidavit of DEREK JACK HAYMAN sworn herein the second day of December 1966, Before me:

G.J. Anderson,
A Commissioner for Oaths.

No. 3

AFFIDAVIT OF AUDREY EMMALIE THOMPSON

IN THE SUPREME COURT

OF NEW SOUTH WALES No. 6165 of 1966

Between:

LAURA ANNE THOMPSON by ARTHUR LESLIE THOMPSON her next friend Plaintiff

and

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

ON the 19th day of April 1967 AUDREY EMMALIE THOMPSON of 3 Vista Avenue, Bayview in the State of New South Wales being duly sworn makes oath and says as follows :-

1. I am the mother of Laura Anne Thompson the abovenamed Plaintiff.

2. On or about the 14th day of August, 1961 when I was pregnant with the Plaintiff Dr. Noel G. Arnott of 30 Belmore Street, Burwood prescribed for me the drug known as "Distaval". The prescription for the drug given to me by Dr. Arnott is exhibited to me at the time of swearing this my Affidavit and marked "A.E.T.1."

3. The prescription was made up by Moseley Street Pharmacy of Strathfield. To the best of my knowledge and belief I subsequently consumed all of the tablets made up for me.

4. Exhibited to me at the time of swearing this my ffidavit and marked respectively "A.E.T.2." "A.E.T.3" and "A.E.T.4" are a packet purporting to contain twenty-four (24) tablets of the said drug "Distaval" a phial contained in such package and a printed document contained in such package.

In the Supreme Court of New South Wales

No. 3

Affidavit of Audrey Emmalie Thompson

19th April 1967 (continued)

5. Exhibited to me at the time of swearing this my Affidavit and marked "A.E.T.5" is a document issued by the Technical Information Department of the Firstnamed Defendant and exhibited to me at the time of swearing this my Affidavit and marked "A.E.T.6" is a book entitled "Prescriptions Proprietaries Guide for Doctors and Chemists 1963".

6. I allege that the condition of the Plaintiff who was born without arms and with defective eyesight results from my use of the drug "Distaval" taken by me as aforesaid.

SWORN by the Deponent at Sydney on the day and year firstly hereinbefore written, Before me:) AUDREY E. THOMPSON

S.M. Marsh, J.P.

A Justice of the Peace.

No. 4

Affidavit of David Louthean Patten with Annexures "A" and "B"

17th April 1967

No. 4

AFFIDAVIT OF DAVID LOUTHEAN PATTEN

IN THE SUPREME COURT

OF NEW SOUTH WALES No. 6165 of 1966

Between:

LAURA ANNE THOMPSON by ARTHUR LESLIE THOMPSON her next friend Plaintiff

and

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

ON the 17th day of April One thousand nine hundred and sixty-seven DAVID LOUTHEAN PATTEN of 6 Wynyard Street, Sydney in the State of New South Wales, Solicitor, being duly sworn

makes oath and says as follows :-

1. I am the Solicitor for the above named Plaintiff.

2. I am informed by my clerk Paul Richard Anderson and verily believe that he searched in the office of the Registrar of Companies at Sydney and ascertained that the Second-named Defendant was incorporated in New South Wales on the 25th day of August, 1958 and that during the year 1961 its capital consisted of approximately 1,000 issued shares. Of those issued shares, 993 stood in the name of the First-named Defendant.

3. Annexed hereto and marked with the letter "A" is a true copy of a letter written by my firm to the Solicitors for the Defendant dated the 9th day of February, 1967 and annexed hereto and marked with the letter "B" is a true copy of the reply dated 14th day of March, 1967 received from the Solicitors for the Defendant.

SWORN by the Deponent at Sydney)
on the day and year firstly) DAVID L.
herein written, Before me:) PATTEN

S.M. Marsh, J.P.

A Justice of the Peace.

Annexure "A" to Affidavit of D.L. Patten.

9th February, 1967.

Messrs. Allen Allen & Hemsley,
Solicitors,
55 Hunter Street,
SYDNEY N.S.W.

Dear Sirs,

Re: Thompson v. The Distillers Company (Bio-Chemicals) Limited & Anor.

We refer to the Affidavit sworn by Mr. Derek Jack Hayman and filed by you herein. Will you admit that the Company referred to in paragraph 8 of the Affidavit is the

In the Supreme Court of New South Wales

No. 4

Affidavit of David Louthean Patten with Annexures "A" and "B"

17th April 1967 (continued)

second-named Defendant. If not, please state the name of the Company referred to.

Should you not be prepared to make the admission referred to above, or to advise the name of the Company, as the case may be, we will require Mr. Hayman to attend for cross examination upon his Affidavit at the hearing of the Summons.

Yours truly,

McDONELL & MOFFITT.

Per:

THIS is the annexure marked "A" mentioned and referred to in the Affidavit of David Louthean Patten sworn at Sydney this 17th day of April 1967, Before me:

S.M. MARSH, J.P.

A Justice of the Peace.

Annexure "B" to Affidavit of D.L. Patten.

ALLEN ALLEN & HEMSLEY
Solicitors and Notaries

P. & O. Building,
55 Hunter Street,
SYDNEY.

Our reference: EJC

14th March 1967

Messrs. McDonell & Moffit,
Solicitors,
6 Wynyard Street,
SYDNEY

Dear Sirs,

The Distillers Company Biochemicals Pty. Ltd. & Anor. ats Thompson & Anor.

We refer to your letter to us of 9th February 1967.

The first named defendant admits that the Australian company referred to in paragraph 8 of Mr. D.J. Hayman's affidavit of 2nd December 1966 is the second named defendant.

Yours faithfully,

ALLEN ALLEN & HEMSLEY.

THIS is the annexure marked "B" mentioned and referred to in the Affidavit of David Louthean Patten sworn the 17th day of April 1967,
Before me:

S.M. MARSH, J.P.

A Justice of the Peace.

In the Supreme Court of New South Wales

No. 4

Affidavit of David Louthean Patten with Annexures "A" and "B"

17th April 1967 (continued)

No. 5

AFFIDAVIT OF DEREK JACK HAYMAN.

No. 5

Affidavit of Derek Jack Hayman 18th September 1967.

IN THE SUPREME COURT

OF NEW SOUTH WALES No. 6165 of 1966

Between:

LAURA ANNE THOMPSON by ARTHUR LESLIE THOMPSON her next friend Plaintiff

and

THE DISTILLERS COMPANY (BIOCHEMICALS) LIMITED and THE DISTILLERS COMPANY BIOCHEMICALS (AUSTRALIA) PTY. LIMITED Defendants

ON the Eighteenth day of September One thousand nine hundred and sixty-seven DEREK JACK HAYMAN of Steepholm, 11 The Mount, Fetcham, Surrey, England, Company Director, being duly sworn makes oath and says as follows :-

1. I am the Managing Director of the first-named defendant herein.

In the Supreme Court of New South Wales

No.5

Affidavit of Derek Jack Hayman 18th September 1967. (continued)

2. I have read what purports to be a copy of the affidavit of Audrey Emmalie Thompson sworn on the 19th day of April 1967 and with reference to paragraph 4 thereof I say that the said packet, tablets, phial and printed document therein referred to were sold as a unit in England by the first-named defendant to the second-named defendant as is set out in paragraphs 7, 8 and 9 of my affidavit of the 2nd day of December 1966. The said unit was one of the pharmaceutical preparations referred to in the said paragraphs of my said affidavit.

SWORN by the deponent DEREK JACK HAYMAN on the day first before mentioned at 39 Jermyn Street London S.W.1, Before me:) D.J.HAYMAN

G.J. Anderson

A Commissioner for Oaths.

No. 6.

Judgment of His Honour Mr. Justice Taylor.

9th November 1967.

No. 6.

JUDGMENT OF THE HONOURABLE MR. JUSTICE TAYLOR

IN THE SUPREME COURT

OF NEW SOUTH WALES

IN PUBLIC CHAMBERS

CORAM: TAYLOR J.

9th November 1967.

THOMPSON v. THE DISTILLERS CO. (BIO-CHEMICALS) LIMITED & Anor.

JUDGMENT

HIS HONOR: This is an application by the first-named defendant (hereinafter called the English company) to set aside the writ upon the ground that the plaintiff has no cause of action against it within the jurisdiction of the Court and, since it does not reside within the State of New

South Wales, this Court is not competent to entertain the action.

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

In the Supreme Court of New South Wales

No. 6

Judgment of His Honour Mr. Justice Taylor.

9th November 1967. (continued)

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.

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.

Since the first-named defendant does not reside here in the sense that a corporation is said to reside and since it is not otherwise within the jurisdiction, the plaintiff must rely upon having a cause of action which arises within the jurisdiction. S.18(4) of the Common Law Procedure Act provides:

> "If the defendant does not appear to the writ of summons within the time prescribed a Judge upon being satisfied that there is a cause of action which arose within the jurisdiction or in respect of a breach of contract made within the jurisdiction...."

The basis of the first-named defendant's

application is that there is not before me any evidence of a cause of action arising within the jurisdiction and hence the writ should be set aside.

Mr. Ash, Q.C. for the applicant, contended that as the applicant manufactured Distival in England and there sold it to the Australian company upon terms that the property in it passed to the Australian company in England, the English company could not be said to have done anything, or failed to do anything in New South Wales that could give rise to a cause of action against it. For the plaintiff to have a cause of action against the English company in New South Wales, he contended, she had to show that the English company had committed a tort within New South Wales. The mere fact that damage occurred to the plaintiff was not sufficient. He claimed that the matter was concluded against the plaintiff by the decision of the Court of Appeal in George Monro v. American Cyanamid & Chemical Corporation (1944 1 K.B. 433). In that case the defendant, the American Cyanamid & Chemical Corporation, had sold in New York to the plaintiff company goods admitted to be dangerous unless certain precautions were taken. The property in the goods passed in New York and there was nothing to indicate that anything took place in England which could be attributed to the American Company as a tort. The English company brought the action because, as the seller of the product in England, it had become liable to various persons through this product being dangerous and causing damages to the users. It sought to recover from the American Company the damages it had to pay in England. 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.

Goddard, L.J. expressly said that the tort relied upon was the sale of what was said to be a dangerous article without warning as to its nature. That act was committed in America, not in this country.

Scott, L.J. took a similar view of the facts, as did du Parcq, L.J.

In the Supreme Court of New South Wales

No. 6

Judgment of His Honour Mr. Justice Taylor.

9th November 1967. (continued)

I am of opinion that there is no practical difference between the meaning of the expression cause of action in s.18(4) and "tort committed within the jurisdiction" in the English Order and in either case 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 issued.

Mr. Woodward, Q.C. for the plaintiff respondent, contended that on principles established by Donoghue v. Stevenson (1932 A.C.562) and Grant v. Australian Woollen Mills (1936 A.C. 85) the English company 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 English company put out its product so as to reach the ultimate consumer in the form in which they had packed it. Since they clearly contemplated that the plaintiff's mother would be a user of their material, there existed between the English company and the plaintiff's mother, in the circumstances, a special relationship or proximity which established the duty.

This duty, so he contended, was breached in New South Wales by the supply to the plaintiff's mother as safe, a drug which was in fact dangerous, if not to the mother then to the unborn child; and it was this breach that the plaintiff's injuries resulted. Hence, so the argument proceeded, all the elements necessary to constitute a cause of action took place within the jurisdiction.

In determining the question of where the plaintiff's cause of action arose it is of assistance, I think, to determine first of all when it arose. The question of when a cause of action arises where the plaintiff seeks to rely on breach of a duty imposed on a manufacturer in accordance with the Donoghue v. Stevenson principle, he having no direct relationship to the manufacturer, was recently considered by the House of Lords. See Watson v. Fram Reinforced Concrete Company (Scotland) Limited & Ors. The House was there concerned with the meaning to be given to s.6 of the Law Reform (Limitation of Actions &c.) Act 1954:

"(1) No action of damages where the damages claimed consist of or include damages or solatium in respect of personal injuries to any person shall be brought in Scotland against any person unless it is commenced -

(a) in the case of an action brought by or on behalf of a person in respect of injuries sustained by that person, before the expiration of three years from the date of the act, neglect or default giving rise to the action...."

Watson, the Pursuer Appellant who had been injured due to the breaking of a defective part in the machine with which he was working brought an action of damages against his employers and later joined the second defendants as the manufacturer of the machine, he alleging that the accident had been caused by the fault of the manufacturer in that they failed to supply the employees with a machine which was safe for use by him. The machine had been supplied on 7th July 1955; the accident happened on 9th August 1956. The manufacturers were not joined in the action until 25th March 1959.

The act, neglect or default of the manufacturing company was faulty welding by its servants or agents in the construction of the machine and it was clear that this took place before they supplied the machine to the appellant's employers and, accordingly, more than three years before he joined them in the action. The majority of the House decided that the three year period ran from the date when the workman suffered injury, not from the date when the manufacturer's servants negligently welded the machine.

Reid, L.J. (at p.110 of the report) said this:

"It appears to me that default in the sense of breach of duty must persist after the act or neglect until the damage is suffered. The ground of any action based on negligence is the concurrence

In the Supreme Court of New South Wales

No. 6

Judgment of His Honour Mr. Justice Taylor.

9th November 1967. (continued)

of breach of duty and damage and I cannot see how there can be that concurrence unless the duty still exists and is breached when the damage occurs."

Keith, L.J. of Avonholm, quoted from the speech of Macmillan, L.J. in Donoghue v. Stevenson:

> "That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption. He intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them."

He went on to point out that Macmillan, L.J. in referring to potential consumers was merely projecting the relationship of duty into the future. No such relationship, in his view, could arise until a potential consumer became the actual consumer and was injured by a breach of the duty. He referred to the statement of Wright, L.J. in Grant v. Australian Knitting Mills:

> "The duty .... cannot at the time of manufacture be other than potential or contingent and can only become vested by the fact of actual use by a particular person."

He then expressed his own views as follows:

> "Applying the ratio of these decisions there was, in my opinion, no act, neglect nor default within the meaning of the Statute affecting the pursuer until he was injured. A fortiori there was no act, neglect or default giving rise to this action before that date. It was then for the first time that there arose a breach of duty which made this impact on the pursuer. Time commenced to run against the pursuer under the statute from that date."

Denning, L.J. (p.115) posed the question:

> "I ask myself, therefore, what is the breach of duty which, in cases falling within the principle of Donoghue v. Stevenson gives rise to the action? Is it the negligence in manufacturing the article? Or the putting into circulation of the faulty article? On the doing of damage to the plaintiff?"

The answer he said is to be found in this statement of principle:

> "You must not injure your neighbour by your fault. It is the doing of damage to him which, in my opinion, is the breach of duty giving rise to the action."

In acoordance with these expressions of opinion it would appear to be clear that the plaintiff's cause of action against the defendant arose when she was injured by her mother consuming the defendant's product., It was at that point of time that the duty was owed and it was breached when the plaintiff was injured, it was then that the defendant committed the wrongful act that is the basis of the plaintiff's cause of action. It did not, in my opinion, commit the wrongful act when it manufactured in Great Britain Distival oontaining Thalidomide, a harmful substance. 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. The fact that the supplying was done by the 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.

Once it is accepted as it must be that the English company owed a duty to the plaintiff or to the plaintiff's mother not to injure them by its product then it follows in my opinion that the plaintiff has a cause of action in this State against the English company. In this State there has been that "concurrence of breach of duty and damage which is the ground to any action

In the Supreme Court of New South Wales

No. 6

Judgment of His Honour Mr. Justice Taylor.

9th November 1967. (continued)

based on negligence."

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 and thus the plaintiff's cause of action arises in this State.

For these reasons I am of opinion that the application fails. The summons will be dismissed with costs and I certify that this was a proper case for the attendance of senior counsel in chambers.

No. 7

Order

9th November 1967.

No. 7

ORDER

IN THE SUPREME COURT

OF NEW SOUTH WALES No. 6165 of 1966.

Between:

LAURA ANNE THOMPSON by ARTHUR LESLIE THOMPSON her next friend Plaintiff

and

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

BEFORE HIS HONOUR MR. JUSTICE TAYLOR

The Ninth day of November, 1967.

THIS APPLICATION coming on for Hearing the 27th and 28th days of September last WHEREUPON AND UPON READING the summons issued herein the 14th day of December last, the two several Affidavits of Derek Jack Hayman sworn on the 2nd day of December last and the 18th day of September last respectively, the Affidavit of Audrey Emmalie Thompson sworn the 19th day of

April last and the Affidavit of David Louthean Patten sworn the 17th day of April last ALL filed herein AND UPON HEARING Mr. W.P. Ash of Queens Counsel and Mr. D. Yeldham of Counsel for the Applicant, Distillers Company (Bio-Chemicals) Limited and Mr. P. Woodward of Queens Counsel and Mr. M. Campbell of Counsel for the Respondent, Laura Ann Thompson IT WAS ORDERED that the matter stand for Judgment and the same standing in the list this day for Judgment accordingly IT IS ORDERED that the Application and Summons be and the same are hereby dismissed with costs AND IT IS CERTIFIED that this is a proper case for the attendance of Senior Counsel in Chambers.

In the Supreme Court of New South Wales

No. 7

Order 9th November 1967. (continued)

For the Prothonotary,

C.G.E. ALLFREE (L.S.)

Chief Clerk

Court of Appeal

No. 8

Notice of Appeal by the Distillers Company (Bio-Chemicals) Limited 29th November 1967

No. 8

NOTICE OF APPEAL.

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL No. 6165 of 1966.

Between:

LAURA ANNE THOMPSON an Infant by her next friend ARTHUR LESLIE THOMPSON Plaintiff

and

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

NOTICE OF APPEAL

Name of Appellant: THE DISTILLERS COMPANY (BIO-CHEMICALS) LIMITED

In the Supreme Court of New South Wales

Court of Appeal

No. 8

Notice of Appeal by the Distillers Company (Bio-Chemicals) Limited 29th November 1967 (continued)

Name of Respondent:	LAURA ANNE THOMPSON an Infant by her next friend ARTHUR LESLIE THOMPSON.
Court from which the Appeal is brought:	The Supreme Court of New South Wales.
Name of the Judge of the Court from which the Appeal is brought:	The Honourable Mr. Justice R.L. Taylor, sitting in Chambers.
Day or days of hearing at first instance:	The 27th and 28th days of September, 1967. Judgment being given on the 10th day of of November, 1967.
Whether Appeal is against the whole or part only of the Order:	The whole.
Order sought to be set aside:	The Order of His Honour dismissing the Appellant's application with costs.
Order sought in lieu thereof:	That the Order made by His Honour be set aside and that in lieu thereof an Order be made setting aside the Writ herein as against the firstnamed defendant or alternatively setting aside service of the said Writ upon the firstnamed defendant or alternatively staying all proceedings herein as against the firstnamed defendant and that the Plaintiff be ordered to pay the costs of the Application before His Honour and of the Appeal.
Grounds of Appeal:	(a) THAT His Honour was in error in dismissing the Application of the first-named defendant;
	(b) THAT His Honour was in error in holding that the

Supreme Court of New South Wales had jurisdiction to entertain the action against the first named defendant;

(c) THAT His Honour was in error in holding that as against the first-named defendant the plaintiff had a cause of action which arose within the jurisdiction of the Court;

(d) THAT His Honour was in error in holding that the plaintiff's cause of action against the first named defendant arose when the plaintiff was injured by her mother consuming the product of the firstnamed defendant;

(e) THAT His Honour was in error in holding that the firstnamed defendant committed a wrongful act in supplying or causing to be supplied to the plaintiff's mother the dangerous substance which injured the plaintiff.

DATED this 29th day of November, 1967.

E.J. CULEY,

Solicitor for the firstnamed Defendant.

In the Supreme Court of New South Wales

Court of Appeal

No. 9

Judgment of Court of Appeal 4th September 1968.

No. 9

JUDGMENT OF COURT OF APPEAL.

THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL No. 6165 of 1966

CORAM: WALLACE, P.
ASPREY, J.A.
HOLMES, J.A.

Wednesday, 4th September, 1968.

THOMPSON v. THE DISTILLERS COMPANY (BIO-CHAMICALS) LIMITED & ANOR.

JUDGMENT

WALLACE, P: I am of opinion that the decision appealed from is correct and that the appeal should be dismissed with costs. I publish my reasons.

My brother Asprey has authorised me to say that he is of opinion That Taylor J. was correct and he (Asprey J.A.) would also dismiss the appeal. I publish His Honour's reasons.

HOLMES, J.A.: In my opinion the appeal should be dismissed with costs and I publish my reasons.

WALLACE, P.: Accordingly, the order of the Court is: Appeal dismissed with costs.

No. 9(a)

In the Supreme Court of New South Wales

Court of Appeal

No.9(a)

Reasons for Judgment of Wallace P. 4th September 1968.

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL No. 6165 of 1966

CORAM: WALLACE P.
ASPREY, J.A.
HOLMES, J.A.

Wednesday, 4th September, 1968.

THOMPSON v. THE DISTILLERS COMPANY (BIO-CHEMICALS) LTD. & ANOR.

JUDGMENT

WALLACE, P.: This is an appeal from an order made by Taylor J. on the 10th November 1967 whereby His Honour dismissed an application made by the first of two defendants in an action now pending in the Supreme Court to set aside the writ upon the ground that the plaintiff had no cause of action against it which arose within the jurisdiction of this Court and therefore as it did not "reside" within this State the Court is not competent to entertain the action. The relevant statutory provision is s.18 of the Common Law Procedure Act which deals with actions against defendants not within the jurisdiction and subsection 4(a) thereof reads :-

> "that there is a cause of action which rose within the jurisdiction...."

The plaintiff in the action is an infant and concurrent writs were issued on the 26th July 1966 by her next friend against two defendants, the first named being a company incorporated in the United Kingdom, and the second being a company incorporated in this State. A conditional appearance was entered on behalf of the first named defendant company with a notice of intention to apply for the writ to be set aside as against it on the ground that the Court had no jurisdiction to entertain the action. No further processes have been filed and the writ does not disclose the cause of action sued upon but from an affidavit filed in

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No. 9(a)

Reasons for Judgment of Wallace P.

4th September 1968.
(continued)

support of the application and annexures attached thereto (upon which the parties have been content to argue the matter before both Taylor J. and this Court) it appears that the declaration to be filed will be framed in negligence. It will be alleged that the plaintiff's mother purchased and consumed in this State while she was pregnant with the plaintiff a substance known as thalidomide in tablet form under the name of Distival manufactured and packaged by the first named defendant in England and distributed by the second named defendant in New South Wales. The plaintiff will allege that the said substance caused her to be born with deformities. It further appears that the plaintiff's mother in pursuance of a prescription given to her by a medical practitioner in Sydney purchased the drug from a suburban pharmacy in a packet purporting to contain 24 tablets of "Distival" and the allegation is that the condition of the plaintiff who was born without arms, and with defective eyesight, results from the mother's use of the drug Distival. The packet contained no warning of any kind but on the contrary the printed matter which went with the packet described the drug as harmless.

The first named defendant has at all times carried on business in England and has never carried on business in Australia, nor has it any registered office here. It is a manufacturer of antibiotics and fabricates pharmaceutical preparations in England. Its supply of the drug thalidomide was obtained in bulk from a German manufacturer and it fabricated tablets and liquid suspensions containing thalidomide which were sold in England. It further appears that the first named defendant sold the pharmaceutical preparation containing thalidomide to the second named defendant in England for sale by the second named company to wholesalers and retailers for the Australian market. The practice apparently was for the said goods to be ordered usually by mail or cable by the Australian company, the order would then be accepted in England and fulfilled by shipment of the goods and the forwarding of the invoice and appropriate documents to the Australian company. We were informed that it was common ground that the property in the drugs passed in England. The only nexus between the first and second named

defendants is that the former owns 993 shares in the issued capital of the latter which consists of 1000 shares. It was also agreed at the Bar that we were concerned only with the jurisdictional problem. The question whether the declaration when filed will be demurrable is for another day. I think this type of procedure applied to a problem of jurisdiction is in order. (Order IX r.6 and cases decided thereunder) - unless the agreed facts showed that any declaration based thereon would be clearly and obviously demurrable. 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. Much discussion has taken place on this and allied subjects in American, English and Australian journals e.g. 39 A.L.J. 256; 78 Harvard L.R. 1452; 64 Columbia L.R. 916 and 69 Yale L.R. 1099. Mr. Ash, Q.C., for the English company made it clear both to Taylor J. and to this Court that he made no concession regarding the validity of the claim and Taylor J. was invited as were we also to determine the question of jurisdiction on the basis that the plaintiff is the proper person to bring the action.

On the basis therefore that the first named defendant owed a duty to the plaintiff in accordance with the principles enunciated in Donoghue v. Stevenson (supra) Taylor J. examined a number of cases including George Monro Ltd. v. American Cyanamid and Chemical Corporation 1944 1 K.B. 33 and Watson v. Winget 1960 S.C. 92; 1960 Sc L.T. 321 and dismissed the application. His Honour's judgment concludes as follows :-

> "Once it is accepted as it must be that the English company owed a duty to the plaintiff or to the plaintiff's mother not to injure them by its product then it follows in my opinion that the plaintiff has a cause of action in this State against the English company. In this State there

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Reasons for Judgment of Wallace P.

4th September 1968. (continued)

has been that 'concurrence of breach of duty and damage which is the ground to any action based on negligence'.

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 and thus the plaintiff's cause of action arises in this State."

I entirely agree with this reasoning and with His Honour's decision. I consider that the appeal can be dealt with quite shortly by the application of principles stated in Donoghue v. Stevenson (supra) complemented by observations of Lord Wright when speaking for the Judicial Committee in Grant v. Australian Knitting Mills. But in deference to the careful arguments of counsel I will deal with some of the matters which were debated before us.

In Williams v. Milotin 97 C.L.R. 465 (a case to which I referred at some length in Hughes v. Australian Blue Metal 1964-5 N.S.W.R. 938) where a Limitation provision relating inter alia to actions on the case was under consideration the joint judgment at p.474 states :-

> "When you speak of a cause of action you mean the essential ingredients in the title to the right which it is proposed to enforce. The essential ingredients in an action of negligence for personal injuries include the special or particular damage - it is the gist of the action - and the want of due care".

The actual phrase of the South Australian Act under review in that case was "shall..... be commenced within.....years next after the cause of action accrued" but nothing turned on the fixation of the precise test for or the date of accrual as the enquiry centred around the particular nature of the action and whether it attracted a four or six years period of limitation. The date when a cause of action "accrues" has for the purpose of construing provisions relating to Limitation of Actions been construed in the case of negligence and

with certain qualifications as the date when the damage occurs rather than when the negligent act (breach of duty of care) occurs - and this irrespective of actual knowledge of loss or damage: see Cartledge v. Jopling 1963 A.C.758 (a decision which caused an amendment to the Act) and Archer v Catton & Co. Ltd. 1954 1 W.L.R 775; - cf Watson v Winget (supra) and Buxton v McKenzie 1960 N.Z.L.R. 732.

But in provisions governing jurisdiction much difference of judicial opinion has been expressed in decisions given both in the United Kingdom (before the change of wording effected in 1920) and elsewhere on the construction to be given the phrase "cause of action which arose within the jurisdiction". The "extraordinary divergence" of opinion in English Courts was traced by Hodges J. in J.D.Lindley & Co. v Pratt 1911 V.R.L. 444 at pp.450-451. His Honour pointed out that the view of the Court of Common Pleas as expressed in Jackson v Spottal L.R. 5 C.P. 542 namely that "cause of action" meant that act on the part of the defendant which gave the plaintiff his cause of complaint, ultimately prevailed - but only for the sake of conformity - Vaughan v Weldon L.R. 10 C.P. 47. The view of the Queen's Bench in a number of cases had been that as a matter of construction the whole cause of action must arise within the jurisdiction in a case where the defendant is not a resident. In my opinion the presence of the word "arose" of itself lends some support to the view taken in Jackson v Spittal (supra).

Since 1920 the English wording has been changed. The wording of R.S.C. Order XI r.1(ee) considered in the George Monro Ltd. case (supra) in so far as it related to tort was "the action is founded on a tort committed within the jurisdiction". The cautious approach of Scott L.J. in that case (supra at p.437) was - "service out of the jurisdiction at the instance of our courts is necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign company (in that case America) where service is to be effected". But the practical effect of the "interference" seems slight unless the defendant has assets in the jurisdiction out of which the writ issues as no judgment so obtained could be enforced or

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No.9(a)

Reasons for Judgment of Wallace P.

4th September 1968. (continued)

execution thereon issue in the foreign jurisdiction without the consent of the latter. Interference of this type would not I think compare with the effects in certain European countries of some of the Restrictive Trade Practice legislation of the United States having extra territorial operation. At all events it was held in the George Monro Case (supra) that the mere occurrence of the damages in England was insufficient to satisfy the test for jurisdiction.

In Dicey 8th Edn. at pp.201 and 202 it is said that the English decisions on the question where a tort is committed are scanty and somewhat difficult to reconcile and that the matter has by no means been worked out. The authors cite the George Monro Case and Abbott-Smith v University of Toronto (1963) 41 D.L.R. (2d) 62 as authorities for the proposition that for the purpose of the modern Order XI r.1(1)(h) the tort of negligence is committed where the negligent act is done and not where the harm is suffered. This view is at least debatable if only because damage is the gist of the action and there is no such thing as negligence in gross or as Lord Macmillan said in Donoghue v Stevenson "negligence in the abstract" (supra at pp.618-9). Moreover in the cases of other torts for example defamation (to select only one of several examples) it is pointed out at pp.950 and 951 of Dicey materially different results have been obtained. These differences appear illogical.

In Bata v Bata 1948 W.N. (Eng) 366 the Court of Appeal held that the tort of libel was committed in England when defamatory material written abroad was published in England and the George Monro Case (supra) was distinguished. It has been suggested however that the two cases are difficult to reconcile as damage in the one case and publication in the other are equally essential components of the respective causes of action (see 36 A.L.J. at p.158).

The wording of the Canadian provision considered in Abbott-Smith v Toronto University (supra) was: "tort committed or wrong done within the jurisdiction" and in the judgment

many Canadian cases are canvassed, but the dissenting view of Chisholm J. in Beck v Willard Chocolate Co. 1924 2 D.L.R. at 1142 was referred to at p. 71 (as were also similar views expressed in Cheshire 5th Edn. at p.282 and the American Restatement) namely :- "The place of wrong is in the State where the last event (semble - ascertained according to the lex fori) necessary to make an action liable for an alleged tort takes place".

In New Zealand the wording of the relevant rule (r.48(a)) is "any act for which damages are claimed" and in Adastra Aviation v Air Parts (N.Z.) 1964 N.Z.L.R. 393 it was held that the delivery in New Zealand by a non resident manufacturer of a defective machine answers the required test as does also the suffering of damage in New Zealand. In each case there is an act done in New Zealand (p.395)

But such phrases as "tort committed" and "wrong done" are not necessarily synonymous with "where the cause of action arose" and also cases dealing with Limitation of Actions may attract somewhat different considerations. But it seems unnecessary to explore these possibilities in the present case. Also I do not think anything is to be gained by examining the phrase in s.18(4)(a) relating to a cause of action in respect of the breach of a contract made within the jurisdiction.

For as earlier indicated I think the dicta in Donoghue v Stevenson (supra) and the comments thereon by Lord Wright in Grant v Australian Knitting Mills (supra) will largely govern the decision in this appeal but the observations of the majority in Watson v Winget Ltd (supra) to which Taylor J. referred also are of importance. That was a case relating to a Limitation of Action provision and the relevant wording was "act, neglect or default giving rise to the action" and in that case defective machinery by which the plaintiff worker was injured on 9th August 1956 had been supplied by the manufacturers to the worker's employers on 7th July, 1955 but in an action by the worker against his employer the manufacturer was not joined as a defendant

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Reasons for Judgment of Wallace P.

4th September 1968. (continued)

until 31st March 1959 (the period qualifying the quoted phrase being 3 years). The majority of the House of Lords held with some force that there was no act neglect or default giving rise to the action until the date of the accident. Taylor J. has quoted relevant extracts from their Lordships' speeches and I will not repeat them but I will add two short passages from the speech of Lord Reid. At p.325 of the report in Scots Law Times His 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".

At p.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".

His Lordship expressed the view (as did the other members of the majority) that the manufacturers' duty continued to the date of the accident.

With much respect this view seems to me to be entirely consistent with what Lord Atkins and Lord Macmillan had said in Donoghue v Stevenson and with Lord Wright's observations in Grant v Australian Knitting Mills. By way of contrast Lord Simonds, who dissented, said at p.322 that the act in question was the act of the defendant manufacturer namely the putting into circulation of the defective machine. But the passage in Grant v Australian Knitting Mills (supra) at pp.104-105 in which Lord Wright when speaking for the Judicial Committee refers to Heaven v Pender 11 Q.B.D. 503 and Dominion Natural Gas Co. Ltd v Collins 1909 A.C. 640 is in my opinion relevant and conclusive in the solution of this appeal.

The brevity and simplicity of expression

of Lord Wright's observations have attracted academic analysis but the intendment is clear. His Lordship had just been referring (in relation to the Donoghue v Stevenson "duty") to intervening transactions after manufacture involving circulation and sale and to the concepts of privity and proximity and had stated that the duty is quite unaffected by contracts of sale by maker to retailer and by retailer to consumer or to the consumer's friend. His Lordship then said :-

> "It may be said that the duty is difficult to define, because when the act of negligence in manufacture occurs there was no specific person towards whom the duty could be said to exist: the thing might never be used: it might be destroyed by accident, or it might be scrapped, or in many ways fail to come into use in the normal way: in other words the duty cannot at the time of manufacture be other than potential or contingent, and only can become vested by the fact of actual use by a particular person."

In my opinion this passage when read in the light of what had been said in Donoghue v Stevenson (supra) by Lord Atkin and Lord Macmillan is conclusive when deciding where the (alleged) cause of action in the present case "arose".

For I think that the English company'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. It is true that the first circulation of the tablets without a warning notice thereon and which took place in England is a link in the chain of acts and omissions which constitute the alleged cause of action but for the purpose of determining where the cause of action "arose" I am of opinion that the first named defendant 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 breah. In other words duty, breach and injury all existed or occurred in New South Wales and so in the

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No.9(a)

Reasons for Judgment of Wallace P.

4th September 1968. (continued)

fullest sense the cause of action arose here.

On this view it is strictly unnecessary to decide whether the phrase "the cause of action" means the whole cause of action or only the act of the defendant which gave the plaintiff her cause of complaint or whether the cases which have been decided on provisions relating to the Limitation of Actions are distinguishable but I wish to add that I consider that Jackson v Spittal (supra) was correctly decided. It was followed by Schutt J. in Chidzey v Breckler 1920 V.L.R. 558, a case decided after an amendment made in 1915 which introduced the phrase "cause of action which arose within the jurisdiction". Schutt J. adopted the remarks of Pigott B. and Cleasby B. in Durham v Spence L.R. 6 Exch. 46 namely that the reasoning in Jackson v Spittal (supra) "seems unanswerable". This means that on any view the cause of action arose here.

The decision appealed from is correct and the appeal should be dismissed with costs.

No. 9(b)

REASONS FOR JUDGMENT OF ASPREY J.A.

In the Supreme Court of New South Wales

Court of Appeal

No.9(b)

Reasons for Judgment of Asprey J.A.

4th September 1968.

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL No. 6165 of 1966

CORAM: WALLACE, P.
ASPREY J.A.
HOLMES, J.A.

Wednesday, 4th September 1968

THOMPSON v. THE DISTILLERS COMPANY (BIO-CHEMICALS) LIMITED & ANOR.

JUDGMENT

ASPREY, J.A.: This is an appeal against an order made by Taylor J. sitting in Chambers whereby His Honour dismissed an application by the firstnamed defendant (hereinafter called the "English Company") to set aside a writ of summons herein upon the ground that the plaintiff has no cause of action against it within the jurisdiction of this Court and that since it does not reside within the State of New South Wales this Court is not competent to entertain the action. It appears to me that, strictly speaking, the order asked for in the summons should have been to set aside, not the writ itself, but the service of the writ (see Tallerman & Co. Pty. Ltd. v. Nathan's Merchandise (Victoria) Pty. Ltd. 98 C.L.R. 93 at p.108).

From the material placed before the Court on affidavit and by agreement at the Bar table we can assume that for the purposes of this application and only for such purposes the facts are as follows. The English Company is incorporated in Great Britain where it has its registered office and carries on business and, as part of its activities, it manufactures pharmaceutical preparations. The English Company's products are sold in New South Wales but not by it. The secondnamed defendant (hereinafter called the "Australian Company")

markets and sells the products of the English Company in Australia. The Australian Company secures these products as a result of orders received by the English Company in England and the English Company packs and ships the goods and forwards the invoices and shipping documents to the Australian Company. The property in the goods passes from the English Company to the Australian Company in England. One of the products manufactured by the English Company and distributed in Australia by the Australian Company was a sedative and sleep-inducing drug marketed under the name of "Distival". The principal ingredient of "Distival" is thalidomide which the English Company obtains in bulk from a German manufacturer. "Distival" 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 and carry the name of the English Company as the manufacturer of the drug and there is no reference to the Australian Company. The packages 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 package describes "Distival" 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. It is, however, only obtainable in N.S.W. upon its retail sale through chemists upon the prescription of medical practitioners. The plaintiff (an infant) has sued both defendants by her father as next friend.

In August 1961, when the plaintiff's mother was pregnant with the plaintiff, a medical practitioner prescribed "Distival" for the mother and she purchased the drug from a chemist upon the prescription provided by her doctor and consumed some of the tablets. The purchase and consumption of the tablets took place in New South Wales. The plaintiff was born on 10th April 1962 without arms and with defective eyesight. The birth of the plaintiff with these disabilities is due to the fact that

her mother consumed "Distival" during her pregnancy. Thalidomide has a harmful effect on the foetus of an unborn child during the first three months of pregnancy. 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". No declaration has yet been filed but Senior Counsel for the plaintiff has stated that the case of the plaintiff against the English Company is founded upon the principles to be extracted from Donoghue v. Stevenson (1932) A.C.562. The English Company has filed a conditional appearance to the writ to enable it to challenge the Court's jurisdiction. We are asked to assume that, putting to one side the jurisdictional problem, the plaintiff could establish a prima facie case against the English Company and that the plaintiff is the proper person to sue in respect of the injuries which her birth has disclosed.

The secondnamed defendant, the Australian Company, is sued as the distributor of "Distival" in New South Wales which it retailed to the chemist who, in turn, sold it to the mother of the plaintiff. The English Company is the registered holder of 933 of the 1,000 issued shares in the Australian Company but, except for the fact that the Australian Company purchases "Distival" from the English Company in the manner hereinbefore described, there is no proved connection between the Australian and English Companies. The Australian Company has filed an unconditional appearance to the writ.

Upon the foregoing assumptions the learned Judge found in effect that the English Company owed a duty of care to the plaintiff, that this duty was breached by it supplying or causing to be supplied a dangerous substance to the plaintiff's mother which injured the plaintiff and that the fact that the drug passed through the hands of the Australian Company and the chemist before coming into the possession of the plaintiff's mother was, having regard to Donoghue v. Stevenson (supra), an immaterial circumstance. He considered that the plaintiff had a cause of action which arose in this State.

In the Supreme Court of New South Wales

Court of Appeal

No.9(b)

Reasons for Judgment of Asprey J.A.

4th September 1968. (continued)

Section 18(1) of the Common Law Procedure Act 1899 (as amended) provides that "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 IV of the Companies Act 1936 as amended by subsequent Acts, the plaintiff may issue a writ of summons in the form prescribed". Subsections (2) and (3) of that Section provide for service of the writ where the defendant being a corporation is incorporated in the United Kingdom. Subsection (4) provides that "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..... 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 in such manner and subject to such conditions as may be prescribed or he, in all the circumstances, may think fit". The success or failure of the English Company's application depends upon the true construction of Section 18(4) of the Common Law Procedure Act as it has not been suggested that there is any limitation upon the legislative jurisdiction of the New South Wales Parliament to enact a law in the terms of Section 18. Within its constitutional limits a state may impose a liability upon any person whose conduct produces consequences within the state. Thus, one who does an act in one state which causes injury to a person in another state is subject to the legislative jurisdiction of the second state for harm so caused to the person in that state (see Cook: Logical and Legal Bases of the Conflict of Laws, Vol.5 in the Harvard Studies, Chap.XIII pp.319-320). Upon this application I am not concerned with a choice of Law problem as in Koop v. Bagg 84 C.L.R. 629 or Anderson v. Eric Anderson Radio and T.V. Pty. Ltd. 114 C.L.R. 20. It follows that the sole question for my determination is whether I am satisfied "that there is a cause of action which arose within the jurisdiction". To resolve that problem I propose, firstly, to consider what constitutes "a cause of action"

when that phrase is applied to the tort of negligence. In Williams v. Milotin 97 C.L.R. 465 (an action for negligence) the High Court at p.474 said: "When you speak of a cause of action you mean the essential ingredients in the title to the right which it is proposed to enforce. The essential ingredients in an action of negligence for personal injuries include the special or particular damage - it is the gist of the action - and the want of due care" (see Cartledge v. E. Jopling & Sons Ltd. (1963) A.C. 758 per Lord Pearce at pp.783-784). In the Donoghue v. Stevenson (supra) type of case the want of due care on the part of the English Company as the manufacturer consisted in the sale of "Distival" in the contemplation that, in the ordinary course, it would be consumed in the form in which it was prepared and sold with the knowledge that, if consumed by a woman in the early stages of pregnancy, injury would be sustained by the foetus. This act took place in England. The damage to the plaintiff took place in N.S.W. In the words of Lord Wright in Grant v. Australian Knitting Mills Ltd. (1936) A.C. 85 at pp.104-105 the duty at the time of manufacture and sale in England was potential or contingent and could only become vested by the consumption of the drug by a particular person and that event did not take place in England but in N.S.W. In these circumstances can it be truly said that a cause of action "arose" in N.S.W.? The argument for the appellant was that for that question to be answered in the affirmative all the essential ingredients of the tort must take place in this State. Whether that proposition is correct must depend upon the meaning of the word "arose" in the context of section 18(4).

In the course of his argument for the English Company, Senior Counsel relied on authorities which have been decided on the English R.S.C. 1883 O.XI r.1(ee) (now R.S.C. 1965 O.XI r.1(h)) which provides that "service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever the action is founded on a tort committed within the jurisdiction". The cases decided under this rule are Kroch v. Rossell et Cie (1937) 1 All E.R.725, George Monro Ltd. v. American Cyanamid and

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Chemical Corporation (1944) K.B.432; Bata v. Bata (1948) W.N. 366 and Cordova Land Co. Ltd. v. Black Diamond Steamship Corporation (1966) 1 W.L.R.793. In the George Monro Ltd. Case the plaintiff who carried on business in England purchased goods in the State of New York from the defendant who carried on business in U.S.A. which goods were dangerous unless certain precautions were taken. The property in the goods passed to the plaintiff in U.S.A. The Plaintiff sold a quantity of the goods in England to Boots Cash Chemists Ltd. who in turn resold them to Shropshire County Council who used them, pursuant to an agreement with one Wynn, for the "de-ratting" of Wynn's farm. Damage having been sustained to the farm, Wynn sued the Council who served a third party notice on the plaintiff and in that action judgment was given for Wynn against the Council. The plaintiff was ordered to contribute one half of the damages and costs. The plaintiff then began an action in England against the defendant to recover the sum paid by it by way of contribution upon a writ endorsed for damages for negligence and breach of contract. The writ was served in U.S.A. upon the defendant who entered a conditional appearance and sought an order setting aside the service of the writ. The order was granted. So far as the action for damages for negligence was concerned, it was held that the action was not founded on a tort committed within the jurisdiction. The case is an unsatisfactory one in that each of the judgments criticises the material upon which the question for the Court was posed for decision. Furthermore, with the greatest respect to the Court, one of its members, Goddard L.J. at p.440 appears to have assumed at one stage in his judgment that the locus delicti commissi was the U.S.A. and then refused to allow service of the writ out of the jurisdiction on the ground that there was no evidence that the wrong complained of was tortious by the lex loci delicti commissi although it would have been regarded as actionable by the law of England as the lex foie (cf. Koop v. Begg (supra)). That does not seem to me to be the correct test to apply when the only question before the Court was whether the plaintiff was suing in an action

founded upon a tort committed in England. Scott L.J. expressly declined to decide the point upon the wording of O.XI r.1(ee) itself and refused the order sought on the ground of international comity. Du Parcq L.J. at pp.440-441 said: "I am willing to infer that the negligence alleged is that the corporation put on the market a dangerous substance with written instructions to use it in a dangerous way. That act of commission was done in America and it is highly wrongful to say that the tort was committed within the jurisdiction of the English courts. The principle of the rule is plain. Looking at the substance of the matter without regard to any technical construction, the question is: Where was the wrongful act, from which the damage flows, in fact done? The question is not where was the damage suffered, even though damage may be the gist of the action." In both Kroch v. Rossell et Cie (supra) and Bata v. Bata (supra) the defendants printed or wrote matter defamatory of the plaintiff out of England which was published in England. The publication in England was held to constitute the commission in England of the tort of libel but in the first of these cases the Court held that it had a discretion and exercised it against the plaintiff. In the Cordova Land Co. Ltd. Case (supra) the defendants, a corporation, resident in U.S.A. entered into contracts in U.S.A. for the sale to the plaintiff (an English Company) of certain goods which were shipped from Boston, Massachusetts, c.i.f. Hull, in two ships owned by the defendant. The masters of the vessels issued clean bills of lading in respect of the goods but on arrival in England the goods were found to have been badly damaged. The buyer sued the defendant shipowner for the alleged fraudulent misrepresentation of the masters in issuing clean bills of lading, asserting that it had accepted the documents as a good tender under the contract in reliance upon those representations whereas, if it had been notified that the goods were not in good order and condition, it would have rejected the documents and not paid the purchase price. Winn J. discussed the question as to whether or not a tort had been committed within the jurisdiction. He referred to a dictum of Lord Tucker in Briese v. Woolley (1954) A.C.333

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(continued)

at p.353 to the effect that "the tort of fraudulent misrepresentation is not complete when a representation is made. It becomes complete when the misrepresentation - not having been corrected in the meantime - is acted upon by the representee. Damage giving rise to a claim for damages may not follow or may not result until a later date, but once the misrepresentation is acted upon by the representee the tortious act is complete, provided that the representation is false as at that date." Winn J. accepted that dictum as meaning that the tort is first complete when the representation is relied on although it does not become actionable until damage has resulted. Winn J. went on to say that to consider when the tort becomes actionable or when the tort is complete is not the appropriate test for giving effect to the words "founded on a tort committed within the jurisdiction". Ex hypothesi, not the whole of the tort complained of, in the sense of all its essential ingredients, was committed within the English jurisdiction. Lord Tucker was not considering the meaning of O.XI r.1(ee) when he uttered his dictum. "Tort" appears to be a word which has always escaped a completely satisfactory definition (cf. Prosser on Torts 3rd Edn. Chap.I Section 1) but it appears to me that when, as in O.XI r.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.

Upon this appeal Senior Counsel for the English Company submitted that there was no essential difference between the words of the English O.XI r.1(ee) and Section 18(4)(a) of the Common Law Procedure Act. However, I cannot accept this submission. Putting to one side for the moment the question of the exercise of a discretion, for the purposes of considering whether or not a Court should make an order under O.XI r.1(ee), I would respectfully agree with the citation which I have made above from the judgment of du Parcq L.J. in the George Monro Ltd. Case and with the reasoning of Winn J. in the Cordova Land Co. Ltd. Case (see also Abbott-Smith v. University of Toronto (1964)

45 D.L.R. (2d.) 672). Where, as in an action of negligence, the act which constitutes the want of due care occurs in one state and the resultant damage is sustained in another state it cannot be said, in my opinion, that the tort of negligence is committed in the last-mentioned state for the reason that only a part of the essential ingredients of the cause of action has taken place in that state. When speaking of an action brought in respect of a tort, to say that the tort has been committed in any one state is to assert that all its essential ingredients have taken place in that state. 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". 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. In some classes of tort, e.g. motor accident cases, the want of due care and the occurrence of injury are coincidental in time and place. In cases of fraudulent misrepresentation the making of the false statement and the act which results in damage to the plaintiff may be widely separated in both time and space; and the same may with equal, or, perhaps, greater force be said of the type of negligence action discussed in Donoghue v. Stevenson (supra) and Grant v. Australian Knitting Mills Ltd. (supra) because, when the want of care in manufacture occurs, there is, as Lord Wright has observed, "no specific person towards whom the duty could be said to exist: the thing might never be used; it might be destroyed by accident or it might be scrapped, or in many ways fail to come into use in the normal way". But the potential or contingent duty vests and its breach becomes actionable when a particular person uses or consumes it with resultant injury. It is at this stage, and thus at the place of the occurrence of the damage, that it can be said that the cause of action arose. In my view, it follows that, on the facts assumed above, the plaintiff has a cause of action against the

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(continued)

English Company which arose in N.S.W.

The wording "a cause of action which arose within the jurisdiction" in Section 18 of the Common Law Procedure Act 1899 is derived from Section 18 of the English Common Law Procedure Act 1852 (15 & 16 Vict. c.76) and the construction which I have given it appears to be consistent with the cases decided upon the 1852 Act - see Jackson v. Spittall L.R. 5 C.P. 542 followed by Vaughan v. Weldon L.R. 10 C.P. 47 cf. Buckingham v. Indramayo Steamship Co. 21 N.S.W.L.R. 215; as to the difference between "a cause of action" and "the cause of action" and as to the relevance of a court of limited jurisdiction, see Payne v. Hogg (1900) 2 Q.B. 43 at pp.51, 54.

The ground of the summons was simply that the Court had no jurisdiction to entertain the action and no question of the Court's discretion under Section 18(4) in the event that the English Company does not enter an unconditional appearance arises. Accordingly, I say nothing on that matter.

For these reasons I am of the opinion that Taylor J. was correct in the conclusion to which he came. I would dismiss the appeal.

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4th September 1968,

REASONS FOR JUDGMENT OF HOLMES J.A.

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL No. 6165 of 1966

CORAM: WALLACE P.
ASPREY J.A.
HOLMES J.A.

Wednesday, 4th September, 1968.

THE DISTILLERS CO. (BIO-CHEMICALS) LTD. V. THOMPSON & ANOR.

JUDGMENT

HOLMES J.A.: This is an appeal from Taylor J. sitting in chambers, when he dismissed a summons to strike out the name of the appellant from the writ in the proceeding, or alternatively to set aside the service of the writ upon this defendant.

The appellant is the first named defendant in an action brought on behalf of Laura Anne Thompson by her father as next friend in respect of damages to her in the circumstances more fully stated in the judgment of my brother Asprey.

The first named defendant in the writ and appellant in these proceedings is a manufacturer of certain anti-biotics and pharmaceutical preparations in England. Insofar as it used the drug thalidomide in one of its preparations, namely Distival, it used thalidomide which had been manufactured in Germany and obtained by it in bulk from the German manufacturers. The tablets and liquids containing thalidomide manufactured by the first named defendant were sold in England by it to an Australian company as purchaser. That company then sold to wholesalers and retailers in the Australian market the preparations it had purchased from the first named defendant in England.

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Reasons for Judgment of Holmes J.A.

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(continued)

The mother of the plaintiff was pregnant with her during August 1961 when she purchased the drug known as Distival which had been prescribed for her by a doctor and she in turn armed with the prescription had purchased the drug at a pharmacy. The Distival tablets were in a packet which contains 24 tablets and a printed document issued by the first named defendant which did not indicate that it was unsafe to take the Distival if the consumer was pregnant, but to the contrary indicated that it was safe to consume it.

The plaintiff was a foetus at the time when her mother consumed the harmful drug. Assuming she has a cause of action against the appellant, the question is whether that cause of action arose in New South Wales. It should be stated that the plaintiff was born without arms and with defective eyesight. The question of whether the plaintiff has a cause of action was not argued before the learned Judge nor before us. The assumption for present purposes is that the plaintiff has a cause of action and the only question is whether that cause of action arose in New South Wales.

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 the 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."

The cause of action relied upon therefore is an action on the case in respect of the damage to

the plaintiff caused by her mother taking the Distival in these circumstances. It has been said in Williams v. Miloton, 97 C.L.R. 465 at 474:-

"When you speak of a cause of action you mean the essential ingredients in the title to the right which it is proposed to enforce. The essential ingredients in an action of negligence for personal injuries include the special or particular damage - it is the gist of the action - and the want of due care."

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. Therefore the plaintiff's mother and in the circumstances the plaintiff could only have been within the neighbour principle of Donoghue v. Stevenson, 1932 A.C.562 in New South Wales. It is true that the appellant did not reside or carry on business in New South Wales but it did as manufacturer put forth a harmful product without a warning to people in various parts of the world, including people in New South Wales and including the plaintiff's mother. It seems to me that the duty was owed by the first defendant to the plaintiff's mother and to the plaintiff (by assumption) even though the first defendant 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 who consumed it. In this sense all the elements of the cause of action, duty, breach of duty and damages occurred in New South Wales.

It was strongly argued by reference to old cases and some modern cases that this result was wrong because the English company, the first defendant,

In the Supreme Court of New South Wales

Court of Appeal

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Reasons for Judgment of Holmes J.A.

4th September 1968. (continued)

was never in New South Wales and never did anything in New South Wales. Whether the duty is expressed in the various ways to which the learned Judge made reference in the speeches in Donoghue v. Stevenson, (supra) or whether it is expressed in the way to which Lord Wright adverted in Grant v. Australian Knitting Mills, (1936) A.C. 85, it seems to me that the wrong which the plaintiff suffered assuming that it is awrong and to which the name negligence is now given, all the elements of the tort arose here, even though the appellant itself was not here, that is to say in New South Wales.

In my opinion the appeal should be dismissed with costs.

No. 10

Rule of Court of Appeal

4th September 1968.

No. 10

RULE OF COURT OF APPEAL

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL No. 6165 of 1966

BETWEEN:

LAURA ANNE THOMPSON by her next friend ARTHUR LESLIE THOMPSON (Plaintiff) Respondent

and

THE DISTILLERS COMPANY (BIO-CHEMICAL) LIMITED (Defendant) Appellant

The fourth day of September One thousand nine hundred and sixty-eight.

THIS MATTER coming on for hearing on the twelfth day of August One thousand nine hundred and sixty-eight and the thirteenth day of August One thousand nine hundred and sixty eight before this Court WHEREUPON AND UPON HEARING READ the Notice of Appeal dated the

twenty-ninth day of November One thousand nine hundred and sixty-seven and the Appeal Book filed herein AND UPON HEARING what was alleged by Mr. Ash of Queen's Counsel with whom was Mr. Yeldham of Counsel for the defendant The Distillers Company (Bio-Chemical) Limited and by Mr. Woodward of Queen's Counsel with whom was Mr. Campbell of Counsel for the plaintiff Laura Anne Thompson IT IS ORDERED that this Appeal stand for Judgment AND the same standing in the paper this day for Judgment accordingly IT IS ORDERED that this appeal be and is hereby dismissed AND IT IS FURTHER ORDERED that the costs of the Appeal be paid by the Appellant to the Respondent.

PASSED this fourth day of September One thousand nine hundred and sixty-eight.
ENTERED same day.

For the REGISTRAR

(Sgd) B. MUIRHEAD (L.S.)

Chief Clerk

No. 11

RULE OF COURT OF APPEAL GRANTING CONDITIONAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL No. 6165 of 1966

BETWEEN:

LAURA ANNE THOMPSON by her next friend ARTHUR LESLIE THOMPSON (Plaintiff) Respondent

and

THE DISTILLERS COMPANY (BIO-CHEMICAL) LIMITED (Defendant) Appellant

Monday the sixteenth day of September one thousand nine hundred and sixty-eight.

In the Supreme Court of New South Wales

Court of Appeal

No. 11

Rule of Court of Appeal granting conditional leave to appeal to Her Majesty in Council.

16th September 1968.

(continued)

UPON MOTION made this day on behalf of The Distillers Company (Bio-Chemical) Limited WHEREUPON AND UPON READING the Notice of Motion herein dated the eleventh day of September last and the Affidavit of Edward John Culey sworn the eleventh day of September last and UPON HEARING what was alleged by Mr. Ash of Queen's Counsel with whom was Mr. Yeldham of Counsel for the Appellant The Distillers Company (Bio-Chemical) Limited and Mr. Campbell of Counsel for the Respondent Laura Anne Thompson IT IS ORDERED that leave to appeal to Her Majesty in Council from the judgment of this Court be and the same is hereby granted to The Distillers Company (Bio-Chemical) Limited hereinafter called the Appellant UPON CONDITION that the Appellant do, within three months from the date hereof, give security to the satisfaction of the Prothonotary in the amount of One thousand dollars ($1,000.00) for the due prosecution of the said appeal and the payment of such costs as may become payable to the Respondent in the event of the Appellant not obtaining an order granting him final leave to appeal from the said judgment or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the Appellant to pay the Respondent's costs of the said appeal, as the case may be, AND UPON FURTHER CONDITION that the Appellant do within fourteen (14) days from the date hereof deposit with the Prothonotary the sum of Fifty Dollars ($50.00) as security for and towards the costs of the preparation of the transcript record for the purposes of the said appeal AND UPON FURTHER CONDITION that the Appellant do within three months of the date hereof take out and proceed upon all such appointments and take all such other steps as may be necessary for the purpose of settling the index to the said transcript record and enabling the Prothonotary to certify that the said index has been settled and that the conditions hereinbefore referred to have been duly performed AND UPON FURTHER CONDITION finally that the Appellant do obtain a final order of this Court granting it leave to appeal as aforesaid AND THIS COURT DOTH FURTHER ORDER that the costs of all parties of this application and of the preparation of the said transcript record and of all other proceedings

hereunder and of the said final order do follow the decision of Her Majesty's Privy Council with respect to the costs of the said appeal or do abide the result of the said appeal in case the same shall stand or be dismissed for non-prosecution or be deemed so to be subject however to any orders that may be made by this Court up to and including the said final order or under any of the rules next hereinafter mentioned that is to say rules 16, 17, 20 and 21 of the Rules of the second day of April One thousand nine hundred and nine regulating appeals from this Court to Her Majesty in Council AND THIS COURT DOTH FURTHER ORDER that the costs incurred in New South Wales payable under the terms hereof or under any order of Her Majesty's Privy Council by any party of this appeal be taxed and paid to the party to whom the same shall be payable AND THIS COURT DOTH FURTHER ORDER that so much of the said costs as become payable by the Appellant under this order or any subsequent order of the Court or any order made by Her Majesty in Council in relation to the said appeal may be paid out of any moneys paid into Court as such security as aforesaid so far as the same shall extend AND after such payment out (if any) the balance (if any) of the said moneys be paid out of Court to the Appellant.

By the Court,

For the Prothonotary,

(Sgd) B. MUIRHEAD (L.S.)

Chief Clerk.

In the Supreme Court of New South Wales

Court of Appeal

No. 12

Rule of Court of Appeal granting final leave to appeal to Her Majesty in Council.

17th March 1969.

No. 12

RULE OF COURT OF APPEAL GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL No. 6165 of 1966

BETWEEN:

LAURA ANNE THOMPSON by her next friend ARTHUR LESLIE THOMPSON (Plaintiff) Respondent

and

THE DISTILLERS COMPANY (BIO-CHEMICAL) LIMITED (Defendant) Appellant

Monday the seventeenth day of February One thousand nine hundred and sixty-nine

UPON NOTICE made this day unto this Court before the Honourable Sir Gordon Wallace President the Honourable Kenneth Sydney Jacobs and the Honourable John Dashwood Holmes Judges of Appeal on behalf of the Appellant The Distillers Company (Bio-Chemical) Limited pursuant to Notice of Motion filed herein the seventh day of February last WHEREUPON AND UPON HEARING READ the said Notice of Motion the Affidavit of Jane Hamilton Mathews sworn the sixth day of February last and filed herein the Order made herein the sixteenth day of September last and the Certificate of the Registrar of the Court of Appeal dated the thirteenth day of December last of due compliance with the terms and conditions of the said Order and filed herein AND UPON HEARING what was alleged by Mr. Capelin of Counsel for the Appellant and Mr. Campbell of Counsel for the Respondent THIS COURT DOTH GRANT to the Appellant final leave to appeal to Her Majesty in Her Majesty's Privy Council from the decree of the Full Court made herein the first day of June last AND THIS COURT DOTH ORDER that upon payment by the Appellant of the costs of preparation of

the Transcript Record and despatch thereof to England the sum of Twenty-five pounds (£25.0.0.) deposited in Court by the Appellant as security for and towards the costs thereof be paid out of Court to the Appellant.

PASSED this 17th day of March 1969.

ENTERED same day.

(L.S.) B. MUIRHEAD

for the Prothonotary,

(signed)

Chief Clerk.

In the Supreme Court of New South Wales

Court of Appeal

No. 12

Rule of Court of Appeal granting final leave to appeal to Her Majesty in Council.

17th March 1969. (continued)

IN THE PRIVY COUNCIL No. 12 of 1969

ON APPEAL

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

B E T W E E N:

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

and

LAURA ANNE THOMPSON BY ARTHUR LESLIE
THOMPSON HER NEXT FREIDN (Plaintiff) Respondent

and

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

RECORD OF PROCEEDINGS

WILKINSON KIMBERS & STADDON
Hale Court,
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London, W.C.2.

Solicitors for Appellants

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Solicitors for Respondent.