Bond Law Review

Volume 9 | Issue 1 Article 5

6-1-1997

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Recommended Citation

Dutson, Stuart (1997) "Product Liability and Private International Law: Jurisdiction in International Product Liability Litigation," *Bond Law Review*: Vol. 9: Iss. 1, Article 5.
Available at: http://epublications.bond.edu.au/blr/vol9/iss1/5

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Abstract
The aim of this article is to identify and analyse the means by which jurisdiction can be established in an Australian court against a foreign manufacturer/designer and/or assembler in a product liability action brought under the tort of negligence and Part VA of the Trade Practices Act 1974 (Commonwealth).

Keywords
product liability, international law, jurisdiction, Trade Practices Act 1974

Cover Page Footnote
I am grateful to Mr Richard Fentiman, Queens' College, Cambridge; Mr John Collier, Trinity Hall, Cambridge; Professor Peter Nygh, University of New South Wales; and Ms. Anne Wallace, Queensland University of Technology; for their helpful comments on the thesis upon which this article is, in part, based.

This article is available in Bond Law Review: http://epublications.bond.edu.au/blr/vol9/iss1/5

PRODUCT LIABILITY AND PRIVATE INTERNATIONAL LAW: JURISDICTION IN INTERNATIONAL PRODUCT LIABILITY LITIGATION

by
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Introduction

The determination of whether a court can exercise jurisdiction in international product liability litigation is a problem that has often bedevilled the court, jurists and practitioners alike. Whilst product liability problems can be entirely domestic, the nature of the design, manufacture, supply, and consumption of products, and the damage that they can do if defective, is such that a product liability problem can involve a plethora of material international elements.[1] The internationalisation of world trade bears this out further - a consumer reaching for a piece of fruit or selecting a motor vehicle, or a business purchasing new equipment or obtaining intermediate goods, may well find that the product that it selected was manufactured overseas. Moreover, the finished product may itself consist of a mix of domestic and foreign parts. The product or one or more of its components may have been designed overseas and manufactured there or elsewhere. However, the international dimension in a product liability case need not arise solely in the design and manufacture stages - the product may have been supplied in a different country and the damage could occur in yet another country but not become apparent until the injured party enters yet another country. Adding yet another level of complexity, any one of these stages in a product liability claim - design, manufacture, supply and damage, may itself have been spread over more than one jurisdiction. In factual scenarios such as these the first

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* LLB (Hons) B.Bus (QUT), PhD (Cantab.). I am grateful to Mr Richard Fentiman, Queens' College, Cambridge; Mr John Collier, Trinity Hall, Cambridge; Professor Peter Nygh, University of New South Wales; and Ms. Anne Wallace, Queensland University of Technology; for their helpful comments on the thesis upon which this article is, in part, based.

1 Cf. Fawcett, J.J. *Products Liability In Private International Law: A European Perspective* (1993) I Recueil des Cours 13 at 26-27, 46, 84-85; Kaye, Peter. *Private International Law of Tort and Product Liability: Jurisdiction, Applicable Law and Extraterritorial Protective Measures*. Aldershot, England: Dartmouth Publishing Company Limited, 1991 at 108-109; and The Law Commission and the Scottish Law Commission. *Private International Law: Choice of Law in Tort and Delict,* Working Paper No 87 (LC) and Consultative Memorandum No 62 (SLC). London: Her Majesty's Stationery Office, 1984. [Law Commission (1984)] at 169-170. North has described product liability as 'the most common international tort': Special Public Bill Committee - House of Lords *Private International Law (Miscellaneous Provisions) Bill [HL] Proceedings of the Committee* London HMSO: 1995 in oral evidence at 40 col. 2.

issue that addresses itself to a lawyer (the question of jurisdiction)[2] may appear to resemble Fermat's Last Theorem - the answer best assumed as a fact without any attempt to determine the precise answer.

The aim of this article is to identify and analyse the means by which jurisdiction[3] can be established in an Australian court against a foreign manufacturer/designer and/or assembler in a product liability action brought under the tort of negligence and Part VA of the *Trade Practices the Act 1974* (Commonwealth) (herein 'TPA').

Substantive Product Liability Law

The effect of the TPA is to make the producer of a product liable in damages for personal injury and some forms of property damage caused by a defect in the product, without the necessity for the plaintiff to prove that the producer was guilty of fault, though certain defences may be raised by the producer.[4] The Act provides, in effect, that the following persons are to be taken to be a producer: the producer of the product, any person who has held himself out as the producer of the product,[5] any person who imports the product into Australia.[6] Producers of component parts of a finished product are also producers under the Act. The Act provides that where two or more persons are liable for the same damage under the Act their liability shall be joint and several.[7]

There are a number of cases in which it may well be worth a plaintiff's while to pursue a foreign manufacturer in a product liability case. The plaintiff may have no relevant contract with anyone and there may be no negligent party who is within the jurisdiction to pursue or worth pursuing. In these circumstances a plaintiff's only possible claim will be in negligence or under the TPA against a foreign party such as the manufacturer, designer and/or assembler. If the importer into Australia has nominal capital, no (or insufficient) assets and no (or insufficient) insurance cover, then they may not be worth pursuing. The same can be said of cases in which the importer, perhaps being a small $2 concern, disappears or is no longer extant. While a judgment can be obtained against a subsidiary of a pecunious foreign holding company in these circumstances, the enforcement of this judgment against the holding company can be obtained only in a limited number of countries.[8] Additionally, if a product is directly imported by a business to be used in its own enterprise, then the only claim that a person

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2 Of course the practical consideration of whether any judgment, if obtained, will ever be able to be enforced, must be addressed by a plaintiff's lawyer at the outset if the plaintiff wishes to avoid a hollow victory.

3 Further consideration is given to this term below.

4 Sections 75AD-75AG and 75AK TPA.

5 Herein the "own-brander".

6 Section 75AB TPA. The term producer as used in this thesis will mean the actual producer and own-brander (if any) unless otherwise indicated.

7 Section 75AM TPA.

8 It appears that it will not be possible in the vast majority of common law nations*: Amust Computer Corporation Pty Ltd v. Australia Entre Business Centres Pty Ltd (No 2)* (1987) A.T.P.R. 40-829 and *Adams v. Cape Industries Plc.* [1990] Ch. 433 (C.A.).

injured or suffering damage by to a defective product can make under the TPA will be against the foreign manufacturer.

Jurisdiction

Jurisdiction as provided for by service of the court's originating process is 'personal jurisdiction' as opposed to 'subject matter jurisdiction'. The former is jurisdiction in the sense of amenability of the defendant to the court's writ.[9] The latter is jurisdiction in the sense of entertainment of disputes as to a particular subject matter and is particularly relevant in cases in which the relevant law is derived from a statute (such as the TPA).[10] Generally, 'personal' and 'subject matter' jurisdiction must be present in any case if the court is to be correctly seized of jurisdiction to be able to hear and determine the dispute.[11] This article is solely concerned with the issue of personal jurisdiction.[12]

In Australia in an action in personam the rules as to legal service of a writ define the limits of the courts' personal jurisdiction.[13] If a defendant is not in Australia when served with the court's process and does not submit to the Australian court's jurisdiction, then the court has no personal jurisdiction at common law to entertain an action in personam[14] against them.[15] However, Order 11 R.S.C. (England), its predecessors,[16] and Australian counterparts,[17] have modified this.[18] These rules give the courts a discretion either to allow service of the court's process (or notice thereof in lieu), outside the court's territorial

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9 See *MacKinnon v. Donaldson, Lufkin and Jenrette Securities Corp.* [1988] Ch. 482 at 493; *David Syme & Co. Ltd v. Grey* (1992) 115 A.L.R. 247 per Gummow J. at 256-257. See further Dutson, Stuart *The Conflict of Laws and Statutes* (1997) 60 Modern L.R. 668.

10 Ibid.

11 Ibid.

12 See further Dutson, Stuart *The Conflict of Laws and Statutes* (1997) 60 Modern Law Review 668 where the distinction between these two forms of jurisdiction is discussed in detail. Subject matter jurisdiction as it relates to the TPA is discussed by the present author in: Dutson, Stuart *International Product Liability Litigation* (1996) 22 Monash University Law Review 244.

13 Collins, Lawrence, ed. *Dicey and Morris on The Conflict of Laws* 12th ed. London: Sweet & Maxwell, 1993 [Dicey and Morris (1993)] at 270. Cf. *Flaherty v. Girgis* (1987) 162 C.L.R. 574 per Mason A.C.J., Wilson and Dawson JJ. at 598.

14 Such as an action in tort or pursuant to the TPA.

15 *Mercedes-Benz AG v. Leiduck* [1996] 1 A.C. 284 (P.C.) at 296-297, *Jackson v. Spittall* (1870) L.R. 5 C.P. 542, *Grehan v. Medical Incorporated* [1986] I.R. 528 at 532, *Jacobs v. Australian Abrasives Pty. Ltd.* [1971] Tas.S.R. 92 at 94; Collins, Lawrence, ed. *Dicey and Morris on The Conflict of Laws*. 12th ed. London: Sweet & Maxwell, 1993 at 313; Cairns, Bernard C. *Australian Civil Procedure*. 3rd ed. Sydney: The Law Book Company Limited, 1992 at 46; and Sharpe, Robert J. *Inter provincial Product Liability Litigation*. Toronto: Butterworths, 1982 at 2.

16 Originally ss.18 and 19 *Common Law Procedure Act 1852* (UK).

17 See below.

18 Cf. *Mercedes-Benz AG v. Leiduck* [1996] 1 A.C. 284 (P.C.) at 296-297, and *Flaherty v. Girgis* (1987) 162 C.L.R. 574 per Brennan J. at 599-600. Note that in the case of England the Brussels and Lugano Conventions have modified this law. O.11 RSC (England) and its Australian counterparts will herein be referred to collectively as the 'extraterritorial service rules'.

jurisdiction, or to allow the plaintiff to proceed where he has already effected service outside the jurisdiction and leave to serve-out is not first required.

The rules of each Australian State and Territory that may be applicable in an international product liability case are analysed and applied to such a case below.

Extraterritorial Service Provisions which may be Employed in the Case of the TPA and the Tort of Negligence

'Tort Committed within the [Jurisdiction]'

Each Australian jurisdiction's rules of court[19] provide for extraterritorial service of the court's process in an action founded on a 'tort committed within the [jurisdiction]'.[20] The rule in South Australia was amended in 1992 to include torts 'wholly or partly' committed within South Australia. The implications of this change of wording have not yet been judicially considered.

It has been concluded by the present author[21] that the cause of action created by the TPA should be characterised as a tort for private international law[22] purposes.[23] Accordingly, this rule (and other rules that deal with torts), is applicable to both the TPA and the tort negligence.

The law dealing with this extraterritorial service rule has been comprehensively dealt with in a number of leading texts.[24] Whether an action is 'founded on a tort' is determined in accordance with the lex fori.[25] The test to

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19 The States and Territories of Australia are different jurisdictions for private international law purposes, therefore the relevant jurisdiction for the purpose of this Rule will be the State or Territory (not Australia as a whole) in whose jurisdiction the tort was committed.

20 High Court Rules RHC O.10 r.1(1)(g); Tasmania RSC O.11 r.1 (1)(f); Northern Territory RSC O.7.01(1)(j); Queensland RSC O.11.01(2)(k); Western Australia RSC O.10 r.1(1)(k); New South Wales RSC Pt.10 r.1A(1)(d); Australian Capital Territory RSC O.12 r.2(e)(ii); Victoria RSC Pt.7.01 (1)(i); South Australia RSC R.18.02 (f); and, Federal Court of Australia RFC O.8 r.1(ac).

21 Dutson, Stuart *Characterisation of Product Liability in Private International Law* to be published in the 1997 volume 2 edition of the University of Queensland Law Journal.

22 Which includes for the purpose of the extraterritorial service rules.

23 Cf. *Sedgwick Limited v. Bain Clarkson Limited (t/a Bain Hogg Limited)* (1995) A.T.P.R. 41-411 at 40,559-40,560 where the court applied the leading Australian authority on the 'tort committed within the jurisdiction' extraterritorial service rule (viz. *Voth v. Manildra Flour Mills* (1990) 171 C.L.R. 538 discussed below), to determine the locus of a 'cause of action of contravention of s.52' of the TPA.

24 Collier, J. G. *Conflict of laws* 2nd ed. Cambridge: Cambridge University Press, 1994 at 230-233; Sykes, Edward; and Pryles, Michael *Australian Private International Law.* 3rd ed. Sydney: The Law Book Company, 1991 at 39-44; and Nygh, P.E. *Conflict of Laws in Australia* 6th ed. Sydney: Butterworths, 1995 at 55-57.

25 *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391 at 443 (C.A.) (overruled in *Lonrho Plc. v. Fayed* [1992] 1 A.C. 448 but not on this point); and Collins, Lawrence, ed. *Dicey and Morris on The Conflict of Laws*. 12th ed. London: Sweet & Maxwell, 1993. First Supplement (1994) and Second Cumulative Supplement (1995) to the 12th ed. [Dicey and Morris (1993)] at 1508.

determine whether a tort has been committed within the jurisdiction which appears to have become accepted by a large number of the leading text authors and jurists is 'that laid down in *Distillers* . . . 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 the cause of action arise'.[26] However it appears that this may not be an entirely accurate statement of the law, at least in Australia.[27] What will be addressed here is the ascertainment of the correct test to determine whether a tort has been committed within the jurisdiction in Australia, and the application of the test to the legal and factual situations with which this article is concerned.

In *Distillers*[28] the court refused to express an opinion on the 'difficult' problem of deciding where in substance the wrongdoing occurred in cases where

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26 Nygh, P.E. *Conflict of Laws in Australia* 5th ed. Sydney: Butterworths, 1991 at 47. The decision referred to is *Distillers Co. v. Thompson* [1971] A.C. 458 (P.C.). Cf. North, P.M., and Fawcett, J.J. *Cheshire and North's Private International Law* 12th ed. London: Butterworths, 1992 [Cheshire and North (1992)] at 199; Morse, C.G.J. '*Product Liability in the Conflict of Laws*' (1989) 42 Current Law Problems 167 at 172; Morse, C.G.J. *Torts in Private International Law* Amsterdam: North Holland Publishing Company, 1978 at 127ff. esp. 129 for the distinction between the proffered test and the test as interpreted in *Voth v. Manildra Flour Mills* (1990) 171 C.L.R. 538; Fawcett, J.J. *Products Liability In Private International Law: A European Perspective* (1993) I Recueil des Cours 13 at 199; Cavanagh, S.W., Phegan, C.S. *Product Liability in Australia*. Sydney: Butterworths, 1983 at 240, Collins, Lawrence, ed. *Dicey and Morris on The Conflict of Laws*. 12th ed. London: Sweet & Maxwell, 1993 [Dicey and Morris (1993)] at 1511 and 1512 however contrast 340; Collier, J. G. *Conflict of laws* 2nd ed. Cambridge: Cambridge University Press, 1994 at 230-233; and Keane QC, P.A. *Personal Injuries Litigation - Conflicts of Law and Forum Shopping* [1990] (6) Queensland Law Society Journal 203 at 209. Contrast The Law Commission and the Scottish Law Commission. *Private International Law: Choice of Law in Tort and Delict*, Working Paper No 87 (LC) and Consultative Memorandum No 62 (SLC). London: Her Majesty's Stationery Office, 1984. [Law Commission (1984)] at 170, North, P.M., and Fawcett, J.J. *Cheshire and North's Private International Law* 12th ed. London: Butterworths, 1992 [Cheshire and North (1992)] at 199, Nygh, P.E. *Conflict of Laws in Australia*. 6th ed. Sydney: Butterworths, 1995 at 55-56; Sykes, Edward, and Pryles, Michael. *Australian Private International Law.* 3rd ed. Sydney: The Law Book Company, 1991 at 40-41; Collins, Lawrence. *Essays in international litigation and the conflict of laws*. Oxford: Oxford University Press, 1994 [Collins (1994)] at 236, and Pryles, Michael C. *Tort And Related Obligations In Private International Law* (1991) II Recueil des Cours 9 [Pryles (1991)] at 37-44 however contrast 199ff.

27 Cf. the differences in the treatment of this extraterritorial service head in Nygh, P.E. *Conflict of Laws in Australia*. 5th ed. Sydney: Butterworths, 1991 at 47 and Nygh, P.E. *Conflict of Laws in Australia*. 6th ed. Sydney: Butterworths, 1995 at 55-56 (i.e. pre and post *Voth*).

28 The extraterritorial service provision that the court was considering in *Distillers* allowed for extraterritorial service in cases of 'a cause of action which arose within the jurisdiction'. However, the cause of action in *Distillers* was in tort and *Distillers* has been treated, and was decided, as a decision dealing in terms with the 'tort committed within the jurisdiction' extraterritorial service provision: see, for example, *Buttigeig v. Stevedoring Corporation* [1972] V.R. 626 at 628; *Grehan v. Medical Incorporated* [1986] I.R. 528 at 533-

'X is the country where the defendant was a negligent and Y is the country in which the defendant's negligence caused the plaintiff to be hurt.'[29] However, the reasoning in *Distillers* has subsequently been approved and followed in cases in which the defendant's negligent acts and the plaintiff's injury were in different jurisdictions, such as the cases which this article is concerned with.[30] Accordingly, what that case decided is nevertheless central to any analysis of this area of law in product liability cases.

In *Voth v. Manildra Flour Mills Pty. Ltd*.[31] the leading Australian decision in this area - counsel for the appellant contended that 'the cause of action alleged constitute[d] a foreign tort because the acts or omissions complained of, as distinct from the damage accruing therefrom, occurred outside [the jurisdiction]'.[32]

Mason C.J., Deane, Dawson and Gaudron JJ.[33] approved and applied what the court described as the approach of *Jackson v. Spittall*:[34] 'that the question whether a cause of action is to be classified as local or foreign is to be answered by ascertaining the place of "the act on the part of the defendant which gives the plaintiff his cause of complaint"'.[35] Their Honours stated that it is 'some act of the defendant, and not its consequences that must be the focus of attention'.[36] In the

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534; and Nygh, P.E. *Conflict of Laws* in Halsbury's Laws of Australia. Gibbs, Sir Harry (ed.). Sydney: Butterworths, 1991 [loose-leaf service cited as Nygh (1993-)] at paragraph [85-375].

29 At 469.

30 See, for example, *Voth v. Manildra Flour Mills* (1990) 171 C.L.R. 538, *Moran v. Pyle National (Canada) Ltd.* (1973) 43 D.L.R. (3d) 239, *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391 (C.A.), *MacGregor v. Application des Gaz* [1976] QdR 175, and *Hall v. Australian Capital Territory Electricity Authority* [1980] 2 N.S.W.L.R. 26. Cf. Morse, C.G.J. *Torts in Private International Law.* Amsterdam: North Holland Publishing Company, 1978 at 129, and Kaye, Peter. *Private International Law of Tort and Product Liability: Jurisdiction, Applicable Law and Extraterritorial Protective Measures*. Aldershot, England: Dartmouth Publishing Company Limited, 1991 at 58-59.

31 (1990) 171 C.L.R. 538. The court in *Voth* was required to determine where the tort in that case was committed because the defendant contended that if it was committed in a foreign jurisdiction (Missouri) then in order to succeed the plaintiff would have to demonstrate civil liability in Missouri under the choice of law rule in tort (i.e. a New South Wales court [the forum court] would have to apply Missouri law), and the consequence of that was that New South Wales was an inappropriate forum. If the defendant's contention was correct then the proceedings in the New South Wales court would be stayed. In reaching its decision on the place of the tort, the court relied exclusively upon cases dealing with the locus of a tort for the purpose of determining whether the court had jurisdiction. It therefore appears that in Australia (contrast the English position discussed below), the test for determining the locus of a tort is, for all practical purposes, the same for the purposes of determining jurisdiction and applying the choice of law rule in tort: Nygh, P.E. *Conflict of Laws in Australia*. 6th ed. Sydney: Butterworths, 1995 at 351; Beerworth, E. (ed.). *Product Liability Australia*. Sydney: Butterworths, 1995- (loose-leaf service) per Nygh at paragraph [25.135]; and Sykes, Edward, and Pryles, Michael. *Australian Private International Law.* 3rd ed. Sydney: The Law Book Company, 1991 at 579-581; and cf. Collins, Lawrence, ed. *Dicey and Morris on The Conflict of Laws*. 12th ed. London: Sweet & Maxwell, 1993 [Dicey and Morris (1993)] at 1509.

32 At 566, see also 541-542.

33 Toohey J. adopted the reasons of the joint judgment in this respect: at 590.

34 (1870) L.R. 5 C.P. 542.

35 At 567. Cf. *Multinational Gas Co. v. Multinational Gas Services Ltd*. [1983] Ch. 258 per Lawton L.J. at 267 and Dillon L.J. at 284 (CA).

36 At 567. Contrast *Tycoon Holdings Ltd v. Trenco Jetco Inc.* (1992) 34 F.C.R. 31 at 37, and Keane QC, P.A. *Personal Injuries Litigation - Conflicts of Law and Forum Shopping* [1990] (6) Queensland Law Society Journal 203 at 209. The much lauded Supreme Court of Canada's decision in *Moran v. Pyle National (Canada) Ltd.* (1973) 43 D.L.R. (3d) 239 was not referred to by the court.

present author's opinion the High Court's approach in *Voth* reflects the true ratio of *Distillers* more adequately than the attempts of the jurists noted above, and the English and Canadian decisions noted below, something which all three sources purport to be attempting to achieve.[37]

Their Honours stated that this test had been 'expressly affirmed in *Distillers*'.[38] Their Honours eschewed reference to the 'substance of the cause of action' approach as the determinant in itself of the place that the tort was committed. Rather they used a form of it in the determination of 'the place of "the act on the part of the defendant which gives plaintiff his cause of complaint"'.[39] The court asked 'where, in substance, [did] the act [take] place'.[40] Their Honours' formulation of the approach is a more definite and precise test than merely asking 'where in substance did this cause of action arise'?[41] It appears to require a rigid and unqualified application of the place of the defendant's act test, the 'substance of the cause of action' approach being rendered nothing more than an articulation of the House of Lord's reasoning employed in arriving to an identical conclusion and endorsement of the decision in *Jackson v. Spittall*.

Their Honours noted that the question 'where, in substance, [did] the act [take] place' would prove particularly useful in cases in which the 'cause of complaint' is an omission. They stated that whilst it is nonsensical to speak of the place of an omission, 'it is possible to speak of the place of the act or acts of the defendant in the context of which the omission assumes significance and to identify that place as the place of the 'cause of complaint"',[42] and, it appears that these places or acts are to be determined by asking 'where in substance did they take place'.

Brennan J. in a separate judgment, dissenting but not on this point, proffered an almost identical approach. However he used the *Distillers* approach in determining the identity of the cause of complaint itself rather than the place of

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37 See esp. *Distillers* at 469 A - B. Cf. Morse, C.G.J. *Torts in Private International Law* Amsterdam: North Holland Publishing Company, 1978 at 128-129; Pryles, Michael C. *Tort And Related Obligations In Private International Law* (1991) II Recueil des Cours 9 [Pryles (1991)] at 42; The Law Commission and the Scottish Law Commission *Private International Law: Choice of Law in Tort and Delict*, Working Paper No 87 (LC) and Consultative Memorandum No 62 (SLC) London: Her Majesty's Stationery Office, 1984 [Law Commission (1984)] at 170; and semble Morse, C.G.J. *Product Liability in the Conflict of Laws* (1989) 42 Current Law Problems 167 at 172-173. Contrast Keane QC, P.A. *Personal Injuries Litigation - Conflicts of Law and Forum Shopping* [1990] (6) Queensland Law Society Journal 203 at 209.

38 At 567.

39 At 567. Cf. The Law Commission and the Scottish Law Commission. *Private International Law: Choice of Law in Tort and Delict*, Working Paper No 87 (LC) and Consultative Memorandum No 62 (SLC) London: Her Majesty's Stationery Office, 1984 [Law Commission (1984)] at 170; and Morse, C.G.J. *Torts in Private International Law* Amsterdam: North Holland Publishing Company, 1978 at 128-129.

40 At 568. Cf. *MacGregor v. Application des Gaz* [1976] QdR 175 at 176; and *Buttigeig v. Stevedoring Corporation* [1972] V.R. 626 at 628.

41 Cf. Morse, C.G.J. *Torts in Private International Law* Amsterdam: North Holland Publishing Company, 1978 at 129.

42 At 567.

it: 'In each case, it is necessary to look at the damage which the plaintiff seeks to recover and then, looking back along the chain of causation, to ascertain the act or omission which was the substantial cause of that damage'.[43] However, it appears that there is no difference in substance between the approaches in the joint judgment and that of Brennan J.

If the High Court's approach in *Voth* is to be followed then the question of where a tort is committed is to be determined by reference to the series of events, and by asking where in substance did the act on the part of the defendant which gives the plaintiff his cause of complaint take place.[44]

A problem that may arise that has been identified by a number of commentators, most notably Fawcett,[45] is the identification of the place of actual manufacture in a product liability case brought under legislation implementing the Directive. The same consideration could be applied equally to an action brought under the TPA or a parallel negligence action. In the case of a final product, parts may have originated in India and Spain, it may have been initially assembled in Italy, and finally assembled in Japan.[46] A similarly cosmopolitan hypothetical situation could be proffered for the design process. In circumstances such as these Fawcett has suggested that the place of the defendant's act becomes somewhat problematic.[47] However, it may be that the High Court in *Voth* has already supplied the solution to this dilemma. In *Voth* the High Court endorsed the process 'as laid down in *Distillers*'[48] of determining 'by reference to the events . . . where, in substance, the act [of the defendant which is the cause of complaint] took place.'[49] Applying this process to determine the place of the cause of action in complex multinational factual circumstances such as those proffered above, the court may look at the precise nature of the defect and the precise nature of the contribution made to the manufacture or design of the product at each of the relevant sites. It could then identify, out of all of these possible places, that place where, in substance, the defendant's act which created or caused the defect occurred.

In *Distillers* the court stated that 'so far as appears, the goods were not defective or incorrectly manufactured. The negligence was in failure to give a warning that the goods would be dangerous if taken by an expectant mother in the first three months of pregnancy'.[50] That warning could have been attached to the goods when they were manufactured in England or it could have been

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43 At 576.
44 At 567-569.
45 Fawcett, J.J. *Products Liability In Private International Law: A European Perspective* (1993) I Recueil des Cours 13 at 70-71 and 211.
46 Fawcett, J.J. *Products Liability In Private International Law: A European Perspective* (1993) I Recueil des Cours 13. at 70-71.
47 Fawcett, J.J. *Products Liability In Private International Law: A European Perspective* (1993) I Recueil des Cours 13 at 70-71 and 211.
48 At 568.
49 At 568.
50 At 469.

communicated directly to persons in New South Wales[51] (the jurisdiction in which the plaintiff's mother purchased the product and in which the plaintiff was born suffering from the injuries) - the medical practitioners, the wholesale and retail pharmacists, patients and purchasers - which jurisdiction, it appears from the report of the case,[52] the manufacturer was aware that the goods were being exported to.[53] The plaintiff was entitled to complain of a lack of the latter and therefore the cause of action arose within the plaintiff's jurisdiction.[54]

The court's reference in *Distillers* to the goods as 'not defective or incorrectly manufactured' cannot be taken to mean that in all cases of defectively manufactured goods within the meaning of the TPA the place of the liability is to be the place of manufacture. 'Defect' is defined widely under the the Act and in negligence cases to include design defects, manufacturing defects, and instructional defects.[55]

In cases of instructional defects the actual decision in *Distillers*, an instructional defect case, assumes greatest significance. If there is a failure to warn or the warnings given are inadequate then it appears that *Distillers* is authority for the proposition that, according to the approach advocated by the High Court in *Voth*, the tort was committed either at the place of manufacture or in the jurisdiction in which the goods were placed on the market for distribution with the manufacturer's knowledge:[56] a plaintiff can complain of a lack of

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51 At 469. Contrast *George Monro Ltd v. American Cyanamid and Chemical Corporation* [1944] 1 K.B. 432 per du Parq L.J. at 440. However, it is very difficult to discern what their Lordships thought that the defect in the product was in that case: ibid. cf. Scott L.J. at 436 and contrast Goddard L.J. at 439 with du Parq L.J. at 440.

52 At 464-465 and note the patent implication in 468 D-E.

53 See 468 D-E for the knowledge requirement.

54 At 469.

55 See s.3 of the , s.75AC(1) and (2) of the TPA and paragraph 15 of the Explanatory Memorandum to the *Trade Practices Amendment Bill 1992* (Commonwealth); and cf. *Voth v. Manildra Flour Mills* (1990) 171 C.L.R. 538 per Brennan J. at 576, *Grehan v. Medical Incorporated* [1986] I.R. 528 at 534, Keeton, W. Page, ed. *Prosser and Keeton on Torts* 5th ed. St. Paul, Minnesota: West Publishing Co., 1984 [Prosser and Keeton (1984)] at 695; Miller, C.J. *Product Liability and Safety Encyclopaedia* London: Butterworths, 1979 [loose-leaf service cited as Miller (1979-)] at paragraphs III [14] - [19]. Paragraph 15 states that:

> 'It should be noted that there are a number of different types of potential defects. Design defects relate to matters such as the form, structure and composition of the goods. Manufacturing defects are those related to matters such as the process of construction and assembly. Instructional defects are those caused by incorrect or inadequate warnings and instructions. All these categories of 'defect' fall within the meaning ascribed to defect in section 75AC.'

Cf. semble Fawcett, J.J. *Products Liability In Private International Law: A European Perspective* (1993) I Recueil des Cours 13 at 201, and 211-212. Contrast Waddams, S.M. *Products Liability* 3rd ed. Toronto: Carswell, 1993 at 152, and Tebbens, H. Duintjer *International Product Liability: A Study of Comparative and International Legal Aspects of Product Liability* Alphen Aan Den Rijn, the Netherlands: Sijthoff & Noordhoff Publishers, 1980 at 285 (where the author refers to the similar views of other jurists), where these jurists doubt the utility of these subdivisions of the concept of defect in the context of the extraterritorial service rules.

56 See 468D-E for the knowledge requirement.

communication of an effective warning to persons within either of these jurisdictions.[57]

In cases of design defects it would appear that in accordance with the *Voth* exposition of *Distillers*, the plaintiff's cause of complaint and the place where the tort was committed will be the place where the product was designed.[58] It may be that this is not the place that the product was manufactured.

In cases of a defect arising in or due to the manufacturing process it appears that *Distillers*, and the *Voth* invocation of that approach, would require that the act of the defendant foreign manufacturer which is the cause of complaint will be the act of manufacture which has taken place outside the jurisdiction.[59]

The plaintiff in *Jacobs v. Australian Abrasives Pty. Ltd*.[60] amended his statement of claim to allege negligence not simply in the manufacture of the product but in 'supplying for sale an abrasive wheel without displaying thereon, or supplying therewith, adequate simple and specific warnings as to its inherent dangers and instructions as to the safe method of using the same'.[61] No doubt this was done with a view to allowing service on the same lines as employed with effect in *Distillers*. The court in *Jacobs* did not address the substance or merit of this particular allegation and merely disposed of the dispute on the basis of the statement of claim as pleaded.[62] This device might be employed by plaintiffs as a method to ensure that the court decides that service is allowed under this rule. However, a plaintiff who serves out on the basis of a failure to warn cannot succeed at trial on a ground other than that of instructional inadequacy (i.e. defective manufacture or design fault), because it was not upon that particular

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57 Cf. Beerworth, E. (ed.) *Product Liability Australia* Sydney: Butterworths, 1995- (loose-leaf service) per Nygh at par [25.65]; Tebbens, H. Duintjer *International Product Liability: A Study of Comparative and International Legal Aspects of Product Liability* Alphen Aan Den Rijn, the Netherlands: Sijthoff & Noordhoff Publishers, 1980 at 289; and Fawcett, J.J. *Products Liability In Private International Law: A European Perspective* (1993) I Recueil des Cours 13 at 70-71 and 211.

58 Ibid.

59 Cf. Kellam, Jocelyn; Travers, Richard; and Davis, Rob (eds.) *Product Liability Law & Practice* Sydney: Prospect Publishing, 1996. (loose-leaf service) per Kellam at chapter 11 paragraph [160], Beerworth, E. (ed.). *Product Liability Australia*. Sydney: Butterworths, 1995-. (loose-leaf service) per Nygh at paragraph [25.65], and Weintraub, Russell J. *Choosing Law with an eye on the prize* (1994) 15 Michigan Journal of International Law 705 at 721. Contrast *George Monro Ltd v. American Cyanamid and Chemical Corporation* [1944] 1 K.B. 432 per Goddard L.J. at 439 where his Lordship appears to have stated that in cases of a manufacturing defect the defendant's act is 'the sale of . . . a dangerous article', and cf. ibid. du Parq L.J. at 440. However, it is very difficult to discern what their Lordships thought that the defect in the product was in that case: ibid. cf. Scott L.J. at 436 and contrast Goddard L.J. at 439 with du Parq L.J. at 440.

60 [1971] Tas.S.R. 92.

61 At 93.

62 However, in other cases dealing with the same issue the courts have addressed the merits of an allegation of a lack of warning or failure to instruct, and they have ignored that pleading as unreal or fanciful in appropriate cases refusing to allow extraterritorial service in reliance upon that allegation: *D'Ath v. T.N.T. Australia Pty Ltd* [1992] 1 Qd R 369 at 378, *MacGregor v. Application des Gaz* [1976] QdR 175 at 176-177 and *Buttigeig v. Stevedoring Corporation* [1972] V.R. 626 at 629 (see below).

basis that service under this head was either granted or ratified by the courts.[63] If the plaintiff has more than one cause of action or more than one legal basis for a cause of action in his writ, then he can serve out only on the basis of those causes of action which comply with an extraterritorial service rule,[64] and he can only pursue the previously specified legal bases for his cause of action(s) at trial.[65] In *Buttigeig v. Stevedoring Corporation*[66] the plaintiff pleaded that the defendant was negligent because, inter alia, it should have sent a warning to the relevant jurisdiction. However the court stated that 'such an argument strikes my mind as artificial. I must look at the substance of the wrong alleged to be a tort.'[67] Accordingly, the court refused to allow extraterritorial service on this basis. This is how the courts could deal with an unmeritorious attempt by the plaintiff to include an instructional defect or failure to warn allegation in the pleadings solely in order to obtain jurisdiction.[68]

The much lauded[69] Supreme Court of Canada's decision in *Moran v. Pyle National (Canada) Ltd.*[70] was not referred to by the court in *Voth*, nor was it referred to in argument. The court in *Moran* stated that '[t]he essence of a tort is the injury or wrong'.[71] The court then asked rhetorically whether, in the case of personal injuries caused by negligent manufacture, 'can carelessness in manufacture be separated from resulting injury'.[72] Accordingly, the court stated that '[t]he jurisdictional act can well be regarded . . . as the infliction of injury and not the fault in manufacture.'[73] The court considered the decision in *Distillers* and, in sharp contrast to the decision in *Voth*, stated that the substance of the cause of action approach endorsed in that decision indicated that the House of Lords was 'moving toward' a test which would regard a tort as having occurred in any country substantially affected by the defendant's conduct.[74] The court decided that it was unnecessary and unwise to resort to an arbitrary set of rules, such as a place of acting or place of harm theory, to determine where a tort had been committed.[75] Rather, the court preferred a test which regarded a tort as

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63 *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391 at 436.

64 *Siskina v. Distos Compania Naviera SA* [1979] A.C. 210 at 255, and *Tycoon Holdings Ltd v. Trenco Jetco Inc.* (1992) 34 F.C.R. 31.

65 *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391 at 436.

66 [1972] V.R. 626.

67 At 629.

68 Cf. Sykes, Edward, and Pryles, Michael, *Australian Private International Law* 3rd ed. Sydney: The Law Book Company, 1991 at 40; Morse, C.G.J. *Product Liability in the Conflict of Law* (1989) 42 Current Law Problems 167 at 172-173; Fawcett, James, *The Interrelationships of Jurisdiction and Choice of Law in Private International Law* (1991) 44 Current Legal Problems 39 at 201; and Miller, C. J., and Lovell, P. A. *Product Liability* London: Butterworths, 1977 at 348.

69 See, for example, Miller, C. J., and Lovell, P. A. *Product Liability* London: Butterworths, 1977 at 349; Collier, J. G. *Conflict of laws* 2nd ed. Cambridge: Cambridge University Press, 1994 at 232, Morse; C.G.J. *Torts in Private International Law* Amsterdam: North Holland Publishing Company, 1978 at 130; Waddams, S.M. *Products Liability* 3rd ed. Toronto: Carswell, 1993 at 153; and Goldring, J. *Product Liability And The Conflict Of Laws In Australia* (1978) 6 Adelaide Law Review 413 at 435.

70 (1973) 43 D.L.R. (3d) 239, followed *Petersen v. AB Bahco Ventilation* (1979) 107 D.L.R. (3d) 49.

71 At 247-248.

72 At 248.

73 At 248.

74 At 249.

75 At 250.

having occurred in any country substantially affected by the defendant's activities or its consequences the law of which is likely to have been in the reasonable contemplation of the parties.[76] The court formulated this test:

> [W]here a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction[77] over the foreign defendant.[78]

The decision in *Moran* was reached after consideration of a range of English and Canadian decisions and English and American texts which dealt with where a tort was committed for jurisdictional purposes and which endorsed a number of approaches to this issue such as place of acting, place of harm or entire cause of action tests.

Australian State and Federal courts are bound by the doctrine of stare decisis to follow the decision in *Voth*[79] and it would appear unlikely that the High Court of Australia will decide to adopt a course similar to that expounded in *Moran* in the future when it had the opportunity and yet did not do so in *Voth*.[80] However, as was mentioned above, *Moran* was not referred to either in the court's judgment or counsel's argument in *Voth*, though other cases which appear to endorse a substance of the cause of action approach over any rigid application of the place of the defendant's act, were. The lack of any reference to *Moran* may be a possible means which a future High Court could use to decline to follow the *Voth* approach. However, in the present author's opinion that would be highly unlikely.

In relation to the *Manufacturers Warranties Act* 1974 (South Australia) - an the Act which in a number of respects is very similar to the TPA - Goldring has suggested that the act of the defendant which is the cause of the plaintiff's complaint is 'the act of the manufacturer in parting with possession of goods containing a defect, when he knows such goods are destined for ultimate retail sale to consumers'.[81] This act will almost invariably take place in the jurisdiction

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76 At 250.

77 This form of jurisdiction is referred to as personal jurisdiction in this article.

78 At 250-251.

79 Cf. *Allstate Life Insurance Co v. Australia and New Zealand Banking Group Limited* (unreported, Federal Court of Australia, 8.11.94) at 16, and *DA Technology Australia Pty Limited v. Discreet Logic Inc* (unreported, Federal Court of Australia, 10 March 1994) at 10.

80 Cf. Cavanagh, S.W., Phegan, C.S. *Product Liability in Australia* Sydney: Butterworths, 1983 at 241.

81 Cf. *Jakob Handte GmbH v. Traitements Mecano-chimiques des Surfaces* (Case C-26/91) [1993] I.L.Pr. 5 at 16-17; and, US decisions dealing with strict product liability in tort: *Barrett v. Superior Court* 272 Cal. Rptr. 304 (Cal. App. 4 Dist. 1990), review denied, 1990 Cal. LEXIS 4922 (1990); *Atkins v. American Motors Corp.* 335 So. 2d 134 (Ala. 1976); contrast *Cornette v. Sarjeant Metal Products Inc.*, 147 Ind. App. 46 at 52, 258 N.E. 2d 652 at 656 (1970).

in which the goods were manufactured.[82] However, the present author is of the opinion that it is the defective manufacture itself and not the parting with possession of a defective product which the court would treat as the defendant's act for the purpose of the *Distillers* test.[83]

Fawcett has criticised the application of a *Distillers* test, as interpreted in *Voth*, to an action under legislation implementing the European Directive dealing with strict product liability.[84] He stated that:

> [T]he emphasis that [this test] puts on the defendant's act, whilst perhaps understandable in the context of negligence, looks to be entirely inappropriate in the context of the strict liability regime . . . where all the injured person is required to prove is the damage, the defect and the causal relationship between defect and damage.[85]

Fawcett's criticism appears to be valid. As he points out, the emphasis in the TPA is not on the defendant's acts but rather on the concept of defect. However, if, as appears will be the case,[86] the courts characterise the TPA as a tort for private international law purposes then, on the present state of the authorities, the tort service rules and law pertaining thereto will be applicable to an action under the legislation, as they are to any strict liability tort. The alternative appears to be that the Australian courts characterise the TPA as a tort but develop a specialised rule for determining where the tort was committed - an unlikely scenario at best.

It appears that the position in England as to where a tort is committed and the test in *Distillers*, at least for choice of law purposes, is not that endorsed in *Voth* - it appears that in England a substance of the cause of action approach has been adopted.[87] In *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.*[88] the Court of Appeal appears to have placed greatest emphasis on the 'where in substance the cause of action arose' approach rather than on the ascertainment of where the defendant's act occurred.[89]

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82 Cf. *Jakob Handte GmbH v. Traitements Mecano-chimiques des Surfaces* (Case C-26/91) [1993] I.L.Pr. 5 at 16-17.

83 Cf. *Distillers* at 469.

84 The Directive provided the inspiration for the TPA and was the European law which was the source of Part I of the *Consumer Protection Act* 1987 (UK) which the TPA largely replicates.

85 Fawcett, James, *The Interrelationships of Jurisdiction and Choice of Law in Private International Law* (1991) 44 Current Legal Problems 39 at 212.

86 See Dutson, Stuart *The Characterisation of Prduct Liability Claims in Private International Law* to be published in the 1997 volume 2 edition of the University of Queensland Law Journal.

87 Cf. Collins, Lawrence, ed. *Dicey and Morris on The Conflict of Laws* 12th ed. London: Sweet & Maxwell, 1993 [Dicey and Morris (1993)] at 1512 and semble 341, and The Law Commission and the Scottish Law Commission. *Liability for Defective Products*, Report No 58 (LC) and 45 (SLC), Cmnd 6831 London: Her Majesty's Stationery Office, 1977 [Law Commission (1977)] at 170.

88 [1990] 1 Q.B. 391, a case which *was* cited in the judgments in *Voth*: at 567 and 579.

89 See further below.

The joint judgment in *Voth* recognised that the Court of Appeal in *Metall* expressly approved the substance of the cause of action approach. However, their Honours stated that this approach 'does no more than lay down an approach by which there is to be ascertained, in a common-sense way, that which is required by *Jackson v. Spittall*, namely, the place of "the act on the part of the defendant which gives the plaintiff his cause of complaint"'.[90]

Conclusion

It appears that in cases of a manufacturing defect the place where the tort was committed will be the place of manufacture or initial supply; in the case of a design defect it will be the place where the product was designed; and in the case of an instructional defect, which must be distinguished from merely a failure to warn that the product has a manufacturing or design defect, the tort will be committed either at the place of manufacture or the jurisdiction in which the goods were placed on the market for distribution with the manufacturer's knowledge. If there is any difficulty in ascertaining any one of these places then the court will determine that place by asking itself 'where in substance did the act of the defendant which is the cause of complaint take place'? In the cases with which this article is concerned the place of manufacture or initial supply and the place of design will be outside the jurisdiction. Therefore this extraterritorial service provision will only be able to be employed in cases of an instructional defect. Consider the following scenario: a product is designed and manufactured overseas by foreign manufacturers and designers, and is exported to Australia with the finished goods manufacturer's knowledge. The product is safe so long as it is used in accordance with a given set of precautions or criteria, however the foreign manufacturer fails to either append instructions or a warning to the product or warn consumers in Australia of these necessary precautions or criteria. In these circumstances a party who is injured or suffers damage in Australia that is caused by the failure to give instructions or a warning will be entitled to serve his originating process claiming in negligence and the TPA on the foreign manufacturer under this service rule.

damage suffered wholly or partly within the jurisdiction caused by a tortious act wherever occurring

The Supreme Court Rules of New South Wales,[91] the Northern Territory,[92] Queensland,[93] South Australia,[94] Victoria,[95] and the Federal Court Rules[96] each contain a provision which provides, in terms, that the court's originating process may be served outside the jurisdiction 'where the proceedings, wholly or partly,

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90 At 567.
91 Pt. 10 r.1A (1)(e).
92 O.7.01 (1)(k).
93 O.11.01 (2)(l).
94 R.18.02 (fa).
95 Pt.7.01 (1)(j).
96 O.8 r.1 (ad).

are founded on, or are for the recovery of damages in respect of, damage suffered in the [jurisdiction] caused by a tortious act wherever occurring'.[97] This rule was intended to facilitate access to the courts in relation to actions for foreign torts.[98] It appears that the first 'wholly or partly' phrase refers to the damage, not to the proceedings.[99] This has been made clear in some versions of the rule.[100]

The concept of 'damage' in this rule has been construed widely in a number of cases and has been held to include 'all the detriment, physical, financial and social, which the plaintiff suffers as a result of the tortious conduct of the defendant.'[101] 'Damage' is not confined to initial or immediate damage and includes consequential damage or continuing loss or disability whether by way of bodily injury, property damage, or financial loss; and wherever the initial, immediate or major damage occurred.[102] The places of manufacture, initial marketing, purchase and the place where the damage was initially sustained, are irrelevant under this rule.

Accordingly, if a plaintiff is injured or suffers damage from a defective product and, whether or not he suffers damage outside the jurisdiction, he suffers any damage within the jurisdiction (including medical expenditure, repair or replacement expenses or financial loss); then he can serve his originating process out of the jurisdiction under this rule.

Breach of a Commonwealth Act

O.8 r.1(b) and (c) of the FCR provide for extraterritorial service:

(a) where the proceeding is founded on a breach of an Act, where the breach is committed in the Commonwealth;
(b) where the proceeding is founded on a breach, wherever occurring, of an Act, and is brought in respect of, or for the recovery of, damage suffered wholly or partly in the Commonwealth;

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97 The States and Territories of Australia are different jurisdictions for private international law purposes, therefore the relevant jurisdiction for the purpose of this Rule will be the State or Territory (not Australia as a whole) in whose jurisdiction the damage was suffered.

98 *Darrell Lea Chocolate Shops Pty Ltd v. Spanish-Polish Shipping Co. Inc.* (1990) 25 N.S.W.L.R. 568 at 577.

99 Cf. *Darrell Lea Chocolate Shops Pty Ltd v. Spanish-Polish Shipping Co. Inc.* (1990) 25 N.S.W.L.R. 568 at 574-575, Beerworth (ed.) (1995) per Nygh at paragraph [25.70], and Sykes, Edward, and Pryles, Michael *Australian Private International Law* 3rd ed. Sydney: The Law Book Company, 1991 at 43.

100 See the Federal Court, Victorian, Northern Territory and Queensland versions.

101 *Flaherty v. Girgis* (1985) 4 N.S.W.L.R. 248 per McHugh J.A. at 266. Cf. *Brix Neilsen v. Oceaneering Australia Pty Ltd* [1982] 2 N.S.W.L.R. 173; *Phosphate Co-operative Co. of Australia Ltd v. SGS Supervision Services Inc.* (unreported, Federal Court of Australia, Gray J., 7 April 1993); *Sedgwick Limited v. Bain Clarkson Limited (t/a Bain Hogg Limited)* (1995) A.T.P.R. 41-411 at 40,561; and, *Darrell Lea Chocolate Shops Pty Ltd v. Spanish-Polish Shipping Co. Inc.* (1990) 25 N.S.W.L.R. 568.

102 See above n. 101 and *Challenor v. Douglas* [1983] 2 N.S.W.L.R. 405.

'[T]he Act' means a Commonwealth Act such as the TPA,[103] and clauses contemplate civil proceedings such as proceedings under Part VA.[104] It appears that the word 'damage' in r.1(c) bears the same meaning as it does in r.1(ad) as discussed above.[105]

It appears that a cause of action created by an Australian statute need not ipso facto arise in Australia. In *Nominal Defendant v. Motor Vehicle Insurance of W.A.*[106] the New South Wales Supreme Court was required to determine where a cause of action created by a Western Australian statute[107] arose for the purpose of the New South Wales provision which provides for extraterritorial service for proceedings founded on a cause of action arising in New South Wales.[108] The action was a direct action against the Western Australian insurer of a person who caused injury by his negligence on a New South Wales highway. The court noted that the decision in *Distillers* dealt with a similarly worded service provision. However, the court noted that in the present case, as distinct from the negligence cause of action in *Distillers*, there was no identifiable act or omission on the part of the defendant insurer. The court noted a number of definitions of 'cause of action' and then adopted a definition which was, in terms: every fact or ingredient which was material to be proved to entitle the plaintiff to succeed forms the cause of action.[109] The court identified and placed in space each element which the statute required to be proved in order to determine where the statutory cause of action arose.[110] These elements all occurred within New South Wales. Accordingly, the court decided that New South Wales was where the statutory cause of action arose.[111]

It may be that in applying these rules the courts will have recourse to the law dealing with the place where a tort is committed.[112] This approach appears more plausible in light of the relationship between rules 1(b) and (c) which appears to replicate that which exists between the FCR tort extraterritorial service rules 1(ac) and (ad). Part VA does not supply any guidance as to 'where' its provisions are breached. However, as distinct from the statutory cause of action which was considered in *Nominal Defendant v. Motor Vehicle Insurance of W.A.*, the TPA does lend itself to the analysis appropriate to 'causes of action' generally and torts specifically which was undertaken in *Distillers* and *Voth*: there are

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103 ss.38(1) and 46(a) *Acts Interpretation Act* 1901 (Commonwealth).
104 Cf. *Thompson v. Noall* (1980) 30 A.L.R. 162 at 164.
105 *Sedgwick Limited v. Bain Clarkson Limited (t/a Bain Hogg Limited)* (1995) A.T.P.R. 41-411 at 40,561.
106 [1983] 3 N.S.W.L.R. 309 at 315-316.
107 Viz. s.7 *Motor Vehicles Third Party Insurance Act 1943* (W.A.).
108 Viz. N.S.W. R.S.C. Pt.10 r.1A (1)(a).
109 At 315-316
110 At 316.
111 At 316.
112 Cf. *Liftronic Pty Limited v. Montgomery Elevator Company* (1996) A.T.P.R. 41-458 at 41,587; *Sedgwick Limited v. Bain Clarkson Limited (t/a Bain Hogg Limited)* (1995) A.T.P.R. 41-411 at 40,559; and Nygh, P.E. *Conflict of Laws in Australia* 6th ed. Sydney: Butterworths, 1995 at 354-355.

identifiable acts on the part of the defendant which can be placed in space - viz. manufacture and supply, importation, or sale.[113]

It therefore appears that in the case of the TPA O.8 r.1(b) will allow extraterritorial service in the same circumstances that the provisions providing for service for a 'tort committed within the jurisdiction' will,[114] and O.8 r.1(c) will allow service in the same circumstances that the provisions providing for extraterritorial service for 'damage suffered within the jurisdiction caused by a tortious act wherever occurring' will.[115]

Cause of Action arising in the [Jurisdiction]

Three Australian jurisdictions have a rule that provides for extraterritorial service for a 'cause of action arising in the [jurisdiction]': Queensland,[116] New South Wales,[117] and the Federal Court of Australia.[118]

In cases where the cause of action is in tort, such as those with which this article is concerned,[119] it is doubtful whether this provision adds anything to the tort committed within the jurisdiction head.[120] However, if the TPA were not characterised as a tort for private international law purposes and the tort service provisions were deemed inapplicable to a TPA action, this would be an alternative service provision.[121]

The expression 'cause of action' does not mean every material fact but rather the particular act or omission which caused the relevant damage that is the plaintiff's cause of complaint.[122] As has already been stated, whilst the TPA is a statutory cause of action, and whether or not it is characterised as a tort for private international law purposes, the test expounded in negligence cases such

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113 Cf. *Nominal Defendant v. Motor Vehicle Insurance of W.A.* [1983] 3 N.S.W.L.R. 309 at 315-316.

114 See above.

115 See above.

116 O.11.1 (2)(a).

117 Pt.10 r.1A (1)(a).

118 O.8 r.1(a).

119 i.e. the , the TPA, and negligence.

120 Nygh, P.E. *Conflict of Laws in Australia* 6th ed. Sydney: Butterworths, 1995 at 55; Pryles, Michael C. *Tort And Related Obligations In Private International Law* (1991) II Recueil des Cours 9 [Pryles (1991)] at 39; Nygh, P.E. *Conflict of Laws* in Halsbury's Laws of Australia. Gibbs, Sir Harry (ed.) Sydney: Butterworths, 1991 [loose-leaf service cited as Nygh (1993-)] at par [85-375]; Cairns, Bernard C. *Australian Civil Procedure* 3rd ed. Sydney: The Law Book Company Limited, 1992 at 62-63; Gerber, Paul. *Tort and related problems in the English and the Australian Conflict of Laws.* Karlsruhe: Verlag C.F. Muller Karlsruhe, 1974 at 37; and Sykes, Edward, and Pryles, Michael *Australian Private International Law.* 3rd ed. Sydney: The Law Book Company, 1991 at 39. Cf. above n. 28. *Distillers* was in fact a case in which an extraterritorial service provision identical to the instant one was considered.

121 Cf. Young, Tony *Product Liability Laws and Policies*, Product Liability, Australian Law Reform Commission Research Paper No 1. Sydney: Australian Law Reform Commission, 1988 at 68 paragraph 145; and Australian Law Reform Commission, *Product Liability*, Report No 51. Canberra: Australian Government Publishing Service, 1989 [Australian Law Reform Commission (1989)] at 125 paragraph 9.31.

122 *Jackson v. Spittall* (1870) L.R. 5 C.P. 542, *Chidzey v. Breckler* [1920] V.L.R. 558, and *Distillers Co. v. Thompson* [1971] A.C. 458. Contrast *Nominal Defendant v. Motor Vehicle Insurance of W.A.* [1983] 3 N.S.W.L.R. 309 at 315-316.

as *Voth* and *Distillers* is equally appropriate to a TPA action because there are identifiable acts on the defendant's part which can be placed in space - viz. manufacture and supply.[123] Accordingly the analysis which was undertaken and the conclusions reached with respect to the 'tort committed within the jurisdiction' service provision are equally applicable here.[124]

However, the Australian Law Reform Commission in its Report on Product Liability which contained the initial recommendation that Part VA be inserted into the TPA, stated that 'The Federal Court Rules O 8, r 1(a) clearly would allow service outside Australia in cases where a person suffered loss in Australia caused by the way goods acted in Australia'.[125] The present author is unable to see how, on the authorities which have interpreted similarly worded service provisions such as *Distillers*, this result can be described without qualification as 'clear'. It appears to the present author, as has been stated earlier, that in the cases with which this article is concerned[126] it is only in cases of an instructional defect that the cause of action will arise within the jurisdiction thereby allowing for service under this Rule.[127]

Necessary or Proper Party

The Rules of Court of all jurisdictions contain a provision which allows for extraterritorial service if the party to be served[128] is a necessary or proper party to a claim brought against another party duly served or to be served.[129]

Some versions of this rule require the original defendant to be served within the jurisdiction (i.e. not in reliance on the extraterritorial service rules),[130] whilst the remainder allow for the original defendant to be served either within or without the relevant jurisdiction.[131]

In the case of a negligence action it appears that the plaintiff will be able to join the foreign manufacturer as a necessary or proper party to actions: in

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123 See above n. 112.

124 See above. Contrast semble Young, Tony *Product Liability Laws and Policies*, Product Liability, Australian Law Reform Commission Research Paper No 1. Sydney: Australian Law Reform Commission, 1988 at 68 paragraph 145; and Australian Law Reform Commission, *Product Liability*, Report No 51. Canberra: Australian Government Publishing Service, 1989 [Australian Law Reform Commission (1989)] at 125 par 9.31.

125 Australian Law Reform Commission, *Product Liability*, Report No 51 Canberra: Australian Government Publishing Service, 1989 [Australian Law Reform Commission (1989)] at 125 par 9.31.

126 Which could include, inter alia, the example given by the Australian Law Reform Commission.

127 See above.

128 Herein referred to as the secondary defendant.

129 RHC O.10 r.1(1)(i); Tasmania O.11 r.1(1)(h); Northern Territory O.7.01 (1)(h); Queensland O.11.01 (2)(p); Western Australia O.10 r.1(1)(h); New South Wales Pt.10 r.1A(i); Australian Capital Territory O.12 r.2(g); Victoria Pt.7.01 (1)(l); South Australia R.18.02 (i); Federal Court of Australia O.8 r.1(g). The latter party will herein be referred to as the original defendant.

130 N.S.W., Tasmania, A.C.T., W.A., S.A., semble Queensland, Federal Court, and High Court.

131 i.e. Victoria, and N.T.

negligence against the assembler[132] of the goods, if any, who may well be within the relevant jurisdiction;[133] in contract against the seller of the product to the plaintiff (if any), who may well be within the relevant jurisdiction;[134] or, against the importer, own-brander or supplier brought under the TPA.[135] These joinders can take place because in each case they can be joined in the original action pursuant to the ordinary rules for joining defendants[136] - their liability arises out of the same transaction.[137] In each case the plaintiff would have been able to join the defendants in the same action had the foreign manufacturer been within the jurisdiction.[138]

The TPA provides for the importer of the goods into the relevant jurisdiction, any own-brander of the goods, and a supplier of the goods who fails to respond to a request for the identity of the manufacturer or his supplier, to be liable under the Act[139] in addition to the actual manufacturer.[140] The importer, own-brander, supplier and actual manufacturer are jointly and severally liable,[141] and the plaintiff is entitled to sue any combination of them in the same action. In the case of the TPA the importer into Australia and an own-brander or supplier present within Australia, will be amenable to the jurisdiction of the Federal Court or the courts of the State in which he is present.[142] Therefore, in the case of actions brought under the TPA, the actual foreign manufacturer will be a necessary or proper party to an action against the importer, own-brander or

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132 The principle in *Donoghue v. Stevenson* [1932] A.C. 562 extends in its application to assemblers: *Howard v. Furness, Houlder Ltd.* [1936] 2 All E.R. 296.

133 *The Manchester Courage* [1973] 1 Lloyd's Rep. 386, *Adstra Aviation Ltd. v. Airparts (NZ) Ltd.* [1964] N.Z.L.R. 393, *Pratt v. Rural Aviation Ltd.* [1969] N.Z.L.R. 46; Sharpe, Robert J. *Inter provincial Product Liability Litigation* Toronto: Butterworths, 1982 at 32-33; Romero, Louis J. *The Consumer Products Warranties Act (Part II)* (1979-80) 41(2) Saskatchewan Law Review 261 at 269-270; Waddams, S.M. *Products Liability* 3rd ed. Toronto: Carswell, 1993 at 154; and Collins, Lawrence, ed. *Dicey and Morris on The Conflict of Laws* 12th ed. London: Sweet & Maxwell, 1993 [Dicey and Morris (1993)] at 327 illustration 6 and at 343 illustration 3 footnote 98.

134 *Adstra Aviation Ltd. v. Airparts (NZ) Ltd.* [1964] N.Z.L.R. 393; Sharpe, Robert J. *Inter provincial Product Liability Litigation* Toronto: Butterworths, 1982 at 32-33; Romero, Louis J. *The Consumer Products Warranties Act (Part II)* (1979-80) 41(2) Saskatchewan Law Review 261 at 269-270; Waddams, S.M. *Products Liability* 3rd ed. Toronto: Carswell, 1993 at 154; and Collins, Lawrence, ed. *Dicey and Morris on The Conflict of Laws* 12th ed. London: Sweet & Maxwell, 1993 [Dicey and Morris (1993)] at 326, 327 illustration 6 and at 343 illustration 3 footnote 98. Cf. *The Manchester Courage* [1973] 1 Lloyd's Rep. 386; and *Pratt v. Rural Aviation Ltd.* [1969] N.Z.L.R. 46. Note that the cause of action against the defendants does not have to be the same: *Osterreichische Export A.G. v. British Indemnity Insurance Co.* [1914] 2 K.B. 747.

135 Cf. above n. 134 and *Bank of New South Wales v. Commonwealth Steel Co. Ltd.* [1983] 1 N.S.W.L.R. 69.

136 *Societe Commerciale de Reassurance v. Eras International Ltd* [1992] 1 Ll.L.R. 570 (C.A.) at 592. Cf. Fawcett, J.J. *Multi-party Litigation in Private International Law* (1995) 44 I.C.L.Q. 744 at 748.

137 See above n. 135.

138 Cf. *Jan Poulsen & Co. v. Seaboard Shipping Co. Ltd.* [1995] I.L.Pr. 698 at 704 (S.Ct. B.C.).

139 In the case of the TPA the dilatory supplier is deemed to be a manufacturer.

140 s.75AB of the TPA, and s.75AJ of the TPA, respectively. And see Dutson, Stuart *International Product Liability Litigation* (1996) 22 Monash U.L.R. 244.

141 s.75AM of the TPA.

142 If the supplier is not present within Australia then any attempt to serve him under a rule providing for service out of the jurisdiction will require the same analysis as has been undertaken above in respect of the foreign manufacturer and the TPA, because the supplier is deemed to be the manufacturer by s.75AJ.

supplier brought under the Act[143] because in each case they can be joined in the original action pursuant to the ordinary rules for joining defendants[144] - their liability arises out of the same transaction, they are jointly and severally liable for the same damage and the case against each will largely be identically to the case against the other.[145] Additionally, in the case of actions brought under the TPA, it appears that the plaintiff will be able to join the foreign manufacturer as a necessary or proper party to an action in negligence against the assembler of the goods, if any, who may well be within the relevant jurisdiction;[146] and an action in contract against the seller of the product to the plaintiff (if any), who may well be within the relevant jurisdiction;[147] because they can be joined in the original action pursuant to the ordinary rules for joining defendants - their liability arises out of the same transaction.[148] In each of these cases the plaintiff would have been able to join defendants in the same action had the foreign manufacturer been within the jurisdiction.[149]

There are Australian decisions which state that the secondary defendant cannot be served under this extraterritorial service head if the sole, as opposed to predominant, purpose of the action against the original defendant is to enable or facilitate jurisdiction against the secondary defendant.[150] In Australia this line of authority would appear to find its basis in the express requirement that the proceedings be "properly brought" against the original defendant.[151] The action against the supplier in the case of the negligence action, or, the importer, own-brander or supplier in the case of a TPA action will be sufficient to satisfy either any Australian requirement. That the own-brander, supplier or importer will not be

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143 Fawcett, J.J. *Multi-party Litigation in Private International Law* (1995) 44 I.C.L.Q. 744 at 62 and 236ff.; Sharpe, Robert J. *Inter provincial Product Liability Litigation* Toronto: Butterworths, 1982 at 32-33; Romero, Louis J. *The Consumer Products Warranties Act (Part II)* (1979-80) 41(2) Saskatchewan Law Review 261 at 269-270; and Waddams, S.M. *Products Liability* 3rd ed. Toronto: Carswell, 1993 at 154. Cf. *Colonna v. Healy Motors Ltd.* (1952) 5 W.W.R. 446 (Alberta S.C.), *Eversure Textiles Manufacturing Co. Ltd v. Webb* [1978] QdR 347, *Westpac Banking Corp. Ltd v. Commonwealth Steel Co. Ltd* [1983] 1 N.S.W.L.R. 735, *Adstra Aviation Ltd. v. Airports (NZ) Ltd.* [1964] N.Z.L.R. 393, and Collins, Lawrence, ed. *Dicey and Morris on The Conflict of Laws* 12th ed. London: Sweet & Maxwell, 1993 [Dicey and Morris (1993)] at 327 illustration 6.

144 See above n. 136.

145 See above n. 135.

146 See above n. 133.

147 See above n. 134.

148 See above n. 135.

149 See above n. 138.

150 *Coppin v. Tobler Brothers Canberra Marine Centre Pty Ltd.* [1980] 1 N.S.W.L.R. 183, *Rosler v. Hilbery* [1925] Ch. 250, and *Multinational Gas Co. v. Multinational Gas Services Ltd.* [1983] Ch. 258 (CA). Cf. Collier, J. G. *Conflict of laws* 2nd ed. Cambridge: Cambridge University Press, 1994 at 83. The position is the same in Canada: *Jan Poulsen & Co. v. Seaboard Shipping Co. Ltd.* [1995] I.L.Pr. 698 at 702 (S.Ct. B.C.). However, the editors of Dicey and Morris favour the less stringent view of the minority in *Multinational Gas Co. v. Multinational Gas Services Ltd.*: Collins, Lawrence, ed. *Dicey and Morris on The Conflict of Laws* 12th ed. London: Sweet & Maxwell, 1993 [Dicey and Morris (1993)] at 325.

151 Cf. *Multinational Gas Co. v. Multinational Gas Services Ltd.* [1983] Ch. 258 at 284-285 (CA).

able completely, or perhaps even partially, to satisfy any judgment against it and that the action against the own-brander, supplier or importer was brought for the predominant, as opposed to sole, purpose of suing the foreign manufacturer and thereby gaining access to a pecunious defendant, does not detract from the fact that there is an action properly brought against the original defendant which has a real issue to be tried and in which the plaintiff genuinely desires to succeed and recover some damages.[152] Accordingly, this extraterritorial service rule could prove to be particularly useful in cases with which this article is concerned.

Contribution or Indemnity for a Liability enforceable by proceedings in the court

The Rules of Court of New South Wales, Queensland and the Federal Court provide for extraterritorial service where proceedings are for contribution or indemnity for a liability enforceable by proceedings in the court. [153]

If an importer, assembler, own-brander, supplier, seller, or other party made liable in negligence, contract or TPA proceedings, wishes to seek contribution or indemnity from the foreign manufacturer he cannot rely on the necessary or proper parties head discussed above to effect service on the third party manufacturer.[154] However, the Rules of Court of Victoria,[155] Western Australia,[156] South Australia,[157] and the Northern Territory[158] each provide for the extraterritorial service of a third party notice in circumstances where the court deems it fit to allow it. A third party notice could include an importer's etc. claim for contribution or indemnity against a foreign manufacturer.

In cases where extraterritorial service of a contribution claim or third party notice is not specifically dealt with[159] the own-brander, supplier, seller, or importer's only possible course will be to attempt to use one of the other extraterritorial service heads. This may be possible if the court will characterise the claim for contribution or indemnity as "founded on a tort". However, this argument has produced varying results before the courts in the past.[160]

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152 Cf. *Multinational Gas Co. v. Multinational Gas Services Ltd.* [1983] Ch. 258 (CA) per May L.J. at 276 and 279 and Dillon L.J. at 285-287 contrast Lawton L.J. at 268, and *The Electric Furnace Co. v. Selas Corporation of America* [1987] R.P.C. 23 at 33 (C.A.).

153 Queensland O.11.01 (2)(n); New South Wales Pt.10 r.1A(1)(f); and, Federal Court of Australia O.8 r.1(d). The question whether the relevant contribution legislation applies at all to a claim under the or TPA is a separate issue addressed by the present author in *International Product Liability Litigation* (1996) 22 Monash U.L.R. 244.

154 *Gilchrist v. Dean* [1960] V.R. 266, and *Speller v. Bristol Steam Navigation Co.* (1884) 13 Q.B.D. 96. The issue of whether legislation providing for contribution applies to the TPA is discussed in Dutson, Stuart *Contribution or Indemnity from Foreign Manufacturers* (1996) 7 Australian Product Liability Reporter 117.

155 R 7.07.

156 O.10 r.7.

157 R.18.07.

158 O. 7.07.

159 i.e. RHC, Tas., ACT.

160 Against characterisation as a tort: semble *Gilchrist v. Dean* [1960] V.R. 266, semble *Arab Monetary Fund v. Hashim (No. 9)* (unreported, High Court of Justice Chancery Division, Chadwick J., 29.7.94, digested at The Times 11 October 1994 at 503) at 21, *Stewart v. Honey* (1972) 2 S.A.S.R. 585 at 592, and *Ronex*

Conclusions On Obtaining Personal Jurisdiction

It appears that a plaintiff can issue and serve originating process that includes claims in negligence and the TPA on a foreign manufacturer in any of the following cases:

1. pursuant to the relevant State, Territory, or Federal courts' 'tort committed within the jurisdiction' extraterritorial service head if it is a case of an instructional defect, the plaintiff is injured in the relevant jurisdiction, and the foreign manufacturer had knowledge that the goods were to be marketed in the relevant jurisdiction; or

2. pursuant to the relevant State, Territory, or Federal courts' 'damage suffered within the jurisdiction' extraterritorial service head where the plaintiff suffers some damage within the relevant jurisdiction; or

3. pursuant to FCR O.8 r.1(b) if it is a case of an instructional defect, the plaintiff is injured in the relevant jurisdiction, and the foreign manufacturer had knowledge that the goods were to be marketed in the relevant jurisdiction; or

4. pursuant to FCR O.8 r.1(c) where the plaintiff suffers some damage within the relevant jurisdiction; or

5. pursuant to the Queensland, New South Wales, and the Federal courts' 'cause of action arising in the jurisdiction' extraterritorial service head if it is a case of an instructional defect, the plaintiff is injured in the relevant jurisdiction, and the foreign manufacturer had knowledge that the goods were to be marketed in the relevant jurisdiction; or

6. pursuant to the relevant State, Territory, or Federal courts' 'necessary or proper party' extraterritorial service head in the negligence action if an action is also brought against the assembler, if any, in negligence, against the importer or other party made liable by the TPA, or against the seller to the plaintiff, if any, in contract; and in the case of the TPA action, against the importer or other party made liable by the TPA, against the assembler, if any, in negligence, or against the seller to the plaintiff, if any, in contract; where the court has personal jurisdiction over the latter party(s). In the case of New South Wales, Tasmania, the Australian Capital Territory, Western Australia, South Australia, semble Queensland, and Federal courts, and the High Court, the assembler, seller, importer or other party made liable by the TPA, must be served within the relevant jurisdiction.

Properties v. John Laing [1982] 3 W.L.R. 875. In favour of characterisation as a tort: *Baldry v. Jackson* [1977] 1 N.S.W.L.R. 494, and *Lucas v. Gagnon* (1992) 99 D.L.R. (4th) 125.

It appears that an assembler sued in negligence, a seller sued in contract, or an importer or other party sued under the TPA in the New South Wales, Queensland, and Federal courts can serve the foreign manufacturer with the court's originating process claiming contribution or indemnity, and in the Victoria, Northern Territory, Western Australia, and South Australia courts with a third party notice claiming contribution or indemnity. It is a moot point whether they could serve a claim for contribution or indemnity out of the Tasmania, Australian Capital Territory courts, and High Court.

As has been discussed above, there will be cases in which it is essential that the foreign manufacturer be joined in any product liability litigation if the action is to have any value for the plaintiff(s). In these cases the plaintiff has a number of means by which he can establish jurisdiction against the foreign manufacturer. When the plaintiff relies upon the TPA the relevant jurisdiction's necessary or proper party extraterritorial service rule will prove to be particularly useful, and in all jurisdictions in which it is available, a plaintiff would be well advised to consider utilising the 'damage suffered within the jurisdiction' rule. A plaintiff in an international case would be well advised to commence his proceedings in the Federal court if his own State court does not provide for the latter extraterritorial service rule. The next question that a plaintiff must consider is whether the TPA applies at all to his claim, and what tort law an Australian court will apply in determining his claim at common law. These issues are addressed by the present author in detail elsewhere.[161]

161 See further Dutson, Stuart *International Product Liability Litigation* (1996) 22 Monash U.L.R. 244, Dutson, Stuart *The Conflict of Laws and Statutes* (1997) 60 Modern L.R. 668, and Dutson, Stuart *The application of the choice of law rule in tort to international product liability actions* (1997) 8 Australian Product Liability Reporter 109.