COMMENT

THE PLACE OF A TORT — RECENT CASES

The problem of determining the 'place of the tort' occurs in two contexts. In the first place, it is a necessary element as part of an application of the second limb of the rule in *Phillips* v. *Eyre*[1] as stated[2] by Willes J., 'As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. ... Secondly, the act must not have been justifiable by *the law of the place where it was done.*' In the second place, it is necessary to locate the place of the tort as part of the jurisdictional test under Order 11; the action is, '*founded on a tort committed*' in the forum. The decided cases all fall within the second category. It has been suggested that, because of the presence of the court's discretion in relation to Order 11, it would be unwise to use these cases as precedents for the purpose of determining the *lex loci delicti* within the second limb of *Phillips* v. *Eyre*. However, there is clearly a very strong analogy between the two situations. In both cases the determination of the place of the tort will depend upon the nature and purpose of the tort involved.

In the important case of *Distillers Co. (Bio-chemicals) Ltd.* v. *Thompson*[3] the Privy Council discussed the different theories which have been advanced for the purpose of locating the place of a tort. It also formulated a principle of general application for determining that question: looking back over the series of events, '... where in substance did this cause of action arise?' This approach emphasises the importance of the court in each case looking at the 'substance' of the tort; determining its crucial element and where this is located.

In the *Distiller's* case the Plaintiff brought an action in negligence, alleging a failure to warn her mother of the harmful effects of Distival. The drug, which contained thalidomide, was manufactured in England by the first defendant and supplied to the second defendant, an Australian company, which distributed it in tablet form in New South Wales. The plaintiff claimed that her mother had purchased the drug in New South Wales and had taken it during her pregnancy with the result that the plaintiff had been born malformed and with defective vision. The printed matter accompanying the drug bore the name of the first de-

1 (1870) L.R. 6 Q.B. 1.

2 Ibid at p. 28.

3 [1971] A.C. 458.

fendant but made no reference to the second defendant. It described Distival as a harmless, safe and effective sedative without any side-effects. The point at issue in the proceedings was whether the claim against the first defendant was sustainable as a 'cause of action which arose within the jurisdiction' of the Supreme Court of New South Wales within s. 18 (4) of the New South Wales *Common Law Procedure Act* 1899. The proceedings thus raised the problem of determining the 'place of the tort'.

In considering this issue the Privy Council examined three theories as to the place of a tort. As Lord Pearson, who delivered the advice of the Board, pointed out,[4]

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

The Privy Council applied the third theory. As the Board pointed out,[5] '... the rule is inherently reasonable, as the defendant is called on to answer for the wrong in the courts of the country where he did the wrong'.[6] The tort in the *Distiller's* case was the failure to warn the plaintiff's mother in New South Wales of the harmful effects of the drug and the cause of action thus arose within the jurisdiction. As the Privy Council said,[7] 'The plaintiff is entitled to complain of the lack of communication in New South Wales causing injury to the plaintiff there. That is the act (which must include omission) on the part of the first defendant which had given the plaintiff a cause of complaint in law. The cause of action arose within the jurisdiction.'

It is interesting to note that the English Court of Appeal in two recent cases has applied what may be described as a flexible test for determining the place of a tort: looking back over the series of events, 'Where in substance did this cause of action arise?' This was framed by Lord Pearson in the *Distiller's* case as a rejection of the 'last event' theory. In relation to negligence, for example, the happening of damage to the

4 Ibid at p. 466.

5 Ibid at p. 468.

6 The Privy Council was quick to point out, however, that the rule laid down in *Jackson* v. *Spittall* (1870) L.R. 5 C.P. 542 did not provide an easy answer in all cases. In the majority of situations the place where the defendant acts negligently and the place where the defendant's negligence causes damage to the plaintiff's interests are the same. Problems can occur, however, where there is a 'separation in time and place' between the negligent behaviour of the defendant and the damage to the plaintiff. However, as the negligent omission and the damage had both occurred in New South Wales the Board decided that there was no need to express an opinion on that difficult question.

7 [1971] A.C. 458 at p. 469.

plaintiff is a necessary ingredient and is the last event completing the cause of action. But the place where this happens may be fortuitous and should not by itself be regarded as determining jurisdiction. As Lord Pearson pointed out,[8] 'It is not the right approach to say that, because there was no complete tort until the damage occurred, therefore the cause of action arose wherever the damage occurred. The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question; where in substance did this cause of action arise ?'

First, in *Castree* v. *E. R. Squibb & Son Ltd. and Another*[9] the plaintiff brought an action against the defendant, her employer, claiming damages for personal injury when a machine she was using disintegrated, causing her injury. The machine had been manufactured in Germany but had been purchased by the defendant in England. The Company sought leave to issue a third-party notice upon the German manufacturer claiming contribution from it as a jjoint-tortfeasor under Order 11, r (i) (h) for a tort committed under the jurisdiction. The Court of Appeal rejected the German company's argument that Germany, as the place of manufacture, was the place of the tort. As Ackner L.J., delivering the leading judgment, pointed out, the 'substantial wrongdoing' was the putting of the machine onto the English market without warning as to its defects.[10] The approach suggested by Lord Pearson in the *Distiller's* case was followed: '... and applying the test which is accepted on all sides as the appropriate test, namely, to look back over the series of events constituting the tort and ask the question where in substance this cause of action arises, I should conclude that it arises in this country'.[11]

Second, in *Multinational Gas and Petroleum Co.* v. *Multinational Gas and Petrochemical Services Ltd. and others*[12] three oil corporations from U.S.A., France and Japan respectively founded the plaintiff company, which was incorporated in Liberia. It was intended that the company should work out of London, chartering and also acquiring oil tankers. On advice from tax counsel, the three corporations agreed to create an English company, the first defendant, who was to act as an agent for the plaintiff company. The plaintiff ran into financial difficulties, became bankrupt and was wound up. As a consequence of this, the first defendant was also ordered to be wound up. It the present proceedings, the plaintiff company sued the first defendant, its directors, its own directors and the three oil corporations, claiming damages for negligence. It also alleged that the first defendant's directors were negligent in preparing inadequate budgets and insufficient information for the plaintiff company's directors and that the three oil companies were also negligent

8 Ibid, at p. 468.

9 [1980] 2 All E.R. 589.

10 *Cf. Jacobs* v. *Australian Abrasives Pty. Ltd.* [1971] Tas. S.R. 92.

11 [1980] 2 All E.R. 589 at p. 592.

12 [1983] 2 All E.R. 563.

in failing to appreciate these difficulties. The plaintiff sought to serve concurrent writs on the ground that the action was founded on a tort committed within the jurisdiction. It was argued by the plaintiff that the decisions of the company directors, made outside the jurisdiction, were the end product of negligence which began within the jurisdiction. The Court of Appeal rejected this argument. It held that, as the decisions of the directors of the plaintiff company had been made abroad and the resultant damage had occurred abroad, the plaintiff had failed to establish that a tort had been committed within the jurisdiction under Order 11. As Lawton L.J. pointed out,[13] 'Any worthwhile claim had to be founded on what the oil companies had done. What had they done which caused loss to the plaintiff and through it to the creditors? They had made what were alleged to have been highly speculative decisions which could not properly be regarded as falling within the scope of reasonable business judgment. Those decisions had not been made within the jurisdiction... and the damage which it was said was caused by those decisions did not occur within the jurisdiction... Following what Lord Pearson said in *Distillers Co. (Biochemicals) Ltd.* v. *Thompson* [1971] 1 All E.R. 694 at p. 700, [1971] A.C. 458 at p. 468 I look back over the series of events alleged to constitute the tort and ask myself the question; where in substance did this cause of action arise?[14] The answer is clear: wherever the plaintiff's directors made the relevant alleged decisions. In my judgment, the plaintiff had not established that the action is founded on a tort committed within the jurisdiction.'

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13 Ibid, at p. 570.

14 See May L.J. at p. 573 and Dillon L.J. at p. 582, both applying this test.

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