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PRODUCT LIABILITY AND THE CONFLICT OF LAWS IN AUSTRALIA

1. *Product Liability Law in Australia*¹

At common law, a consumer of a product who suffers as a result of a defect in the product usually has two different types of remedy available to him, if he is unable to obtain redress without litigation. The more usual remedy is against the seller or supplier of the goods, for breach of the terms of a contract to which both are parties; the term relied upon may be express or implied. It is now quite common that certain terms of the contract which are implied by statute may not be excluded, varied, or modified by agreement of the parties.² Where such an action is brought, the seller or supplier will be liable upon proof of the contract and of the existence in the goods of a defect which amounts to a breach of a term at the time of delivery. No proof of any negligence or other "fault" is required. The amount of damages recoverable will depend on proof of the loss which the plaintiff can show to have resulted from the existence of the defect.

Alternatively, the injured person may sue the seller or supplier of the goods, their manufacturer, or some other person concerned in the production of the goods, including a repairer, for breach of a duty which the defendant owes to a class of persons of which the plaintiff is a member. The duty may be one which arises at common law, or by statute; if the latter, the plaintiff must also establish that the statute is intended to create a personal right of action. In either case the right of action does not depend upon any contractual relationship between the parties. The plaintiff must show the existence of a duty of care, a breach of that duty, and an injury to his person or property which is a direct and foreseeable consequence of the breach of duty. The burden of establishing each of these matters may be a heavy one. The liability of the defendant may be said to depend on his "fault".

This is not intended to be an exclusive list of the possible rights of action which may accrue in the case of defective goods. If the supplier, manufacturer, or some other person has made a statement or representation relating to the goods which is capable of being construed as some sort of warranty as to their quality, then the plaintiff, provided he can establish some consideration, may recover for damages for breach of warranty.³

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1. This question is considered in more detail in Goldring & Richardson, "Liability of Manufacturers for Defective Goods", (1977) 51 *A.L.J.* 127. See also Harland, "Products Liability and International Trade Law", (1977) 8 *Sydney L.R.* 358. Miller & Lovell, *Products Liability* (1977) is a statement of the English law with some analogies from the United States. Waddams, *Products Liability* (Toronto, 1974), though dealing principally with Canadian law, gives an account of the common law position.

2. Trade Practices Act, 1974 (Cth.), ss. 68, 71; Sale of Goods Act, 1923 (N.S.W.), s.64; cf. Supply of Goods (Implied Terms) Act, 1973 (U.K.); Powell, "Consumer Protection — Untying the Judicial Wrist", (1976) 4 *Aust. Bus. L.R.* 201.

2. Trade Practices Act, 1974 (Cth.), ss.68, 71; Sale of Goods Act, 1923 (N.S.W.), Misrepresentation", (1976) 50 *A.L.J.* 126.

Until the end of 1976, damages recoverable by a plaintiff in contract were likely to be more extensive than those recoverable in tort, though a recent decision of the High Court appears to have altered this position.⁴

Usually, the seller or supplier of the goods is the defendant, because his identity is known, and because the law has traditionally rendered him liable where he supplies defective goods. But if the seller becomes insolvent, or disappears, or if the plaintiff has no contractual relation with him, then the action must be brought against the manufacturer or some other person concerned in the production or marketing of the goods. Such actions have become known as "product liability" cases. There are strong social and economic reasons why the manufacturer of goods, rather than the seller, should bear the legal responsibility for defects in them which cause injury. It is very commonly the case that goods are supplied to the consumer in the same condition, even in the same package, as they were when they left the manufacturer's premises. The seller has no part in their preparation, and often no opportunity to inspect the goods without spoiling either the goods themselves or their package. It is also argued that the burden of responsibility is in reality met by an insurer, and that the cost of insurance is less when one manufacturer, rather than a number of sellers, bears the cost of liability insurance. The smaller cost is reflected in lower prices to the consumer. It is not certain whether this argument can be substantiated.

For these and other reasons, attention is being given in Australia and in Europe to the question of the manufacturer's liability for defective products.⁵ In the United States, it is well established that the manufacturer of any product, defective when it is put into commercial circulation, is liable for any injury caused by that defect, without proof of any negligence on the part of the manufacturer, and whether or not he knew or ought reasonably to have known of the defect at that time.⁶ Such liability is

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4. *Caltex Oil (Australia) Pty. Ltd. v. Decca Survey Australia Ltd.* ("The Willemstad") (1976) 11 A.L.R. 227 (Gibbs, Stephen and Murphy JJ.).
 5. *Association Européenne d'Etudes Juridiques et Fiscales, Product Liability in Europe* (London, 1975) is the most up-to-date study of the position. An earlier study prepared by UNIDROIT (The International Institute for the Unification of Private Law) as background to the preparatory work on the Strasbourg Convention (*infra*, n.8) was published by the Council of Europe in three volumes in 1972, and examines in more detail the law of all the members of the Council of Europe, together with Japan, the United States and Canada: see Council of Europe, Committee of Experts on the Liability of Producers, *Products Liability* (1972) (EXP-Resp. Prod. (71) 1). The English and Scottish Law Commissions, Working Paper No. 64, *Liability for Defective Products* (1975), contains some comparative material. The final report of Commission (No. 82) (also entitled *Liability for Defective Products* (1977)) differs from other reports of the Commission in that it does not make specific proposals for a law or append any draft legislation. It accepts that the law in the United Kingdom will be determined by the decision of the European Communities. However, the conclusions expressed in the report adopt the approach of the Strasbourg Convention rather than that of the current E.E.C. Draft Directives. See also Lorenz, "Some Comparative Aspects of the European Unification of the Law of Products Liability", (1975) 60 *Cornell L.R.* 1005; Fleming, "Draft Convention on Products Liability (Council of Europe)", (1975) 23 *Am. J. Comp. L.* 729; Wassermann, "Council of Europe: Products Liability Convention", (1977) 11 *J.W.T.L.* 192; Note, [1977] *J.B.L.* 50; Goldring, "Liability of Manufacturers for Defective Goods: Some European Trends", (1977) 51 *Law Inst. J.* 240.
 6. Prosser, "The Assault Upon the Citadel", (1960) 69 *Yale L.J.* 1099; "The Fall of the Citadel", (1966) 50 *Minnesota L.R.* 791; Szladits, "Comparative Aspects of Products Liability", (1966) 16 *Buffalo L.R.* 229. The U.S. position is conveniently summarised for English and Australian readers in Jolowicz, "The Protection of the Consumer", (1969) 32 *M.L.R.* 1; Legh-Jones, "Product Liability; Consumer

predicated either on a general duty of care owed by manufacturers to the general public, or on the basis of a warranty (which need not be supported by consideration) of the quality of the goods.

Similar provisions exist in some Australian jurisdictions. The Manufacturers Warranties Act, 1974 (S.A.), was designed to impose upon the manufacturers of goods a similar liability to consumers of goods in that State. The Law Reform (Manufacturers Warranties) Ordinance, 1977 (A.C.T.), is in most respects modelled on the South Australian Act. It differs in that there is no definition of "consumer", though persons acquiring goods of a kind normally used for personal or household purposes are presumed to be "consumers"; and warranties other than that of merchantable quality are implied under the Ordinance. The Ordinance replaced the Manufacturers Warranties Ordinance, 1975 (A.C.T.), after the latter had been repealed pending consideration by the Senate Standing Committee on Constitutional and Legal Affairs, which recommended its re-enactment with minor amendments.⁷ The Trade Practices Act Review Committee in its 1976 Report⁸ recommended an amendment to the Trade Practices Act, 1974 (Cth.), to make manufacturers of goods liable to consumers for injuries caused by defects in those goods in cases where that Act applied. It appears that the Commonwealth Government has accepted these recommendations in principle, and the question has been referred to the Standing Committee of Commonwealth and State Attorneys-General. No other part of Australia, as yet, has any similar legislation.

In Europe, there is also an awareness that rights of consumers based only on fault or contract may not give adequate protection. At the present time only France has rules which impose strict liability on a "commercial seller" of goods, in a manner at all similar to the "strict liability" regime of the United States.⁹ The German Federal Republic has a system based upon "fault" liability, but because of rules relating to the onus of proof of fault, it is at times difficult for a manufacturer to escape liability.¹⁰ The Federal Republic also has special rules relating to the liability of the manufacturers of pharmaceutical products, which will come into effect at the beginning of 1978.¹¹ However, most of the other European States deny recovery to an injured consumer unless he can establish either a contractual relationship or fault on the part of the manufacturer.¹²

Today, the manufacturer and the consumer of goods, as often as not, reside in different jurisdictions. A South Australian consumer is likely to buy many items which are manufactured in other parts of Australia, or

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Protection in America", (1969) 27 *C.L.J.* 54; Gibson, "Products Liability in the United States and England", (1974) 3 *Anglo-Amer. L.R.* 493; Waddams, "The Strict Liability of Suppliers of Goods", (1974) 37 *M.L.R.* 154.

7. Senate Standing Committee on Constitutional and Legal Affairs, *Report on Manufacturers Warranties Ordinance 1975* (December, 1976).

8. Para. 9.127.

9. See *Product Liability in Europe* (*supra*, n.5), ch. 3; Unidroit, *op. cit.* (*supra*, n.5) I, 53.

10. *Ibid.*; Mankiewicz, "Products Liability — A Judicial Break-through in West Germany", (1970) 19 *I.C.L.Q.* 99.

11. Pharmaceuticals Act (*Arzneimittelgesetz*), 1976.

12. Unidroit, *op. cit.* (*supra*, n.5) I, 1-11 (Austria), 20-30 (Cyprus), 63-64 (Ireland), 65-76 (Italy), 79-84 (Malta), 85-122 (Netherlands); II, *passim* (Scandinavian States). See also *Product Liability in Europe* (*supra*, n.5), 39-54 (Denmark) 83-90 (Italy), 91-100 (Netherlands); 101-116 (England).

outside Australia. If, for some reason, he cannot sue the supplier of the goods, who is presumably in South Australia, is he obliged to go to some other jurisdiction, whether it be Queensland, Italy, or Japan? If he does, what will become of any rights which he may have under the South Australian Act? If he could afford to sue in California, he would be able to recover, as Californian law appears to be fairly favourable to consumers.¹³ His task would be more difficult if he were to sue in Italy,¹⁴ or Japan.¹⁵ In Queensland, England, or Scandinavia, his chances would appear to be roughly equal, since these jurisdictions require either contract or fault before holding a manufacturer liable.¹⁶

These problems are not specifically Australian: similar, indeed more complex ones arise in Europe. In January 1977, the Council of Europe opened for signature its convention on Product Liability in the Case of Personal Injury or Death.¹⁷ The Strasbourg Convention (as it will be referred to here) has already been signed by France, Belgium and Luxembourg. The European Economic Community has also prepared a Directive on Product Liability¹⁸ which, if approved by all members, will require each of them to amend its national laws to comply with the principles set out in the Directive. Both the Strasbourg Convention and the Directive provide for a manufacturer's liability without proof of fault or contract. The United Nations Commission on International Trade Law (UNCITRAL) is also considering a Convention on Product Liability.¹⁹ It appears likely that before long all of the developed world will subject the manufacturer to liability in respect of defects in goods manufactured by him. South Australia is only slightly ahead of a number of other jurisdictions.

2. Conflict of Laws and Product Liability

The Manufacturers Warranties Act, 1974 (S.A.), establishes the principle of product liability without contract or fault, at least where both manufacturer and consumer are within the jurisdiction, but problems can arise where either party resides in a jurisdiction whose laws make no such provision. In the United States these problems are not new. There, product liability law is now established as a distinct body of rules, and in general, a manufacturer or producer of goods, a defect in which causes injury, will be liable to the injured person either under an implied "warranty" (notwithstanding the absence of any express contract between the manufacturer and the injured person) or, in a majority of the States, under more general rules of tort.²⁰

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13. Cf. *Greenman v. Yuba Power Products Inc.* 27 Cal. 697; 377 P.2d. 897 (1962).
 14. *Product Liability in Europe* (*supra*, n.5), 83-90; Unidroit, *op. cit.* (*supra*, n.5) I, 65-70.
 15. *Id.* III, 65.
 16. The position in Queensland and England appears to be the same, and is set out in Goldring and Richardson, *loc. cit.* (*supra*, n.1), 127-135. The Scandinavian countries also require either proof of fault or the existence of a contract: Dahl, "Product Liability in Scandinavian Law", (1975) 19 *Scandinavian Studies in Law* 59, and in *Product Liability in Europe*, (*supra*, n.5), ch. 2.
 17. (1977) 16 *Int. Leg. Mat.* 7.
 18. Commission of the European Communities, Draft Directive Concerning the Approximation of the Laws of Member States relating to Product Liability (23rd July, 1976).
 19. See Harland, *loc. cit.* (*supra*, n.1), 358.
 20. See Note, "Products Liability and the Choice of Law", (1965) 78 *Harv. L.R.* 1452; Weintraub, "Choice of Law for Products Liability: The Impact of the Uniform Commercial Code and Recent Developments in Conflicts Analysis", (1966) 44 *Texas L.R.* 1429; Kühne, "Choice of Law in Products Liability", (1972) 60 *Calif. L.R.* 1.

Where the manufacturer and the injured party are in different jurisdictions the question is not so simple. For example, the liability of a manufacturer to an injured consumer under French law is contractual rather than delictual,²¹ so that in addition to the normal conflict of laws problems of jurisdiction and choice of law, there may also be a problem of characterisation. Because of these difficulties, the matter was raised at the Hague Conference on Private International Law (of which Australia has been a member since 1973).²² In 1972, the Hague Conference produced a Convention on the Law Applicable in Cases of Product Liability, which is not yet in force.²³ The purpose of the convention is to specify the system of law which will determine whether a manufacturer is liable to a person injured as a result of a defect in a product manufactured by him. In general, the law to be applied is that of the place where the plaintiff is injured, if that is also the place where he habitually resides, and provided that the manufacturer is aware that the product is likely to be used in that country. The proviso was considered necessary to ensure that a manufacturer would not be liable if he had no opportunity to insure against liability to which he might be subject under that legal system.

The 1972 Hague Convention is designed to operate both in common law countries and in the civil law systems of continental Europe. With the exception of the francophone systems, European laws appear to treat the liability of manufacturers, if any, as delictual rather than contractual. The liability which will be imposed under the Strasbourg Convention and the laws made in pursuance of the E.E.C. Directive in its present form also appears to be delictual. The Hague Convention appears to be more appropriate for delictual, rather than contractual liability.

3. The Provisions of the Australian Legislation

The three Australian statutes currently in force differ from those in force, or proposed, in Europe in that they have the effect of creating a notional contract between the manufacturer of the goods and the consumer. It has already been noted that the liability of a manufacturer under French law is contractual, but that in the United States and elsewhere it is tortious. However, the solution adopted in South Australia, and followed elsewhere, may have considerable advantages.

Into the notional contract between the "manufacturer" and the "consumer" (both defined in the legislation) is implied a term that the goods shall be of "merchantable quality", a concept well-known to common lawyers, and now defined by statute. The definition in s.4(2) of

21. Unidroit, *op. cit.* (*supra*, n.5) I, 32 *et seq.*

22. The history of the Hague Conference is summarised in Nadelmann, "The United States Joins the Hague Conference on Private International Law", (1965) *Law and Contemporary Problems* 291. See also Macpherson, "Recent Activities of the Department" in Australia, Attorney-General's Department, *Meeting on International Trade Law, 1974* (Canberra 1974) and Note, (1974) 48 *A.L.J.* 269.

23. For the text of the Convention see Hague Conference on Private International Law, *Acts and Documents of Second Session, 2-21 October 1972* (1974) III, 246-250.

For discussion see Saunders, "An Innovative Approach to Product Liability", (1972) 4 *Law and Policy in International Business* 187; Lorenz, *loc. cit.* (*supra*, n.5), 1066; Reese, "The Hague Convention on the Law Applicable to Products Liability", (1973) 21 *Am. J. Comp. L.* 149; *id.*, (1974) 8 *International Lawyer* 606; Harland *loc. cit.* (*supra*, n.1), 360.

the Manufacturers Warranties Act, 1974 (S.A.), is based on that in the Supply of Goods (Implied Terms) Act, 1973 (U.K.), and the virtually identical definition in s.66(2) of the Trade Practices Act, 1974 (Cth.). If the goods are not of that quality, s.5 of the Manufacturers Warranties Act, 1974 (S.A.), provides that the consumer may recover "damages for breach of warranty in all respects as if the action were for breach of warranty under a contract between the manufacturer and the consumer". Thus, adopting the facts of an American case,²⁴ if a South Australian resident buys from a South Australian retailer an electric drill manufactured in South Australia, and because of a defect in the drill injury is caused to the consumer, the Act gives to the consumer a right to sue the manufacturer for breach of a warranty of merchantable quality. Such a right does not derogate in any way from the right which the consumer has to sue the supplier of the drill (s.5(2)). However, the definition of "consumer" in s.3(1) includes only the purchaser of the goods and a person who derives title to the goods though or under the purchaser. A person who is not a "consumer", as defined, has no remedy under the Act. Neither a member of the "consumer's" household, nor a total stranger, is given any statutory right. Such persons would be forced to rely on rights under the general law. In the case of articles of a household or domestic nature which are the subject of most consumer transactions, injury is as likely to a member of the "consumer's" household as it is to the "consumer" himself when the goods are defective. The various solutions to the problem of liability for defective products suggested in different parts of Europe do not rely on any notional contract, and so do not raise any question of privity. In the United States, where rights under implied terms are of considerable importance, both as against the seller and against any other person involved in the production or distribution of goods, s.2-318 of the Uniform Commercial Code extends the benefit of the implied terms at least to the members of the contracting party's household.²⁵ The insertion of a provision such as s.2-318 of the Uniform Commercial Code of the United States would be an improvement in the Act. But even this would not make the manufacturer liable to suit by members of the general public, as is the case under the Strasbourg Convention and the E.E.C. Directive.

24. *Greenman v. Yuba Power Products Co. Inc.* 27 Cal. 697; 377 P.2d. 897 (1962).

25. S.2-318 of the Uniform Commercial Code reads:

Alternative A: A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B: A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C: A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person or an individual to whom the warranty extends."

A State adopting the Code has a choice between the three alternatives. Some have gone even further than Alternative C, which was inserted in 1966, following the trend set by s.402A of the *Restatement of Torts* (2d). It is in line with the Strasbourg Convention and the E.E.C. Draft Directive, but those drafts are not limited by the requirement of foreseeability. Alternative C would seem the most appropriate formulation in modern conditions.

4. *The Manufacturers Warranties Act, 1974 (S.A.), and the Conflict of Laws*

In this article it is not proposed to deal with the situation where all of the elements of a transaction occur within the one jurisdiction, nor with detailed problems of interpretation of the Manufacturers Warranties Act, 1974 (S.A.). However, there may be difficulties where any of the elements required for liability under the Act occurs outside South Australia, or where some or all of the parties are outside that State. The problems are magnified when action is brought in the courts of some place other than South Australia.

(A) PLACE OF TRANSACTION

S.4(1) of the Act provides:

“Where any manufactured goods [defined in s.3(1)]

(a) are sold by retail in this State; or

(b) are delivered, upon being sold by retail, to a purchaser in this State, the manufacturer warrants—

(c) that the goods are of merchantable quality . . .”

Thus the Act can only have effect where the goods are sold by retail, or delivered after a retail sale, in South Australia. It is directed to an act taking place in South Australia, and it would not appear relevant that the parties have chosen the law of some other place to govern their relationship.²⁶ Conversely, the choice of South Australian law by parties to a contract, the proper law of which would not otherwise be South Australian, would not appear to mean that the provisions of the Act would apply to such a contract, unless the sale or delivery took place in South Australia.

(B) PLACE OF MANUFACTURE, OR PLACE WHERE THE MANUFACTURER IS

For the Act to apply, it is not necessary that the goods be manufactured in South Australia, nor that the manufacturer have a place of business in that State. The relevant provision is the definition of “manufacturer” in s.3(1):

“manufacturer, in relation to manufactured goods, means—

(a) any person by whom, or on whose behalf, the goods are manufactured or assembled;

26. In *Kay's Leasing Corporation Pty. Ltd. v. Fletcher* (1964) 116 C.L.R. 124, the High Court had to consider a provision of the Hire Purchase Act, 1961 (N.S.W.), which purported to subject to the Act some hire purchase contracts the proper law of which was *prima facie* not that of N.S.W. Because the relief sought included imposition of a criminal penalty, the Court took a restrictive view of the “statutory localization rule” and also reversed the decisions of the trial judge (Walsh J.) who had invoked the proper law of the contract to determine the applicability of the statute. Cf. *Goodwin v. Jorgensen* (1973) 128 C.L.R. 374. Kelly, *Localising Rules in the Conflict of Laws* (Adelaide, 1974), esp. 125-136, criticises the use in statutes of localizing rules. He draws some conclusions from the decision in *Kay's* case which might also apply to the provisions of s.4(1) of the Manufacturers Warranties Act, 1974 (S.A.), as, like the case of the N.S.W. Hire Purchase Act, the proper law of the contract is irrelevant: indeed, in the case of what might be called the “notional contract” between the “manufacturer” and the “consumer”, it is difficult to see how the concept of a proper law could apply. As there are no parties to a contract in the traditional sense, not only are manufacturers or consumers unable to “opt out” of the effect of the Act, but they cannot “opt in”. In this sense s.4(1) of the Act is different from s.6 of the Consumer Transactions Act, 1972-1973 (S.A.), of which Kelly is most critical, because that section applies to contracts and is expressed in the traditional language of choice-of-law rules applicable to contracts.

- (b) any person who holds himself out to the public as the manufacturer of the goods;
- (c) any person who causes or permits his name, the name in which he carried on business, or his brand, to be attached to or endorsed upon the goods or any package or other material accompanying the goods in a manner or form that leads reasonably to the inference that he is the manufacturer of the goods; or
- (d) where the goods are imported into Australia, and the manufacturer does not have a place of business in Australia, the importer of the goods . . .”

It is therefore irrelevant where, or by whom, the goods are actually manufactured. For the purpose of the Act, all goods sold by retail in South Australia will have a “manufacturer” who can be made liable if the goods are not of merchantable quality.

(C) PLACE OF DAMAGE OR INJURY

Because the Act applies wherever there is a retail sale, or delivery of goods after such a sale, in South Australia, the place where the defect occurs, or is discovered, or where it causes injury to the person or property of the plaintiff, is quite irrelevant, unless a court chooses to characterise the liability of the manufacturer in a particular way, a matter which is discussed below.

(D) PLACE WHERE THE ACTION IS BROUGHT

In most cases where the Manufacturers Warranties Act is invoked, the action will be brought in South Australia; it would be unwise for an aggrieved consumer to choose any other forum, because a plaintiff in any other court runs the risk of being stranded upon the shoals of the technicalities of conflicts law. Nevertheless, in some cases it will not be practicable to sue in South Australia, perhaps because of the unavailability of witnesses, perhaps because of expense and inconvenience for the plaintiff. It is in these cases that the difficulties will occur.

(E) JURISDICTION

At common law, the jurisdiction of the courts depended principally upon the personal presence of the defendant within the jurisdiction of the court, *i.e.*, those places to which the King’s writ would run.²⁷ This presence was required only at the time of service of the writ. The jurisdiction of the State courts has, however, been somewhat expanded, both by the Rules of the Supreme (and other) Courts,²⁸ and particularly, in the context of the Manufacturers Warranties Act, within Australia, by the Service and Execution of Process Act, 1901 (Cth.). Thus paragraph (d) of the definition of “manufacturer”, set out above, refers to the persons who imports the goods, not into *South* Australia, but into *Australia*. This definition assumes that, if an action is brought under s.5 of the Manufacturers Warranties Act, the provisions of the Service and Execution of Process Act will permit the importer of the goods, no matter where in Australia he may be found, to be called to account in the courts of South Australia.

The assumption appears well-founded. While the Australian federal system allows States to regulate those matters over which they have constitutional competence, the Service and Execution of Process Act requires that the

27. *Sirdar Gurdyal Singh v. Rajah of Faridkote* [1894] A.C. 670; *Laurie v. Carroll* (1958) 98 C.L.R. 310.

28. *E.g.*, Rules of the Supreme Court of South Australia, O.XI.

process of the courts of one part of Australia be served in all other parts, provided that the issuing court is properly seized of jurisdiction. Where process is served under this Act, a defendant who appears to the originating process is taken to have submitted to the jurisdiction of the issuing court; if he fails to appear, a plaintiff may proceed to judgment by default on satisfying the court that the matter is one over which it would have had jurisdiction if the defendant had been served with process in the territory of the forum State.²⁹ Although the House of Lords in *The Atlantic Star*³⁰ stated that a court might decline jurisdiction in a limited range of cases where to assume jurisdiction might work hardship on the defendant, there cannot yet be said to exist in Australia a doctrine of *forum non conveniens*, especially where the facts giving rise to an action contain elements of an inter-State, rather than a transnational, nature. The Service and Execution of Process Act is a clear statutory directive that a forum should be provided in a court of any part of Australia, even though the events giving rise to the action touch more than one part. The situation may be different where the action arises out of events involving both the legal system in a part of Australia and that of some other place.³¹

Where, under the Service and Execution of Process Act, a defendant does not appear, the plaintiff must establish that he has an arguable cause of action which falls within one of the heads set out in s.11 of the Act.³² The relevant heads are sub-sections (1)(b), which deals with actions for damages for a breach of contract which "was made or entered into within the State", (1)(c), dealing with actions for relief in respect of a breach within the State of a contract, wherever made, and (1)(d), which allows service outside the State where any act or thing sought to be recovered or restrained or for which damages are sought to be recovered, was done within the State.

If the South Australian court accepts the contention that the effect of the Manufacturers Warranties Act, 1974 (S.A.), is to create, by operation of law, a contractual relationship between the consumer and the manufacturer (a question which is dealt with below³³) it appears that the contract is created when the goods are sold by retail, or delivered after a retail sale, in South Australia. In such a case, it seems that s.11(1)(b) of the Service and Execution of Process Act, 1901 (Cth.), may be relied upon; if not, in cases where the contract is made outside South Australia, and delivery of the goods in that State brings the Act into operation, s.11(1)(c) might be relied upon. However, if the courts reject the contention that the obligation imposed by the Manufacturers Warranties Act, 1974 (S.A.), upon the manufacturer is contractual, even though such a finding might not

29. See generally Nygh, *Conflict of Laws in Australia* (3rd ed., 1976), ch. 33.

30. [1974] A.C. 436.

31. *Cf. G. W. J. Blackman & Co. Pty. Ltd. v. Oliver Davey Glass Co. Pty. Ltd.* [1966] V.R. 570.

32. *Tallerman & Co. Pty. Ltd. v. Nathan's Merchandise (Vic.) Pty. Ltd.* (1957) 98 C.L.R. 93, 108.

32a. *Delivery in New Zealand of goods manufactured negligently in another country has been held to be an act "for which damages are claimed" which had been "done in New Zealand" so as to give the courts of that country jurisdiction under R.48(a) of the Code of Civil Procedure: Adastra Aviation Ltd. v. Airparts (N.Z.) Ltd.* [1964] N.Z.L.R. 93; *Pratt v. Rural Aviation (1963) Ltd.* [1969] N.Z.L.R. 46; *My v. Toyota Motor Co. Ltd.* [1977] 2 N.Z.L.R. 113.

33. *Infra*,

necessarily mean that the liability is tortious, s.11(1)(d) would still allow South Australian process to be served in some other part of Australia. The ground of recovery is the existence in the goods at the time of sale or delivery of some attribute which renders them unmerchantable, and the Manufacturers Warranties Act, 1974 (S.A.), will not apply at all if that sale or delivery did not take place in South Australia.

Thus, whatever the nature of the obligation imposed on a manufacturer by the Manufacturers Warranties Act, the fact that it applies only in cases which have a specific territorial connection with South Australia is sufficient to allow reliance on the Service and Execution of Process Act to bring the manufacturer as a defendant before the courts of South Australia, no matter where in Australia he may be.

(F) THE SOUTH AUSTRALIAN ACT AND INTERSTATE CONFLICTS

Where goods not of merchantable quality are manufactured in Queensland by a manufacturer who carries on business only in that State and are then sold by retail in South Australia to a consumer, a consumer who chooses to sue in Queensland will face a number of problems. The problems facing a consumer who is a resident of, say, Victoria, who has purchased in South Australia goods manufactured by a Queensland manufacturer, and who sues in the courts either of Victoria or of Queensland will be somewhat similar. Although this article discusses the problems that arise in these types of situations, it should be clear that the wisest course will be to sue in South Australia under the Manufacturers Warranties Act, 1974 (S.A.), if this is at all possible.

In the first hypothetical situation, a Queensland court will allow a plaintiff to recover only if he can establish a right enforceable under the laws of Queensland, including the conflict-of-law rules of that State, whether the action be characterised as an action in tort, for breach of contract, or in some other way.³⁴ The courts of one State do not enforce the laws of some other State unless special reasons can be established for them to do so.³⁵

I Characterisation

It has already been suggested that the South Australian Act, by creating a notional contract between the consumer and the manufacturer, may have a special significance for the conflict of laws. In the case of contracts, the law which governs the rights and obligations of the parties to the contract *inter se* is the law which they have, expressly or impliedly, chosen to do so.³⁶ In the case of a contract for the supply of goods by retail to a consumer, an express choice of law will be extremely rare; and as any contractual relationship between manufacturer and consumer is notional only, there will, of course, be no express choice. Thus the court will seek an implied choice of a governing law, and this will be, in general, the system of law which has the "closest and most real connection" with the transaction.³⁷ Therefore, in the first hypothetical case, the plaintiff must overcome two obstacles if he is to convince the Queensland court that the defendant is liable under the Manufacturers Warranties Act, 1974 (S.A.).

34. *Koop v. Bebb* (1951) 84 C.L.R. 629, 649.

35. *E.g.* that the law sought to be enforced is entitled to "full faith and credit" as was the case in *Permanent Trustee Co. (Canberra) Ltd. v. Finlayson* (1967) 9 F.L.R. 424.

36. *Bonython v. Commonwealth of Australia* [1951] A.C. 201, 219.

37. *Ibid.*

He must convince the court that his action is founded in contract, or is so closely analogous to an action in contract that the same choice-of-law rules should be applied. He must then show that the proper law of the contract is South Australian law.

The question of characterisation is central. If the action is characterised as an action in tort, the plaintiff will most likely fail, for reasons to be discussed below. Characterisation is a matter to be carried out according to the law of the forum,³⁸ but the principles to be applied are far from clear.³⁹ The relationship between the consumer and the manufacturer lacks some of the traditional elements of contract (e.g., offer and acceptance, consideration), unless the placing of the goods on the market by the manufacturer can be said to be an offer to all the world, and capable of being the basis of a "unilateral contract".⁴⁰ Or, perhaps, there may be some basis of finding a "collateral contract" to which the manufacturer and the consumer are the parties.⁴¹ On the other hand, the Manufacturers Warranties Act, 1974 (S.A.), speaks of "warranties", and provides in s.5(1) that the liability of the manufacturer is "in all respects as if the action were for breach of warranty under a contract between the manufacturer and the consumer".

Alternatively, the courts might regard the action as tortious; not the tort of negligence, but for breach of a statutory duty to supply goods of a merchantable quality. This would involve the construction of s.5 as specifically providing a private right of action in favour of the consumer.⁴² The wording of the Act suggests that the intention of the legislature was to create a right which, if not strictly speaking one flowing to an injured party under a contract, was one very closely analogous to a contractual right. Even if the courts are reluctant to give effect to this apparent intention, their reluctance should not necessarily lead to the characterisation of the right to sue as a right in tort, with the consequent probability of failure of the plaintiff for non-compliance with the rule in *Phillips v. Eyre*.⁴³ Possibly influenced by the complexity of and anomalies flowing from application of the tort choice-of-law rules, the courts (especially the Supreme Court of South Australia) have been prepared to characterise rights of action given under statutes as *sui generis*. Perhaps the most fruitful analogy with the Manufacturers Warranties Act may be found in the "direct action" statutes which provide a right to a person, injured as a result of the negligent driving of a motor vehicle, to sue the insurer

38. Cheshire and North, *Cheshire's Private International Law* (8th ed., 1970), 43.

39. Note, "Products Liability and the Choice of Law", (1965) 78 *Harv. L.R.* 1452, 1453.

40. See *The Eurymedon* [1975] A.C. 154, in which such an argument was advanced in order to overcome the problem of lack of privity. But note *The New York Star* [1977] 1 Lloyd's Rep. 445 (C.A., N.S.W.) where applying *Australian Woollen Mills Pty. Ltd. v. The Commonwealth* (1954) 92 C.L.R. 424, 457, such an argument was rejected. The decision has been affirmed by the High Court *sub. nom. Port Jackson Stevedoring Pty. Ltd. v. Salmond and Spraggon (Aust.) Pty. Ltd.* (1978) 18 A.L.R. 333.

41. *Shanklin Pier Ltd. v. Detel Products Ltd.* [1951] 2 K.B. 854; *Brown v. Sheen and Richmond Car Sales Ltd.* [1950] 1 All E.R. 1102; *Andrews v. Hopkinson* [1957] 1 Q.B. 229; cf. *Heilbut Symons & Co. v. Buckleton* [1913] A.C. 30, discussed by Stoljar, "The International Harvester Case: A Manufacturer's liability for Defective Products", (1959) 32 *A.L.J.* 307; Fricke, "Manufacturer's Liability for Breach of Warranty", (1959) 33 *A.L.J.* 35; "Consumers' Remedies", (1962) 36 *A.L.J.* 153. A warranty seems to be the basis of liability in some of the United States.

42. Cf. *O'Connor v. S. P. Bray Ltd.* (1937) 56 C.L.R. 464.

43. (1870) L.R. 6 Q.B. 1.

of the motor vehicle directly, where the negligent person has died. Such statutes were considered by the Supreme Court of South Australia in *Plozza v. South Australian Insurance Company Limited*,⁴⁴ where an action was brought in that court as a result of a negligent act in Victoria by a deceased person. The relevant Victorian statute did not permit a "direct action" against the insurer, but instead allowed a right of action against the legal personal representatives of the deceased person. The deceased was a resident of South Australia and the vehicle concerned was insured by the defendant under the provisions of the Motor Vehicles Act, 1959 (S.A.), which provided for a "direct action". The defendant sought to characterise the right of action as one in tort, and contended that, as the place of the injury was Victoria, whose laws did not permit a direct action, the plaintiff could not sue in South Australia. Hogarth J., however, rejected this contention and described the imposition of the liability on the insured upon the insurer as a statutory extension of a contract, rather than the statutory creation of a right in tort,⁴⁵ even though "wrongful death" statutes are generally considered as tortious. He also rejected a contention that the right conferred on the plaintiff was a right *sui generis*. His Honour was concerned directly with the question of full faith and credit, discussed below, and his remarks on characterisation were perhaps *obiter*; though Zelling J., who applied them in *Hine v. Fire & All Risks Insurance Co. Ltd.*⁴⁶ considered them a basic part of the decision. A similar question came before the Full Court of the Supreme Court in *Hodge v. Club Motor Insurance Agency Pty. Ltd.*⁴⁷ where the injury occurred in South Australia, but the policy was issued under the Motor Vehicles Insurance Acts, 1936-1968 (Qld.). That Act specifically provided for a right of "direct action" if the injury occurred outside Queensland. The question arose in the context of an application to set aside service of the writ, effected under the Service and Execution of Process Act, 1901 (Cth.). The Court had to characterise the right of action in order to determine whether the requirements of s.11 had been fulfilled. Bray C.J.⁴⁸ expressly rejected the view that the statutory liability of the insurer was a liability in tort, and described it "quasi-contractual". Bright J. did not expressly characterise the right of action, but it is clear from his judgment⁴⁹ that he, too, did not characterise it as a right in tort. Zelling J. considered that in so far as characterisation was necessary, the views of Hogarth J. in *Plozza's* case, which he had applied in *Hine's* case,⁵⁰ conclusively determined that the right was at least analogous to a contractual right.⁵¹

In the case involving direct action statutes, it could be argued that before a right under the statute came into existence, there was a concluded contract upon which the provisions of the Act could operate, *viz.* the

44. [1963] S.A.S.R. 122.

45. *Id.*, 128.

46. (1974) 7 S.A.L.R. 49.

47. (1974) 7 S.A.L.R. 86.

48. *Id.*, 89-90.

49. *Id.*, 97.

50. *Id.* 102. The same view has been taken consistently by the South Australian courts: *Nominal Defendant v. Bago's Executor and Trustee Co. Ltd.* [1971] S.A.S.R. 346, 365-366 *per* Bray C.J.; *Stewart v. Honey* (1972) 2 S.A.S.R. 585, 592. The Victorian Courts, on the other hand, have characterised the right arising under s.113 of the Motor Vehicles Act, 1959-70 (S.A.), as a *tortious*, rather than a quasi-contractual right: *Ryder v. Hartford Insurance Co.* [1977] V.R. 257. *Cf. Hall v. National and General Insurance Co. Ltd.* [1967] V.R. 355.

51. Kelly, *op. cit.* (*supra*, n.26), 9-10.

policy of insurance. In the case of the right accruing to an injured consumer under the Manufacturers Warranties Act, 1974 (S.A.), any contract which is "extended" by the operation of the Act comes into existence on the making of the contract for sale by retail, or on the delivery of the goods in South Australia, and if the Act does "extend" any contract it must be the contract between the consumer and the retail supplier of the goods. A contract for the supply of goods may be sufficiently different from an insurance contract for a court to distinguish an injured consumer's rights under the Manufacturers Warranties Act from those given under the "direct action" statutes. The former might be regarded as, if not quasi-contractual, then at least *sui generis*. This might be more likely if the action was tried outside South Australia. Even if the right were to be characterised as *sui generis*, the court would have to apply some choice-of-law rules, and it is likely that these rules would be determined by analogy either with the choice-of-law rules applied in cases of tort or those applied in cases of contract. In *Nominal Defendant v. Bagot's Executor and Trustee Co. Ltd.*^{52a} Bray C.J. found that the governing law in situations of quasi-contract was that with which the transaction had the closest and most real connection. Thus it makes little difference whether the right of action is characterised as contractual or quasi-contractual.

If the liability of the manufacturer is characterised as a liability in tort, the choice-of-law rules are those laid down in *Phillips v. Eyre*⁵² as modified in later cases.⁵³ These rules are stated as follows by Dicey and Morris:

- "(1) As a general rule, an act done in a foreign country is a tort and actionable as such in England only if it is both
- (a) actionable as a tort according to English law, or, in other words, is an act which, if done in England, would be a tort; and
 - (b) actionable according to the law of the foreign country where it was done.
- (2) But a particular issue between the parties may be governed by the law of that country which, with respect to that issue, has the most significant relationship with the parties."⁵⁴

52. (1870) L.R. 6 Q.B. 1.

52a. [1971] S.A.S.R. 346, 365-366, followed in *Stewart v. Honey* (1972) 2 S.A.S.R. 585.

53. Especially *Chaplin v. Boys* [1971] A.C. 356. There are numerous comments upon this difficult case. Comments with a specifically Australian approach include: Nygh, "Boys v. Chaplin or The Maze of Malta", (1970) 44 *A.L.J.* 160; Keeler, "Torts in Australian Private International Law", (1971) 4 *Tas. U.L.R.* 17; Pryles, "Recent Australian Trends in Tortious Choice of Law", (1973) 11 *Canadian Ybk. of Int. L.* 271; Nygh, "Boys v. Chaplin in the Antipodes", (1973) 4 *Tas. U.L.R.* 161; Pose, "The Proper Law of the Tort — Some Recent Australian Developments", (1976) 50 *A.L.J.* 110. English comments include North and Webb, "Foreign Torts and English Courts", (1970) 19 *I.C.L.Q.* 24; Karsten, "Chaplin v. Boys — Another Analysis", (1970) 19 *I.C.L.Q.* 35; Graveson, "Towards a Modern Applicable Law in Tort", (1969) 85 *L.Q.R.* 505. The latest editions of the leading texts devote considerable attention to the problems created by *Chaplin v. Boys*. In this context, the "Australian" articles are, of course, more relevant, but no clear statement of principles can be given until the High Court pronounces on the matter. State courts have considered some of the questions involved *inter alia* in *Schmidt v. Government Insurance Office of New South Wales* [1973] 1 N.S.W.L.R. 59; *Corcoran v. Corcoran* [1974] V.R. 164; *Maple v. David Syme & Co. Ltd.* [1975] 1 N.S.W.L.R. 97; *Gorton v. Australian Broadcasting Commission* (1974) 22 F.L.R. 181, all decided since *Chaplin v. Boys*.

54. Dicey and Morris on the Conflict of Laws (9th ed., J. H. C. Morris ed., 1973), 930, 938 (Rule 178).

For Australian purposes it must be remembered that another State or Territory must, for the purposes of the conflict of laws, be treated in most respects as a foreign country.⁵⁵

Rule 178 as set out takes account of the significant complications introduced by the five speeches delivered in *Chaplin v. Boys*.⁵⁶ The High Court of Australia has not had to decide any case involving the choice-of-law rules in tort since *Chaplin v. Boys*. Its approach in the most recent relevant decision, *Anderson v. Eric Anderson Radio and TV Pty. Ltd.*,⁵⁷ was to apply *Phillips v. Eyre* without modification. There was no mention of any of the exceptions to those rules which *Chaplin v. Boys* seems to have made possible in England, and it may be that those exceptions will not apply in Australia.⁵⁸

For this reason, an action brought in Queensland against a Queensland manufacturer in respect of goods sold by retail in South Australia would fail if the court chose to characterise the action as one in tort (subject to a possible exception dealt with below), even though the action would almost certainly succeed if it had been brought against the same defendant in South Australia. Neither the sale by retail, nor the existence of the defect in the goods, would be actionable as a tort in Queensland (in the absence of fraud or negligence on the defendant's part). The same would be true even if the manufacturer were a South Australian resident sued in Queensland, although in that case it is unlikely that the Queensland courts would have jurisdiction; presence of the plaintiff, and probably the suffering of an injury by him, within the State is not enough to give the courts of that State jurisdiction in the matter, and s.11 of the Service and Execution of Process Act, 1901 (Cth.), is almost certainly not wide enough to cover the situation.

II "Full faith and credit"

Assuming that an action is brought in a part of Australia other than South Australia, and that the action is characterised by the court as tortious, there is one argument which might enable the plaintiff to succeed in an action based upon the Manufacturers Warranties Act, 1974 (S.A.). It is an argument which has not been much aired before the High Court, and only the courts of South Australia have been at all receptive to it. Because of the unique character of the rights given to an injured party by the Act, an action based on such a right might have some chance of success.

The plaintiff's right arises under a public Act of South Australia. The public Acts of a State are entitled to "full faith and credit" in the courts of every other State and Territory under s.118 of the Constitution, and under s.18 of the States and Territories Laws and Records Recognition Act, 1901 (Cth.).⁵⁹ A plaintiff might claim that the South Australian Act should be given such full faith and credit in the courts of the forum as it has in South Australia. It seems clear that a judgment of one State court must be enforced in the courts of other parts of Australia, even if, at common law, the judgment concerns a matter, such as revenue, which

55. *Pederson v. Young* (1964) 110 C.L.R. 162, 170 *per* Windeyer J.

56. [1971] A.C. 356.

57. (1965) 114 C.L.R. 20.

58. See the authorities cited *supra*, n.53.

59. Hereafter referred to as the Recognition Act.

would not be enforced outside the territory of the State in which the judgment was obtained.⁶⁰ The position of statutes of other States, and of rights arising under them, is less clear,⁶¹ but it is certainly arguable that a right arising under a statute, or public Act, of one part of Australia is enforceable in the courts of every part of Australia, provided that court is properly seized of the matter, in exactly the same way as it would be enforceable in the courts of the part of Australia whose Act it is.

An argument of this type seems to be supported by a literal construction of the words of the Constitution, though such a wide effect for the section was not envisaged by the founding fathers in the Constitutional Conventions.⁶² However, in *In re E. and B. Chemicals and Wool Treatment Pty. Ltd.*, Napier J. said:

“When the ‘writ’ is issued, under the Federal Statute, out of any court of competent jurisdiction, it runs throughout the Commonwealth, and the law of the Commonwealth provides for the enforcement of the judgment in any other State. The correlative to this jurisdiction, over persons resident in other States, is s.118 of the Constitution which requires that full faith and credit shall be given throughout the Commonwealth to the laws of every State. I think this is a direction to the Court of trial to ascertain the proper law of the matter or transaction that is in question. In other words, *the intention is that the law to be applied shall be the same, wherever in Australia the cause is tried.*”⁶³

It should be noted, in the hypothetical case under consideration, that if a judgment were obtained in a court of South Australia, it could be enforced in any other State, even if the public policy of the State in which enforcement were sought did not favour the policy which is the foundation of the South Australian statute.⁶⁴ It seems illogical that the choice of South Australia as the forum should lead to success for the plaintiff while choice of some other forum for the trial of an action arising out of the same transaction would result in failure. Moreover this result denies the national character of the Australian federation. The argument advanced does not

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60. *Commissioner of Stamps (Qld.) v. Counsell* (1937) 57 C.L.R. 248; *Permanent Trustee Co. (Canberra) Ltd. v. Finlayson* (1967) 9 F.L.R. 424.
61. *Finlayson's case* (*supra*, n.60) suggests that statutes are entitled to full faith and credit; but see Sykes, *A Textbook on the Australian Conflict of Laws* (1972), 241-242, and esp. 292. Cf. his earlier views in “Full Faith and Credit — Further Reflections”, (1954) 6 *Res Judicatae* 353. Also Pryles and Hanks, *Federal Conflict of Laws* (1974), 89-92.
62. Cowen, “Full Faith and Credit — The Australian Experience”, (1952) 6 *Res Judicatae* 37; revised and reprinted in Else-Mitchell, ed., *Essays on the Australian Constitution* (2nd ed., 1961), 293, cites the debates at the Constitutional Conventions. Sir Samuel Griffith and Sir Edmund Barton took the view that the section was evidentiary only; Sir Isaac Isaacs was, perhaps, aware of wider possibilities. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 961, seem to take the same view, which was adopted by O'Connor J. in *Varawa v. Howard Smith Company Ltd.* (1911) 13 C.L.R. 35, 69, and by Windeyer J. in *Anderson v. Eric Anderson Radio and TV Pty. Ltd.* (1965) 114 C.L.R. 20, 45. See also text at nn.84-87 *infra*.
63. [1939] S.A.S.R. 441, 443-444 (my italics.); affirmed, [1940] S.A.S.R. 267. The same judge had earlier taken a similar view in *In re Commonwealth Agricultural Service Engineers Ltd.* [1928] S.A.S.R. 342, 346, where he said that the Constitution makes the laws of other States in effect, the law of the forum.
64. *Merwin Pastoral Co. Pty. Ltd. v. Moolpa Pastoral Co. Pty. Ltd.* (1933) 48 C.L.R. 565; *Permanent Trustee Co. (Canberra) Ltd. v. Finlayson* (1967) 9 F.L.R. 424. Walsh J. took a similar view in *Kay's Leasing Corporation Pty. Ltd. v. Fletcher*, but was reversed: (1964) 116 C.L.R. 124, 133-134.

involve any contention that the statutes of one State should be applied equally to all transactions, no matter in what part of Australia those transactions take place. Given the scheme of the Constitution, which reserves to the States the residue of legislative powers, any such contention would be absurd. In the passage quoted above, Napier J. concedes that the Courts of a State are only to apply the law of another State where that law is the law which governs the transaction.⁶⁵ The law of a State will govern a transaction, either where it is chosen to do so, expressly or impliedly, by the parties, or where it applies because of some territorial connection with that State which brings it within the legislative competence of the Parliament of that State. The Manufacturers Warranties Act, 1974 (S.A.), applies only where there is a retail sale in South Australia, or a delivery in that State following a sale. It would be difficult to deny the Parliament of South Australia the competence to make such a law. It is difficult to see why the enforcement of the rights it confers should be confined to the courts of South Australia.

In the *E. and B.* case Napier J. uses the language of the choice-of-law rules applicable in cases of contract, but, it is suggested, the principle is not confined to cases of contract. His Honour used the expression "matter or transaction".⁶⁶ It is most unlikely that Australian courts will create a "proper law of the tort"⁶⁷ or something approaching it, which appears to be the case in the United States.⁶⁸ But every transaction which gives rise to a liability is governed by a particular legal system, which gives to these acts their enforceable character. The purpose of any choice-of-law rule is to determine which legal system is to govern the particular transaction. If the rule creating an enforceable right is to be found in the statutes of a State, and the legal system of that State governs the transaction, then the right should, so goes the argument, be enforceable in every part of Australia, even though the laws of that part contain no similar rules or confer no similar rights.

It appears to be quite clear that if a contract has a certain legal system as its "proper law", then all the rules of that legal system, whether statutory or judge-made, will apply to the rights and obligations of the parties. If the question is whether a certain legal system governs the right of one person to obtain a remedy for a civil wrong, it does not seem that the situation should be any different. As McTiernan J. said, in *Koop v. Bebb*⁶⁹ (quoting from Willes J. in *Phillips v. Eyre*⁷⁰):

65. When the case went on appeal, [1940] S.A.S.R. 267, Napier J. affirmed his previous view, and Richards J. explicitly made the same point: *id.*, 280.

66. [1939] S.A.S.R. 441, 443.

67. This solution for English law was advanced by Morris, "The Proper Law of a Tort", (1951) 64 *Harv. L.R.* 881; a similar approach, described as an approach which balances the interests of the States having a connection with the transaction, is taken by the U.S. *Restatement of the Law: Conflict of Laws* (2nd), s.379. The approach is not without its critics, mainly on the ground that it produces more uncertainty than the alternatives, principally the *Phillips v. Eyre* approach and the older American approach, which was to apply the *lex loci actus*: see Ehrenzweig, "Products Liability in the Conflict of Laws — Towards a Theory of Enterprise Liability under 'Foreseeable and Insurable Laws'", (1959-1960) 69 *Yale L.J.* 794; Ehrenzweig, "The Not So 'Proper' Law of a Tort: Pandora's Box", (1968) 17 *I.C.L.Q.* 1; Nygh, Note, (1968) 42 *A.L.J.* 313.

68. *Rest. 2nd.*, s.379.

69. (1951) 84 *C.L.R.* 629, 649.

70. (1870) *L.R.* 6 *Q.B.* 1, 28.

"A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto . . . in like manner the civil liability arising out of a wrong derives its birth from the law of the place; and its character is determined by that Law."

Both judges, it would seem, concede that the right of action arises under the law of the forum, but it is a right in the creation of which the *lex loci actus* or the proper law, as the case may be, has a most significant influence. This is to say no more than Lord Mansfield C.J. said in 1775:

"Every action tried here must be tried by the Law of England, but the law of England says, that in a variety of circumstances . . . the laws of the country where the cause arose shall govern."⁷¹

In *Koop v. Bebb*, McTiernan J. was the only judge who found it necessary to hold that the full faith and credit provision of the Constitution and the Recognition Act gave to the law of New South Wales the effect it would have had in the courts of New South Wales, even though *Koop v. Bebb* was an action in the Supreme Court of Victoria. In that case the plaintiffs sued as personal representatives of a deceased person whose death resulted from a motor vehicle accident in New South Wales. Both New South Wales and Victoria had "wrongful death" statutes which would have allowed the plaintiffs to succeed, as they did, but only McTiernan J. found that recovery was under New South Wales rather than Victorian law. His judgment is one of two statements in the High Court⁷² which support the interpretation of the full faith and credit provisions as having a substantive, as opposed to a merely evidentiary effect, but it is submitted that this is the interpretation to be preferred.

In most of the cases in which the full faith and credit provisions have been considered by the High Court, it has not been necessary for the decision to state categorically that those provisions have a substantive effect. The one exception is *Merwin Pastoral Co. Pty. Ltd. v. Moolpa Pastoral Co. Pty. Ltd.*,⁷³ where the Court found that the courts of Victoria could not refuse to enforce a New South Wales statute on the ground that it offended against the public policy of the forum.⁷⁴ Most of the other suggestions that the full faith and credit provisions have a substantive effect come from academic writers,⁷⁵ and there have been statements in the High

71. *Holman v. Johnson* (1775) 1 Cowp. 341, 343; Lipstein, "The General Principles of Private International Law", (1975) 135 *Receuil des Cours* 97.

72. The other is the dissent of Higgins J. in *Jones v. Jones* (1928) 40 C.L.R. 315, 320-321; cf. *Harris v. Harris* [1947] V.L.R. 44.

73. (1933) 48 C.L.R. 565.

74. *Permanent Trustee Co. (Canberra) Ltd. v. Finlayson* (1967) 9 F.L.R. 424 appears to take the position further; "full faith and credit" seems to override other grounds of non-enforceability, at common law, of foreign or sister-State judgments.

75. Notably Sykes, "Full Faith and Credit — Further Reflections", (1954) 6 *Res Judicatae* 353; Harding, "Common Law, Federal and Constitutional Aspects of Choice of Law in Tort", (1965) 7 *U.W.A.L.R.* 196. Other writers are more cautious, mostly because the courts have, with the exceptions mentioned in the text, not considered the matter. As Pryles and Hanks, *Federal Conflict of Laws* (1974), 84, point out, in important cases such as *Kay's Leasing Corporation Pty. Ltd. v. Fletcher* (1964) 116 C.L.R. 124, the issue has not been argued. Their conclusions (*id.*, 84-94) are at best tentative. See also Cowen, "Full Faith and Credit: The Australian Experience", (1952) 6 *Res Judicatae*, 27, and the revised version in Else-Mitchell, ed., *Essays on the Australian Constitution* (2nd ed., 1961), 293; and Section IV of his *Australian-American Private International Law*

Court that s.118 of the Constitution and s.18 of the Recognition Act should be regarded as evidentiary or procedural rather than as substantive.

Perhaps the most extreme example of this is to be found in the unsatisfactory decision of the High Court in *Anderson v. Eric Anderson Radio and TV Pty. Ltd.*⁷⁶ In that case a collision between two motor vehicles occurred in the Australian Capital Territory, as a result of which the plaintiff suffered personal injuries. The accident was caused by the negligence of both the plaintiff and the defendant's servant. The plaintiff brought an action in the District Court of the Metropolitan District of New South Wales at Sydney. At the time contributory negligence was a complete defence to actions of negligence in New South Wales, but the Law Reform (Miscellaneous Provisions) Ordinance, 1955 (A.C.T.), s.5, provided for apportionment of damages in such cases. Levine D.C.J. found that the law of the A.C.T. should apply, but on appeal both the Full Court of the Supreme Court and the High Court held that the plaintiff could not recover because, under the rule in *Phillips v. Eyre*, the act which gave rise to the plaintiff's claim was not actionable in New South Wales. It seems clear, even on the reasoning of the High Court, that had the plaintiff sued in the A.C.T. he would have recovered a proportion of his damages. Counsel for the plaintiff (now Murphy J.) argued that the provisions of the A.C.T. apportionment legislation were entitled to full faith and credit in the courts of New South Wales, if not under the Constitution, which arguably applied only to the public acts of the States (an argument seized upon by Kitto J.⁷⁷), then under s.18 of the Recognition Act. The court rejected this argument, and dealt with the case under the traditional rules for choice-of-law in tort. This finding involved an implied characterisation of the nature of the apportionment legislation, which may be criticised.

In *Koop v. Bebb*⁷⁸ the High Court had decided that the common law in Australia does not know any *obligatio* theory, that is, a notion that a plaintiff acquires a vested right under the law of the place where an act occurred which may be enforced against the defendant wherever he may be found;⁷⁹ they held that any right is one given him by the law of the forum. This reasoning was applied by the majority in the form of a principle that whether the law of the forum will allow a right of action in cases in which a foreign element is involved will necessarily depend to some extent on rights which may exist under a foreign law; but the right which is the subject of particular litigation is a right which, if it exists at all, is the creature of the *lex fori*. Even McTiernan J., whose views have already been noted,⁸⁰ accepted this view, though he considered that the full faith and credit provisions had a more significant effect on the right to be accorded by the forum than did the other justices.

(1957). Sykes, in a later work (*A Textbook on the Australian Conflict of Laws* (1972)) is more sceptical of the effect of the full faith and credit provisions; at 292ff. he remains constant to his former views, but at 242 concedes that the attitude of the courts may render the full faith and credit provisions "nugatory".

76. (1965) 114 C.L.R. 20.

77. *Id.*, 31-32.

78. (1951) 84 C.L.R. 629, 642, 644.

79. *Cf. supra*, text at nn.69-71.

80. *Supra*, n.69.

The right which Anderson sought to enforce was, therefore, a right arising under the law of New South Wales. The question was the effect on this right of the A.C.T. Ordinance. There was no question that the Ordinance would have to be applied in litigation in the courts of that Territory. Barwick C.J. found that the Ordinance "clearly only applies to proceedings in the courts of the Australian Capital Territory."⁸¹ This view was based on a construction of the Seat of Government (Administration) Act, 1912 (Cth.), under which the Ordinance was made, but it seems likely that His Honour would have taken the same view if State legislation had been in issue. His Honour's view of the territorial limitation of the effect of the Ordinance coloured his approach to the arguments based upon full faith and credit. He said:

"There is no failure to give full faith and credit to the Ordinances of the Australian Capital Territory by deciding that they do not apply to the trial of an action in a court of the State of New South Wales for a cause of action given by the laws of that State."⁸²

Kitto, Taylor and Menzies JJ. agreed with the Chief Justice that the cause of action arose, not under the laws of the Australian Capital Territory, but under the laws of New South Wales, and therefore that there was no room for the operation of the full faith and credit principle. Windeyer J. took a similar view⁸³ but went even further in rejecting the argument that the full faith and credit provisions required that the laws of the A.C.T. govern the cause of action, even though it had been brought in New South Wales. As if anticipating, and overreacting to, something which would lead to the creation of a "federal common law" in Australia (such as at one time was thought to exist in the United States⁸⁴), his Honour said:

"The laws of the Commonwealth are not a transcendent system of jurisprudence supernally hovering over the laws of the States . . . The 18th section, which is the section [of the Recognition Act] relied upon, is really an evidence section, and does not affect the principles on which the Courts of one State take cognizance of wrongs committed in another State."⁸⁵

The passage quoted was taken from the judgment of O'Connor J. in *Varawa v. Howard Smith Co. Ltd.*⁸⁶ O'Connor J. took part in the Constitutional Convention and was a Senator at the time of the passage of the Recognition Act. His views reflect a common attitude to the full faith and credit provisions at the time of Federation.⁸⁷ But it is submitted that while the Recognition Act certainly does provide for the proof and authentication of the laws, judgments and records of one State in the courts of the other States, it goes further; and that the words as they appear in s.18 of the Recognition Act, and s.118 of the Constitution do provide substantive rights as well.

81. (1965) 114 C.L.R. 20, 24.

82. *Id.*, 25.

83. *Id.*, 44-45.

84. A development stopped by the Supreme Court in *Erie Railroad Co. v. Tompkins* 304 U.S. 64 (1938).

85. (1965) 114 C.L.R. 20, 45-46.

86. (1911) 13 C.L.R. 35, 69.

87. *Supra*, n.62.

Jackson J. referring to the full faith and credit clause of the United States Constitution, spoke of it as an attempt by the founding fathers of that country to "federalize" the separate and independent legal systems of the several States.⁸⁸ Although there are significant differences between the application of United States full faith and credit provisions⁸⁹ and those contained in the Commonwealth Constitution and the Recognition Act, the spirit of the provisions appears to be the same, and the wording of the Australian provisions, particularly the words of s.18 of the Recognition Act, appears to carry through this spirit. As suggested above, the giving of the same faith and credit to the public Acts of one State in the courts of another in no way impinges on the legislative sovereignty of either State, because that sovereignty is limited to matters upon which the State enacting the legislation has legislative competence.

In *Anderson's* case the Court appeared to adopt two techniques of decision which served to preserve in operation the cumbersome choice-of-law rules in tort which, in this case, worked injustice to the plaintiff. The first was to confine the operation of the apportionment legislation of the Australian Capital Territory to actions brought in the courts of that Territory. In *Koop v. Bebb*⁹⁰ the majority stated that the legislative powers of the States were limited, under the common law, and probably also under the federal system adopted by the Australian Constitution, to transactions which had a sufficient territorial connection with the State.⁹¹ In *Anderson's* case the collision took place within the A.C.T., and this would seem to be a sufficient territorial connection with that place to bring it within the legislative power delegated to the Governor-General under the Seat of Government (Administration) Act, 1912 (Cth.). It was unnecessary to state that laws enacted under that power can only be enforced in the courts of the Territory, and the application of

88. Jackson, "Full Faith and Credit — The Lawyer's Clause of the Constitution", (1945) 45 *Col. L.R.* 1.

89. These differences were recognised by Fullagar J. in *Harris v. Harris* [1947] V.L.R. 44, when he refused to apply the American decisions in Australia. The requirement of "due process of law" under the U.S. Constitution has had a very significant effect on the development of interstate conflict of laws in that country. There have been difficulties in the application of the full faith and credit provision in the U.S.; these are discussed by Sykes, *op. cit. (supra, n.75)*, 293ff. In the earlier article Sykes criticises the reasoning of Fullagar J., while approving the result. The principal difficulty is the question whether a State should apply a statute of a sister-State which is contrary to its own statute. This question was discussed by the Supreme Court of the United States in *Bradford Electric Light Co. v. Clapper* 286 U.S. 145 (1932) and in *Alaska Packers Association v. Industrial Accident Commission of California* 294 U.S. 532 (1935); it appears to have been resolved by the application of an "interests analysis" approach. In Australia, given that the Constitution is construed in a strictly legalistic way, there seems no room for such an approach. The Constitution, including s.118, and the Recognition Act, by virtue of s.109 of the Constitution, will prevail over any State law. It is submitted that these provisions require a substantive effect for full faith and credit. Therefore, where a State statute governs a transaction, for example, because there is the requisite territorial connection, that statute should prevail over the statutes of the forum. This argument is consistent with the result in *Harris v. Harris* and *Permanent Trustee Co. (Canberra) Ltd. v. Finlayson* (1967) 9 F.L.R. 424; and gives the result of the full faith and credit which is desirable, as stated by Napier J. in the *E. and B. Chemicals* case (*supra, n.63*). See also Jackson, *loc. cit. (supra, n.88)*, and Cowen, *op. cit. (supra, n.75)*, 307.

90. *Koop v. Bebb* (1951) 84 C.L.R. 609, 639-641.

91. The consideration apply to contracts in the conflict of laws may be different, as there a legal system is applied as the result of an agreement between the parties. In such a case, it is the policy of the law to uphold and enforce the agreement of the parties, which is reflected in the application of the law of the place chosen by the parties.

the full faith and credit provisions would not have meant a recognition by the common law in Australia of any "vested rights" or *obligationes* such as the High Court was at pains to reject in *Koop v. Bebb*. By confining the operation of the Ordinance to actions brought in the A.C.T., the majority of the justices were able to avoid consideration of the effect of the full faith and credit provisions.

Secondly, by treating the operation of the Ordinance as confined to the A.C.T., the majority appeared to treat apportionment legislation as a matter of procedure, rather than a matter of substance. This characterisation is, it is submitted, erroneous. At common law, the existence of a right of action, or actionability, is regarded as a matter for the *lex loci delicti commissi*; this is a matter of *substance*. On the other hand, the *quantum* of damages is regarded as a matter of procedure, and therefore to be decided by the *lex fori*.⁹² Although, on the reasoning of the judges in *Anderson's* case, the plaintiff might still have failed because he could not show that his claim satisfied the first of the tests laid down in *Phillips v. Eyre*, that of actionability by the *lex fori*, at common law courts should treat apportionment legislation as substantive, rather than procedural. Thus, had the action been brought in South Australia rather than New South Wales, apportionment of damages should have been made under the A.C.T. rather than the South Australian legislation once it was shown that contributory negligence was not a complete defence under South Australian law, although in *Koop v. Bebb* only McTiernan J. stated this explicitly.⁹³

The Manufacturers Warranties Act, 1974 (S.A.), which is unique, so far, in Australia, may be an appropriate cause for the courts to reconsider the application of these rules. It is an Act which undoubtedly confers substantive rights, and which, it is submitted, should not be confined in its operation to actions brought in the South Australian courts. It does not impinge on the legislative competence of the other States, as it applies by its terms only to acts which have the requisite territorial connection with South Australia.

III The Locus Delicti Commissi

If a court characterises product liability cases where the plaintiff relies on the Manufacturers Warranties Act, 1974 (S.A.), as tortious, the plaintiff will have to establish actionability by the *lex loci delicti commissi*, and it is not exactly clear what state or country is the *locus delicti commissi*.⁹⁴ Even though the South Australian Act will not apply unless the retail sale or delivery of defective goods takes place in that State, it does not follow that under the private international law rules of a forum which is not South Australia, that State will be taken to be the *locus delicti commissi*. To some extent, the mist has been cleared away by the Privy Council in *Distillers Co. (Bio-chemicals) Ltd. v. Thompson*,⁹⁵

92. *Chaplin v. Boys* [1971] A.C. 356, whatever else it stands for, preserves this rule.
93. (1951) 84 C.L.R. 629, 649.

94. Cowen, "The *Locus Delicti* in English Private International Law", (1948) 25 *B.Y.I.L.* 394; Webb and North, "Thoughts on the Place of Commission of a Non-statutory Tort", (1965) 14 *I.C.L.Q.* 1314; Gerber, "Tort Liability in the Conflict of Laws", (1966) 40 *A.L.J.* 44; Bennett, "The Liability of the Manufacturers of Thalidomide to the Affected Children", (1965) 39 *A.L.J.* 256.

95. [1971] A.C. 458; also *Cordova Land Co. Ltd. v. Victor Bros. Inc.* [1966] 1 W.L.R. 793, which was a case of fraudulent misrepresentation.

even though the Privy Council specifically reserved its position on whether a cause of action would arise in a particular place if some of the necessary conditions for its accrual are separated in time or space from others. Their Lordships ruled out the possibility of a rule that in order for a place to be the *locus delicti commissi* each of the necessary elements should be committed there, a view advanced in the Nova Scotia case of *Abbott-Smith v. Governors of the University of Toronto*.⁹⁶ They also rejected the view that the commission of the last act necessary to give a cause of action is the crucial one in determining the place of commission of the wrong.

Their Lordships stated as a general rule that the cause of action arises in a place "if the act on the part of the defendant, which gives the plaintiff his cause of complaint has occurred within the jurisdiction."⁹⁷ In *Thompson's* case, brought by the next friend of a child who had been born with deformities as a result of its mother having taken the drug thalidomide during pregnancy, the defendant manufactured the drug in the United Kingdom, having bought the active ingredient from a German company. The mother bought the drug in New South Wales, and sued the defendant there in negligence, alleging that the defendant was negligent in failing to warn consumers of the product of the possible side-effects of the drug, of which it was aware at the time. The actual point in issue was whether a tort had been committed within the State of New South Wales, so as to give the courts of that State jurisdiction. It was held by Taylor J., and affirmed by the Privy Council, that the failure to warn had occurred in New South Wales, and therefore that the court properly assumed jurisdiction.

Further assistance may be found in a Canadian product liability case, *Moran v. Pyle National (Canada) Ltd.*⁹⁸ In that case a person was fatally injured when he touched a defective light bulb manufactured by the defendant. The injury took place in Saskatchewan, where the action was brought, though the defendant did not carry on business at all in that province. The article in question had apparently been manufactured in Ontario. The action was brought under the "wrongful death" statute of Saskatchewan. As in many of the cases which bear on this question, the issue was not the determination of the *locus delicti commissi* for the purpose of the application of the rules in *Phillips v. Eyre*, but whether a tort had been committed in the province so as to give its courts jurisdiction to hear the matter. The Supreme Court of Canada drew attention to the arbitrary nature of both the "place of acting" and the "place of injury" rules, and suggested that it was unwise to lay down a rigid general rule to determine the place of commission of a tort. The court said:

"Where 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 both that as a result of the carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the

96. (1964) 45 D.L.R. (2d) 672.

97. [1971] A.C. 458, 468; cf. *George Monro Ltd. v. American Cyanamid and Chemical Corp.* [1944] 1 K.B. 432; *Bata v. Bata* [1948] W.N. 366; *Cordova Land Co. Ltd. v. Victor Bros. Inc.* [1966] 1 W.L.R. 793. This principle was applied by Crockett J. in *Buttegeig v. Universal Terminal and Storage Corporation* [1972] V.R. 626.

98. (1973) 43 D.L.R. (3d) 239.

plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a State has in injury suffered by persons within its territory.”⁹⁹

This statement goes of course to the jurisdiction of the court; the Supreme Court admitted that the rules as to jurisdiction may be different from those for choice of law.¹⁰⁰ The decision is, of course, only of persuasive authority in Australia, but it is a comprehensive and thoughtful opinion entitled to the greatest weight. It would seem, with respect to the Manufacturers Warranties Act, 1974 (S.A.), that retail sales in South Australia ought to be foreseen by a manufacturer who places goods on the national market; though perhaps it is more difficult to say that South Australia’s interest in protecting its consumers from defective products would outweigh the interest of some other State, *e.g.*, the State where the injury occurred.

What, then, are the elements of the right given by the Manufacturers Warranties Act, 1974 (S.A.)? Is it the putting of goods into circulation with the defect (*i.e.*, the delivery of the goods to a wholesaler or distributor)? Or is it the sale or delivery to the consumer? Does the cause of action require injury? The answer to the last question would seem to be “no”, as the right is akin to a right to sue for breach of contract, which does not require proof of injury. The better view seems to be that it 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.

5. Part VIII of the Sale of Goods Act, 1923 (N.S.W.), and the Conflict of Laws

The second recent statutory change which may render a manufacturer of defective goods liable to a consumer without proof of negligence is Part VIII of the Sale of Goods Act, 1923 (N.S.W.), inserted by the Commercial Transactions (Miscellaneous Provisions) Act, 1974 (N.S.W.), which also made similar amendments to other Acts dealing with the supply of goods to consumers, such as the Hire-Purchase Act, 1961.¹⁰¹

The Part applies to “consumer sales” as defined. The relevant provision is s.64(5):

“Where in any proceedings arising out of a contract for a consumer sale (not being a consumer sale of secondhand goods), it appears to the court that the goods, at the time of their delivery to the buyer, were not, by reason of any defect in them or for that and any other reason, of merchantable quality, the court may add the manufacturer of the goods as a party to the proceedings and, if of the opinion that the defect should be remedied by the manufacturer, may make against him either—

- (a) an order requiring the manufacturer to pay to the buyer an amount equal to the estimated cost of remedying the defect; or
- (b) an order requiring the manufacturer to remedy, within such time as may be specified in the order, the defect and in default

99. *Id.*, 250.

100. *Id.*, 242.

101. The Law Reform (Manufacturers Warranties) Ordinance, 1977 (A.C.T.), is, for present purposes, identical to the South Australian Act, upon which it was substantially based.

or defiance of that order, require the manufacturer to pay to the buyer an amount equal to the estimated cost of remedying the defect, and may make such other ancillary orders against the manufacturer as to the court seems proper."

This provision does not give any *right* to the consumer; the *Court* is given a discretion, in appropriate circumstances, to add the manufacturer as a defendant in the action, and to make an extremely limited range of orders against him. Applications to join manufacturers are more likely to be made by seller-defendants than by plaintiffs, because those defendants will find it difficult or impossible to join as third or subsequent parties to the actions prior intermediate sellers to them. Not only is the remedy of the buyer limited, but it is uncertain, because it depends on the exercise of a judicial discretion. The courts of other parts of Australia would, it is suggested, be quite justified in construing the provision merely as a direction to the Courts of New South Wales to exercise a discretion in certain cases, rather than as conferring any rights whatsoever on any class of persons. Even if the other court did not treat the provision as a direction, it would be clearly justified in characterising it as a matter of procedure, and therefore as a matter for the courts of New South Wales with no effect in any other forum.¹⁰² The rights of a New South Wales consumer as against a foreign (and, probably, also a New South Wales) manufacturer are tenuous at best, and more likely completely illusory. They have no real effect where a foreign manufacturer is concerned. It may be that such a manufacturer might be joined as a subsequent defendant under the provisions of the Service and Execution of Process Act, 1901 (Cth.), but consideration of s.11 of that Act makes even this proposition doubtful. It may also be that a manufacturer who is made a party to an action brought in New South Wales against a seller under Part VIII of the Sale of Goods Act, 1923 (N.S.W.), would be a "necessary and proper party" who could be joined under the appropriate Rule of Court (Part 10 Rule 1(h), corresponding to Order II Rule 1(h) of the South Australian Rules).

6. Conclusions

In Australia, at the present time, most "product liability" claims will be claims in tort, based on the negligence of the manufacturer, or claims in contract based on breaches of terms in contracts concerning the quality of goods, either express, or implied by the common law or statute (e.g., the Trade Practices Act, 1974 (Cth.), or the sale of goods legislation of the States and Territories). Where a foreign or out of state element arises in the course of such a claim, it may be resolved by application of the normal rules of conflicts of law, which in the case of tort, although perhaps confusing and unsatisfactory, are at least reasonably well settled. The Manufacturers Warranties Act, 1974 (S.A.), has made it easier for a consumer who is injured or otherwise suffers loss by reason of a defect in goods which are not of merchantable quality. Such a consumer is assured of recovery if he brings his action in South Australia, provided he can show a sale by retail in that State, or delivery in the State following a retail sale. If, however, the plaintiff brings his action elsewhere than in South Australia, he faces considerable problems because of the state of the conflict-of-laws rules in Australia. If he is able to convince the

102. *Supra*, text at n.92.

court of the forum that the effect of the Act is to create a notional contract between himself and the manufacturer of the goods, and the proper law of that contract is South Australian law, his action is likely to succeed. He will also succeed if he can convince the court that the right which he has under the Act, though not strictly speaking a right arising out of a contract, is sufficiently analogous with a contractual right that the conflicts rules will be similar to those applied in cases of contract. However, if the court of the forum characterises the right as, or by analogy with, a right of action in tort, he will founder on that aspect of the rule in *Phillips v. Eyre* which requires that the act giving rise to the claim be one which would be actionable as a tort by the *lex fori*. Only if the court accepts s.118 of the Constitution, or s.18 of the Recognition Act (or both), as requiring it to give the South Australian Act the same faith and credit in the forum as it would have in South Australia would he succeed. Although s.118 of the Constitution probably does not require that full faith and credit be given to the Law Reform (Manufacturers Warranties) Ordinance, 1977 (A.C.T.), in other parts of Australia, s.18 of the Recognition Act does. For this reason, rights acquired under the A.C.T. Ordinance should be treated in the same way as rights acquired under the South Australian Act.

The legislation in New South Wales under which a manufacturer might in some circumstances be made liable to a consumer of defective goods is of such slight effect even in the case where all elements occur in that State that it is not likely to be relied upon by a plaintiff seeking a remedy in the courts of some other State. The legislation does not create rights as such, and for conflicts purposes is likely to be characterised merely as a direction by the Parliament to the courts of New South Wales of a procedural nature.

In many cases goods are manufactured in, or imported into, one State of Australia with a view to their eventual sale in some other part of the country. Australia is a national market. Such activities are part of "trade and commerce" between the States and with other countries. They appear to fall squarely within the power of the Commonwealth Parliament to make laws with respect to such matters, conferred by s.51(i) of the Constitution. Many manufacturers are nowadays incorporated, and their activities would appear to fall within the legislative power of the Commonwealth Parliament contained in s.51(xx); and use of mails, telephones, and broadcasting and television would also appear to bring at least some aspects of the sale and marketing of goods beyond the confines of any one State within Commonwealth legislative power.¹⁰³ The recommendation of the Trade Practices Act Review Committee¹⁰⁴ that the Trade Practices Act be amended to make manufacturers and importers liable for defects in goods which render them unmerchantable or unfit for a purpose for which such goods are normally used may be justified on many other grounds, but it would certainly avoid problems in the conflict of laws such as those discussed in this article.

Where the manufacturer is outside Australia, so far as the consumer is concerned a solution, such as that adopted under each of the three statutes enacted to date, of defining "manufacturer" to include the first

103. *Ex parte CLM Holdings Pty. Ltd.* (1977) 13 A.L.R. 273.

104. *Report of the Trade Practices Act Review Committee*, August 1976, para. 9.127.

importer of the goods into Australia, is quite satisfactory, because the effect of the Service and Execution of Process Act, 1901 (Cth.), is to ensure that there will be a defendant to every claim arising out of a defect in goods, who can be brought before the courts of the State whose legislation is relied upon. There is no need to force a consumer to engage in the process of litigation in a foreign country, and an international convention, such as the Hague Convention on the Law applicable in cases of Product Liability, becomes superfluous. Importers could rely on any rights they may have under contracts for the purchase of goods they import, or make necessary insurance arrangements to cover any possible liability.

One of the reasons why, in Europe, there is a move to standardise the conditions in which a manufacturer may be made liable for defective products is the practical difficulty caused by a divergence in legal rights of consumers against manufacturers. Australia is economically one unit. Differences in the rules for liability of manufacturers at the suit of consumers, with the attendant differences in matters of insurance cover and protection of consumers, is in the interest neither of consumers nor of business. In the United States and in Europe it is recognised that many factors favour the direct liability of manufacturers to consumers. However, the existence of difficulties arising from differences in legal rules and consequent problems in the conflict of laws are yet another reason why, in Australia, the problem is best handled by national rules expressed in legislation of the national parliament.