

THE INTERNET VARIABLE IN PRODUCT LIABILITY: A COMPARATIVE AND MULTI-PERSPECTIVE EXAMINATION OF PHILIPPINE PRODUCT LIABILITY LAW

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INTRODUCTION

Imagine this hypothetical situation: Juan, a Filipino residing in Makati City, purchases a brand-new laptop from the manufacturer's nearest store in Greenbelt. Happy with his much-awaited acquisition, he immediately takes the laptop for a "test-drive". However, as soon as he plugs the machine into an outlet and turns the power on, smoke comes out of the battery chamber and the power supply suddenly fails, rendering the laptop completely unusable. Dismayed, Juan returns the very next morning to Greenbelt, demanding for either a replacement unit, or in lieu thereof, a full refund.

What if the dealer refuses to give Juan a replacement unit or his money back, and denies having anything to do with the malfunction? Juan could file the appropriate suit in court to hold the store owner liable for whatever damages he may have sustained. Undoubtedly, Juan could legally compel him to either replace the defective laptop or to refund the purchase price.

However, the fast pace of modern technology has made it possible for people to buy and sell goods and offer services without needing to come face-to-face with one another. Juan can now simply and conveniently log on to www.dell.com and browse through the laptop models featured online. He

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may then select the appropriate unit based on his desired specifications according to information posted online.

What if Juan wants the most advanced Dell model in the market, which unfortunately, is yet to be available on stock? Juan could then click on the options in the Dell website, pay the unit price plus shipping and handling charges through his credit card, and have the laptop delivered to his Makati condominium unit. What if, upon receipt of the shipment, a similar “smoke-and-bang” scenario occurs? With the Dell warehouse or service center located thousands of miles away in the United States of America, how could Juan obtain redress for the defective unit sold to him? This peculiar quandary is a product of the Internet --and the convenient, borderless commerce it has introduced into modern society, which has challenged traditional jurisdictional rules of adjudication.

In the Philippines alone, the Internet population has grown from 2,000,000 users in 2000 to a staggering 3,500,000 users in 2003. As of April 2007, it has been estimated that 16% of the entire population or around 14,000,000 Filipinos use the Internet.¹ While this percentage places the Philippines among the lowest penetration rates in Asia,² the country’s Internet sector is nonetheless well-positioned for growth, with considerable investment from the private sphere, strong government support for IT development, and a population becoming increasingly Internet savvy.

According to the research group BSBC Hook UAI, there were 1,925,649 Internet users in 2004 in Metro Manila belonging to the A, B and C classes, with age groups ranging from 13 to 30 years old, as compared to 1,885,465 in 2002, indicating a 21.3-percent increase.³ In addition, a report released by the International Data Corporation forecasts that Philippine Internet usage will record a growth of 23 percent annually and will reach 21.5 million by 2008.⁴ Moreover, the recent wave of Internet commerce sites demonstrates that Internet commerce is slowly becoming part of the Philippine commercial order. In fact, Cisco Systems predicts that by 2010, 25 percent of all retail transactions worldwide will take place over the

¹ Internet World Stats, Usage and Population Statistics,
<http://www.internetworldstats.com/asia/ph.htm>

² *Id.*

³ *Id.*

⁴ *Id.*

Internet.⁵ An example of such website would be the local counterpart of the world-famous auction site, eBay, www.ebay.ph.

The Internet has transcended the spatial limitations found in traditional commerce. While this has resulted in numerous benefits for ordinary consumers everywhere, it also poses a number challenges especially in the realm of product liability.

Prescinding from Juan's present predicament, the aggrieved purchaser decides to go to court and sue Dell. However, he continues to ponder whether or not it would be feasible to try his cause of action against Dell before a court of local jurisdiction and whether or not he would actually succeed in compelling Dell to pay.

In an alternative situation, Juan owns a laptop which is unfortunately broken. He logs on to the manufacturer's website and seeks technical support. After following the instructions sent to him via e-mail, his computer becomes all the more unusable. He wants to sue the manufacturer, but the distance between them keeps him from expediently doing so. Can Juan, a Filipino, drag this multinational to court so the latter can pay for the defective technical support provided online?

These questions relate to the ability of a consumer injured by his purchase to seek redress for any damage sustained as a result of the product acquired from a manufacturer or dealer. In law, this concept is referred to as product liability.

In broader terms, product liability is a derivative of torts law⁶ which allows a consumer to hold someone along the supply chain⁷ liable for any damage sustained as a result of a product acquired. The concept provides a consumer with a cause of action⁸ against another which may be litigated in a court of law.

While pursuing a cause of action on the basis of product liability is relatively simple in cases where the parties to the transaction are within the jurisdiction of local courts as in the case of Juan and the Greenbelt dealer,

⁵ F. H. Bicknese, *Websites And Personal Jurisdiction: When Should A Defendant's Internet Selling Activities Subject It To Suit In A Plaintiff-Buyer's State?* 73 TEMP. L. REV. 829 (2000), citing South China Morning Post, Jul. 10, 1999 at 2

⁶ Cornell University Law School Legal Information Institute, at http://www.law.cornell.edu/wex/index.php/Products_liability#Federal_Material

⁷ *Id.*

⁸ RULES OF COURT, Rule 2, § 2. "A cause of action is the act or omission by which a party violates a right of another."

the difficulty, however, arises when online transactions over the Internet result in a product liability case where the parties to the suit are found in separate jurisdictions. Where could the plaintiff sue? Will his country's product liability law support his case and maximize his relief? Alternatively, can he subscribe to the laws of the seller's country to obtain his refund?

This paper will focus on the concept of product liability as applied in Internet cross-border transactions from a Philippine perspective. It aims to evaluate existing Philippine laws on product liability and to determine whether or not they afford Philippine consumers adequate protection and effective remedies, especially for those who may have causes of action against manufacturers, dealers or sellers who transact online, whether locally or abroad.

Corollary to this, the second part of this paper includes a discussion of the concept and definition of product liability, and the history and evolution of product liability law in the United States and the Philippines. It will further expound on the concept of strict liability, which is really the heart of any cause of action arising from product liability. Thereafter, the third part of this paper will offer an exposition of the pertinent conflict-of-law rules on torts and product liability with particular emphasis on questions of jurisdiction and choice-of-law.

Part Five of this paper will explore the Internet as a medium for commercial transactions. It will examine the traditional mold of product liability law in the Philippines followed by a short discourse on its current state in the Philippines with emphasis on the concept of strict liability. It will then analyze whether existing Philippine statutes and laws can be considered adequate in protecting the ordinary Filipino consumer in light of growing commercial transactions over the World Wide Web.

This will be followed by a closer study of the United States Product Liability Law which has gone through various changes in order to assimilate the peculiarities of the Internet into the American legal order, considering also that it has become common place for Americans to do business online.⁹ The subsequent portion of this paper will involve a comparative analysis

⁹ According to an article by Sergei Rusak on www.techmedia.com, dated December 14, 2007, there had been a projected 140 million online shoppers in the United States in 2007 (could reach 150 million in 2008), which comprises 69 percent of the total United States population. This prevalence in online purchases has led to around \$250 billion in online sales revenue. (available at <http://www.techwebmedia.com/2007/12/14/trend-in-online-shoppers-in-united-states/>)

between U.S. and Philippine product liability law as a necessary step in recommending several reforms to the latter.

The author will further elaborate on these recommendations in Part Eight of this paper which will culminate in the introduction of certain amendments to the Philippine Consumer Act (the main product liability law existing in the country), geared towards the overall, not merely nominal or superficial, benefit to the Philippine Internet consumer.

I. BACKGROUND AND FUNDAMENTAL PRINCIPLES OF PRODUCT LIABILITY LAW

A. THE CONCEPT OF PRODUCT LIABILITY

The eminent legal encyclopedia, American Jurisprudence 2d, provides a definition of product liability. It refers to the **liability** of a manufacturer, processor, or nonmanufacturing seller for injury to the person or property of a buyer or third party caused by a **product** which has been sold.¹⁰ Although it has previously merely served as an adjunct of actions based on negligence, sales or torts, product liability has become a cause of action in itself especially when the concept of strict liability in tort was introduced in the 1960s in the California case of *Greenman v. Yuba Power Products, Inc.*¹¹

Product liability claims are usually obtaining when a product which is reasonably certain to place life and limb in peril, is distributed without re-inspection and causes bodily harm. A manufacturer becomes liable regardless of whether negligence on his part exists on the basis of public policy which demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.¹²

Although typical cases in product liability involve personal injuries or damages as a result of defective products, a California Appellate Court case has stretched the applicability of product liability to cases wherein the product itself was lost or destroyed.¹³ In another case¹⁴ however, the US

¹⁰ 63 Am. Jur. 2d Products Liability, § 1 (1984).

¹¹ 59 Cal 2d 57 (1963).

¹² See *supra* note 6.

¹³ *Ghera v Ford Motor Co.* (1st Dist), 246 Cal App 2d 639, 55 Cal Rptr 94 (1966).

¹⁴ *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986).

Supreme Court has maintained a contrary view, stating that such damage to the product itself cannot be recovered under a negligence or strict liability theory but only under a warranty theory.

As stated, the typical product liability case involves the presence of personal injuries or damages as a result of product defects. This implies that there are different types of injuries which do not fall within the proper scope of product liability. California case law provides some answers.

In *Seely v. White Motor Co.*,¹⁵ the plaintiff-truck driver was able to recover damages from the manufacturer based on a breach of implied warranty. The court however, held that product liability on the basis of strict liability in tort cannot lie since such a degree of liability is impossible only in cases of physical harm to person or property. Any such commercial loss beyond the extent of physical harm cannot be recovered under strict liability.¹⁶

Furthermore, American Jurisprudence 2d refers to “bad bargain” cases which are likewise outside the purview of product liability. While these generally pertain to instances when the buyer wants to seek redress for failed expectations of a product, the presence of a bad bargain element may still result in product liability awards if coupled with proof of physical injury or property damage to the buyer.¹⁷

In sum, product liability is an action mainly based on tort which is resorted to by a buyer or a third party for personal or property injury, the liability being based primarily on the doctrine of strict liability in tort. Strict liability in tort, which is the anchor of modern product law, will be discussed in detail further in later parts of this paper.

B. HISTORY AND EVOLUTION OF PRODUCT LIABILITY LAW

Prior to the *Greenman* ruling in 1963, causes of action on product liability were limited to negligence and breach of warranty. However, certain difficulties became evident from such limitation. For example, in actions based on negligence, complainants face the burden of having to prove the existence of a specific act or omission on the part of the defendant which may have given rise to a defect in the product and which in turn may have

¹⁵ 63 Cal 2d 9 (1963).

¹⁶ *Id.*

¹⁷ 63 Am. Jur. 2d Products Liability § 1 (1984).

caused the injury subject of the complaint.¹⁸ This is particularly complex for plaintiffs dealing with defendant manufacturers or wholesalers who mass-produce or "mass-sell" these products.

Breach of warranty claims, on the other hand, are hardly free of these difficulties. A defendant may easily raise "non-privity" or "non-reliance on the warranty" as a defense. He may also invoke the plaintiff's failure to comply with notice requirements. The defendant may even go so far as to place stipulations disclaiming liability in contracts of sale, which may constitute an absolute defense for a supposed breach of warranty.¹⁹

These factors have led courts to develop newer, more effective "plaintiff-friendly" bases for product liability. Some courts have departed from a negligence-based theory of product liability and have resorted instead to misrepresentation or nuisance, or even *res ipsa loquitur*²⁰ in imputing product liability.

The idea of strict liability in tort was introduced in a concurring opinion almost nineteen years before *Greenman* in the case of *Escolta v. Coca-Cola Bottling Co.*²¹ Justice Traynor opined therein that a manufacturer should be absolutely liable for placing a defective product on the market which causes injury to persons. He thus made the following pronouncements, to wit:

In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . Even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless

¹⁸ 13 A.L.R.3d 1057 § 1 (1967).

¹⁹ *Id.*

²⁰ *Id.*

²¹ 24 Cal 2d 453 (1944).

find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market...Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.²²

Justice Traynor further explained that actions based on negligence are not favorable to the cause of an injured person as it would be difficult for him to refute an affirmative defense of proper care, *viz*:

...An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is.²³

He likewise found actions based on breach of warranty circuitous as they are based on a number of legal fictions i.e., "warranty runs with the chattel"²⁴ or "that the cause of action of the dealer is assigned to the consumer" or "that the consumer is a third party beneficiary of the manufacturer's contract with the dealer." Such fictions, according to him, become unnecessary once a cause of action emanating from a contract of sale between the dealer and the consumer is instead based on the tort law concept of strict liability rather than breach of warranty.

This opinion in *Escolta* ripened into doctrine in the case of *Greenman*, which involved an action from a plaintiff who had sustained injuries from a combination power tool which had defective attachments. Traynor adopted his reasoning in *Escolta* and applied strict liability. After the decision in *Greenman*, the doctrine of strict liability immediately found numerous applications in many other product liability cases in California and in several other jurisdictions.²⁵ Its status as a widely-accepted theory of product liability was crystallized when it was included under § 402 of the Second Restatement of Torts.

Thus, in the United States, product liability has evolved from being a mere species of actions based on negligence or breach of warranty actions into a full-fledged action all on its own.. This is due largely to the advent of

²² *Escolta v. Coca-Cola Bottling Co.*, 24 Cal 2d 453, 463-464 (1944).

²³ *Id.* at 464

²⁴ This is to allow breach of warranty claims by a consumer against a manufacturer, after having bought the product from a retailer

²⁵ See *supra* note 14.

strict liability in tort cases which has become the prevailing theory in product liability since *Greenman*.

C. THE CONCEPT OF STRICT LIABILITY IN TORT

As mentioned in the earlier parts of this article, strict liability in tort has become the prevailing view in the United States particularly in product liability claims of buyers and third parties. As such, a discussion on strict liability under U.S. Federal law is necessary in order to adequately understand its application in Philippine jurisdiction.

1. Second Restatement of Torts

In 1965, § 402(A) of the Second Restatement of Torts was formulated by the American Law Institute. This Section was modified by the Third Restatement in 1998. However, it is relevant to include the Second Restatement in this discussion as many states have adopted its provisions in their product liability law and jurisprudence,²⁶ notwithstanding the fact that it has been in existence for a much longer period than the later Restatement. The aforementioned section provides a succinct statement of strict liability in tort:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.²⁷

The provision above defines the scope of strict liability in tort and provides the conditions necessary for an action based thereon to prosper. A person who is engaged in the business of selling products who may have sold a product in a defective condition dangerous to the user or consumer

²⁶ See E. B. Ruff, and S. R. Jurado, *The Restatement (Third) of Torts and its Effects on Products Liability Law*, Federation of Insurance & Corporate Counsel, (Spring 1999).

²⁷ II RESTATEMENT OF THE LAW, TORTS 2d, § 402 (A) Comment (American Law Institute Publishers ed. 1965) [hereinafter cited as RESTATEMENT SECOND].

or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property.

While § 402(A) uses the term “seller,” the doctrine can be similarly applied to manufacturers, wholesale or retail dealers or distributors, and operators of restaurants.²⁸ It however excludes occasional sellers and sales out of the usual course of business from the ambit of the doctrine.²⁹ In addition, the product sold in a defective condition dangerous to the user or consumer or to his property must have reached the consumer or user without substantial change in condition from the time it was sold.³⁰

Moreover, strict liability in tort covers damage claims for physical, personal injuries.³¹ This can be gleaned from § 402(A), which provides that: “liability for physical harm...to the ultimate user or consumer or to his property.” In fact, most states have associated strict liability actions in cases of sustained personal injuries.³² Wrongful death actions were also associated by a few state courts (California, Connecticut and New York) with strict liability in tort as a theory of product liability.³³ The same clause from § 402(A) also demonstrates that product liability covers more than just personal damage caused by the product.

*Seehy*³⁴ first affirmed the applicability of product liability under strict liability in tort to damages to property. An Illinois court, in *Suvada v. White Motor Co.*,³⁵ similarly awarded damages to a milk truck owner as a result of a faulty brake system and held the manufacturer and the seller of the said brake system liable.

However, inasmuch as § 402(A) has maintained the applicability of strict liability to personal or property damage claims, it has somehow left out commercial losses. Some courts have validated this exclusion. The *Seehy*³⁶

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Greenman v. Yuba*, 59 Cal 2d 57 (1963).

³² *Vandermark v Ford Motor Co.* 391 P.2d 168 (1964), ; *Crane v Sears Roebuck & Co.*, 218 Cal App 2d 855, 32 Cal Rptr 754 (1963); *Haley v Merit Chevrolet, Inc.* 7 Ill. App.2d 19, 214 N.E.2d 347 (1966) ; *Greeno v Clark Equipment Co.* 237 F.Supp. 427, 429 (N.D.Ind.1965); *Allen v Coca-Cola Bottling Co. (Ky)*, 403 SW2d 20 (1966); *Hacker v Rector D.C.*, 250 F.Supp. 300.

³³ *Canifax v Hercules Powder Co.*, 237 Cal App 2d 44, 46 Cal Rptr 552 (1965); *Mitchell v Miller*, 26 Conn Supp 142, 214 A2d 694 (1965); *Swain v Boeing Airplane Co.*, (CA2 NY) 337 F2d 940 (1964), cert den 380 US 951, 13 L ed 2d 969, 85 S Ct 1083 (1965);

³⁴ *See supra* note 15.

³⁵ 32 Ill 2d 612 (1965).

³⁶ *See supra* note 15.

case held that in the absence of personal or property injuries, no recovery under strict liability in tort can be made for damages in the form of commercial losses although there may be recovery under breach of warranty.

In *Rhodes Pharmacal co. v. Continental Can Co.*,³⁷ an Illinois appellate court denied strict liability claims for losses due to the refusal of customers to buy plaintiff's products and forced it to refund to other customers as a result of the leak in the cans manufactured by defendant. At least two more cases in other states have upheld this view.³⁸

In Comment 1 of § 402(A), the American Law Institute has clarified that the term "consumer" may refer a person who "need not have purchased the product at all, but may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser; and the term "user" is defined so as to include those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it." Textual support for this in the restatement can be seen in the second sentence, which goes:

... (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller...

The doctrine of strict liability has even been applied to a bystander who was neither a user nor a consumer as envisioned by § 402(A), taking into account the nature of the danger posed to pedestrians (which in this case was an automobile the transmission of which failed to lock in park) and the public policy of protecting innocent bystanders from such types of defects.³⁹

To sustain an action under strict liability in actions based on product liability, two main elements must be satisfied for the action to prosper: 1) the defective and unreasonably dangerous condition of the defendant's product, including the defendant's connection with the product; and 2) a causal connection between such condition and the plaintiff's injuries or damages.⁴⁰ The defective and dangerous condition has been held in various states to encompass manufacturing defects, defects in design⁴¹ and when the

³⁷ 72 Ill App 2d 362 (1966).

³⁸ *Price v Gatlin*, 241 or 315, 405 P2d 502 (1965); *Ford Motor Co. v Lonon*, (Tenn) 398 SW2d 240 (1966).

³⁹ *Mitchell v. Miller*, 26 Conn Supp 142.

⁴⁰ 13 A.L.R.3d 1057, § 5 (1965).

⁴¹ *Wright v Massey-Harris, Inc.*, 68 Ill App 2d 70, 215 NE2d 465 (1966).

defendant fails to warn consumers about such condition.⁴² The causal connection refers to the concept of proximate cause,⁴³ whereby the condition of the product proximately resulted to the injury or damage sustained by the plaintiff.

2. Third Restatement of Torts

While the Second Restatement had been in existence for a long time and had become part of the corpus of most states' laws and jurisprudence on product liability, some states have shifted to the risk-utility test as the basis for determining strict liability with respect to design defects. Thus, a new Restatement was formulated in 1998. This Restatement which professes to capture the current state of products liability law prevailing among the states will be thoroughly discussed in Part VI, in conjunction with Internet transactions.

3. Contrasted with Negligence, Breach of Warranty

In discussing the history and evolution of product liability, this article made reference earlier to the older product liability theories of negligence and breach of warranty, citing their limitations as the catalyst for the development of strict liability.

Strict liability in tort however, is different from actions based on negligence in that the former requires neither proof of fault nor proof that the defendant had acted carelessly and without due care in manufacturing, designing or selling the defective product. § 402(A) of the Second Restatement of Torts reflects this distinction:

...The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product...⁴⁴

§ 2 of the Third Restatement reiterates this in its provision covering manufacturing defects:

⁴² *Crane v. Sears Roebuck, Inc.* 218 Cal App 2d 855, 32 Cal Rptr 754 (1963).

⁴³ 13 A.L.R.3d 1057, § 7 (1965).

⁴⁴ RESTATEMENT SECOND

...A product (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product...⁴⁵

The presence of due care notwithstanding, a plaintiff may still recover damages for personal or property injuries sustained as a result of a defective product provided that the elements of the action as stated in the previous sub-part are complied with. The removal of the proof of negligence requirement makes it more convenient for the plaintiff who may be unable to refute any due diligence claim by a defendant due to unfamiliarity with manufacturing processes.⁴⁶

Meanwhile, the contrast between strict liability in tort and breach of warranty lies in that the latter requires that the plaintiff suing on such cause of action must share privity with the seller or manufacturer. Privity is the connection or relationship, e.g., through a contract, between two parties, each having a legally recognized interest in the same subject matter.⁴⁷ This privity requirement has been considered a bane for litigants who may have been injured by “remote” defendants who in the interest of justice should have been held liable for the damages sustained. This inference is reinforced in § 402(A), which also provides:

... (b) The user or consumer has not...entered into any contractual relation with the seller...⁴⁸

The distinctions between strict liability in tort and the theories of negligence and breach of warranty demonstrate the broader degree of responsibility required of a manufacturer or seller. In adopting strict liability as the predominant product liability theory, courts arguably have adhered to the importance of protecting users and consumers against the “unassailable, technical” defenses often employed by manufacturers and sellers to evade liability for the damages sustained by these users or consumers.

II. FUNDAMENTAL PRINCIPLES IN CONFLICT OF LAWS FOR PRODUCT LIABILITY

Conflict of laws, or private international law as known in European jurisdictions, is referred to as that part of the law which comes into play

⁴⁵ RESTATEMENT OF THE LAW THIRD, TORTS, PRODUCT LIABILITY, § 2 Comment (American Law Institute Publishers ed. 1998) [*Hereinafter cited as* RESTATEMENT THIRD].

⁴⁶ *Escola v. Coca-Cola Bottling Co.*, 24 Cal 2d 453, 463-464 (1944). (Traylor J., *concurring*).

⁴⁷ BLACK'S LAW DICTIONARY 7TH EDITION, St. Paul, Minnesota, c1999.

⁴⁸ RESTATEMENT SECOND.

when the issue before the court affects some fact, event, or transaction that is closely connected with a foreign system of law as to necessitate recourse to that system.⁴⁹ The focal point of this paper is the effect of cross-border transactions over the Internet on product liability claims. A study into the pertinent conflict of law rules is therefore warranted.

The resolution of Juan's predicament requires the application of private international law principles as the person liable is assumed to be a foreign corporation or entity which more often than not has no regular conduct of business in the Philippines. The connection with the foreign system of law in this case lies in the fact that the defendant is not domiciled or doing business in the Philippines, and the possibility that the transaction entered into over the Internet with a Filipino buyer could be considered as having a foreign *situs*.

According to Justice Jorge Coquia and Professor Elizabeth Aguilin-Pangalangan, there are three distinct but interrelated issues in conflict of laws.⁵⁰ The first refers to the issue of jurisdiction which determines the circumstances that allow a legal order to impose upon its judiciary the task of deciding disputes with foreign elements.⁵¹ The second issue refers to choice-of-law, relating to the applicable law to the controversy.⁵² The third one is recognition and enforcement of foreign judgments which refers to the enforceability of foreign judgments in local courts.

A. THE QUESTION OF JURISDICTION

The question of jurisdiction is generally divided into two queries - (1) the subject-matter of the litigation; (2) the person of the parties therein; and (3) in actions *in rem* or *quasi-in-rem*, the res.⁵³

1. Subject Matter Jurisdiction

Jurisdiction over the subject matter is determined by law and the allegations of the initiatory pleading.⁵⁴ Coquia and Pangalangan further

⁴⁹ G.C. Chesire, *Private International Law* (1947), cited in J. Coquia and E. Pangalangan, *Conflict of Laws* (Cases, Materials and Comments) (2000).

⁵⁰ JORGE COQUIA & ELIZABETH PANGALANGAN, *CONFLICT OF LAWS* (Cases, Materials and Comments) (2000).

⁵¹ *Id.*, at 9.

⁵² *Id.*

⁵³ *Rayray v. Chae Khung Lee*, GR No. L-18176, Oct. 29, 1966.

⁵⁴ *Tomas Claudio Memorial College, Inc. v. CA*, GR No. 124262 October 12, 1999

explain that both constitutional and statutory laws allocate cases among the courts of justice based on the *nature* of the controversy.⁵⁵ Such aspect of jurisdiction cannot be made to depend on the consent of the parties,⁵⁶ nor upon the defenses set up in the court or upon a motion to dismiss; otherwise, the question of jurisdiction would depend almost entirely on the defendant.⁵⁷

2. In Personam and In Rem Jurisdiction

Meanwhile, jurisdiction over the person is acquired by voluntary appearance of a party and his submission to authority. Such are needed especially in actions *in personam*, which are based on the personal liability of a defendant.⁵⁸ Jurisdiction over the property or the *res* which is the subject matter of litigation results from either the seizure of property under a legal process or from the institution of legal proceedings wherein the court's power over the property is recognized and made effective.⁵⁹ Common examples of the latter are jurisdiction obtained over properties involved in land registration proceedings and subject to preliminary attachment as a provisional remedy to the main action, which are essentially actions *in rem* and quasi *in rem*, respectively.

In a proceeding *in rem* or *quasi in rem*, jurisdiction over the person of the defendant is not a prerequisite to confer jurisdiction on the court provided that the court acquires jurisdiction over the *res*. Nonetheless, summons must be served upon the defendant not for the purpose of vesting the court with jurisdiction but merely for satisfying the due process requirements.⁶⁰

Thus, where the defendant is a non-resident who is not found in the Philippines and (1) the action affects the personal status of the plaintiff; (2) the action relates to, or the subject matter of which is property in the Philippines in which the defendant has or claims a lien or interest; (3) the action seeks the exclusion of the defendant from any interest in the property located in the Philippines; or (4) the property of the defendant has been attached in the Philippines, service of summons may be effected by (a)

⁵⁵ Coquia, *supra* note 55, at 36.

⁵⁶ Caluag v. Pecson, 82 Phil. 8 (1948).

⁵⁷ Sumawang v. De Guzman, GR No. 150106, September 8, 2004.

⁵⁸ Dial Corp. v. Soriano, 161 SCRA 737 (1988).

⁵⁹ Banco Espanol Filipino v. Palanca, 37 Phil. 921 (1918).

⁶⁰ Valmonte v. Court of Appeals, 252 SCRA 92, 100-101, Jan. 22, 1996.

personal service out of the country, with leave of court; (b) publication, also with leave of court, or (c) any other manner the court may deem sufficient.⁶¹

Jurisdiction over the person of the defendant can be obtained in a number of ways. First is when he enters his appearance or is served with the legal process within the state, which may be by personal service or substituted service of summons. Where the hypothetical defendant is a non-resident alien, entry of appearance and personal service are highly improbable. Where the defendant is either a Filipino citizen, a resident foreign corporation licensed to do business, or a non-resident foreign corporation with a resident agent, obtaining jurisdiction over the defendant through personal service or substituted service of summons would be feasible as he is subject to the compulsory processes available in Philippine courts.

The improbability of personal service as regards a non-resident defendant has been addressed by United States courts through the application of the minimum contacts and fundamental fairness rules. The United States Supreme Court has held that for due process to be observed, a defendant must "have certain minimum contacts such that the maintenance of the suit does not affect traditional notions of fair play and substantial justice."⁶²

The oft-quoted *International Shoe Co. v. State of Washington*⁶³, has laid the foundation of pre-Internet personal jurisdiction. The "minimum contacts" standard, enunciated more than half a century ago by the United States Supreme Court, requires a nonresident defendant to have certain minimum contacts with the forum state in order to be subject to a personal judgment, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Several decades later, the Supreme Court again refined the minimum contacts doctrine in *World-Wide Volkswagen Corporation v. Woodson*.⁶⁴ The Court held that only when the defendant "purposefully avails itself of the privilege of conducting activities within the Forum State," will the minimum contacts standard be met.⁶⁵ According to *World-Wide Volkswagen*, the

⁶¹ RULES OF COURT, Rule 14, § 15.

⁶² *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁶³ *Id.*

⁶⁴ 444 U.S. 286 (1980).

⁶⁵ *Id.* at 297

principles established in *International Shoe* provide "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."⁶⁶

In *Burger King Corp. v. Rudzewicz*⁶⁷ however, the Court has raised the bar. In this case, the test was expanded to include a "minimum contacts" prong where the defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."⁶⁸ A nonresident's "purposeful availment" must be such that the defendant "should reasonably anticipate being haled into court" in the forum state, such as when a defendant has intentionally entered into business dealings in another state. As such, specific jurisdiction can be found even where the defendant has never actually visited the state. Such contacts may be effectuated by mail and electronic communications.

To determine whether minimum contacts exist, a court must engage in a factual determination of the relationship among the forum, the defendant, and the litigation.

3. Jurisdiction in Tort/Product Liability Cases

Having stated these concepts of jurisdiction, one may ask how they figure into the context of product liability suits. The concept of minimum contacts has been applied in a product liability case by the United States Supreme Court in *Asahi Metal Industry v. Superior Court of California*.⁶⁹ In that case, a Japanese tire valve manufacturer was sued by a Californian for damages, alleging that the accident was caused by a defect in the tire valve which was incorporated into a motorcycle.

The United States Supreme Court through Justice Sandra Day O'Connor ruled that in order to satisfy the necessary degree of "substantial connection" between a defendant and the forum State for there to be minimum contacts, there must be purposeful availment.

⁶⁶ *Id.* at 299.

⁶⁷ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, May 20, 1985.: The "purposeful availment" requirement for the exercise of specific jurisdiction over nonresident defendants ensures that they will not be haled into a jurisdiction solely as a result of a random, fortuitous, or attenuated contact, or by the unilateral activity of another party or a third person.

⁶⁸ *Id.* at 477.

⁶⁹ 480 U.S. 102 (1987).

The California Supreme Court found that petitioner's intentional act of placing its assemblies into the stream of commerce by delivering them to Cheng Shin in Taiwan, coupled with its awareness that some of them would eventually reach California were sufficient to support state court jurisdiction under the Due Process Clause. The US Supreme Court reversed the state Supreme Court's ruling, holding that even assuming Asahi's awareness that some of the assemblies it sold would be incorporated into tires sold in California, such failed to establish the minimum contacts sufficient to render the State's exercise of personal jurisdiction consistent with fair play and substantial justice.

The Federal Supreme Court placed great weight on the fact that Asahi did not create, control, or employ the distribution system that brought its assemblies to, nor design them in anticipation of sales in, California. Asahi did not engage in any action to *purposefully avail* itself of the California market. The "substantial connection" necessary for a finding of minimum contacts must be derived from an action purposely directed toward the Forum State. The mere placement of a product into the stream of commerce will not suffice.⁷⁰

Although the Supreme Court included dicta favorable to the stream-of-commerce theory, it left the issue in a state of confusion. Justice O'Connor's opinion rejected the stream-of-commerce theory without providing any persuasive rationale for her decision. However, she noted that "additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum state. Such an approach may appropriately be characterized as a type of "stream-of-commerce plus" standard."⁷¹

Revisiting our earlier hypothetical scenario, Juan logs on to Dell's website, the latter being a US company, without a Philippine branch or agent. Logically, Juan would want to file a complaint against Dell in the Regional Trial Court of Makati where he lives. However, how could such court obtain jurisdiction over Dell? Can Dell argue that it did not purposely seek to conduct activities here, even if it knows that the Internet can be accessed anywhere? A discussion on Internet-specific personal jurisdiction in Part VI, *infra*, will shed light over these queries.

⁷⁰ Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 108-113, 116 (1987).

⁷¹ M. H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, The Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 584 (1998).

B. THE QUESTION OF CHOICE-OF-LAW

1. General Theories on Choice-of-law

All choice of law problems seek to answer two important questions: first, what legal system should control a case where some of the significant facts occurred in two or more states; and second, to what extent should the chosen legal system regulate the situation.⁷² Two categories of theories have emerged: the traditional approach, which emphasizes simplicity, convenience and uniformity; and the modern approach, which relates to reaching appropriate results in particular cases.⁷³

On the one hand, the traditional approach includes vested-rights theories, the local law theory and Caver's Principles of Preference. Under the vested-rights theory advanced by Professor Joseph H. Beale, an act done in a foreign jurisdiction gives rise to the existence of a right if the laws of such state so provide. This right vests in the plaintiff who carries it with him to be enforced in any forum he chooses to bring suit. The forum refers to the law of the place of occurrence of the 'last act' necessary to complete the cause of action, such law being applicable to all substantive issues of the case.⁷⁴

The local law theory espoused by Professor Walter Wheeler Cook has two main points. First, "the power of the state to regulate within its territory has no limitation, except such as may be imposed by its own positive law." Second, in conflict of laws problems, the court does not enforce a foreign right but a right created by its own law by treating a case as a purely domestic case that does not involve a foreign element. As a result, the law applied might not be exactly that which the foreign court would have enforced.⁷⁵

The three-step process advocated by Professor David F. Cavers ensures that policy, rather than the 'last act', would be considered in choice-of-law decisions. He theorized that courts must: 1) scrutinize the event or transaction giving rise to the issue before it; 2) compare carefully the proffered rule of law and the result which its application might work with the rule of the forum in the case at bar; and 3) appraise these results from

⁷² Coquia, *supra* note 55, at 57, citing Von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 Cornell L. Rev 927 (1975).

⁷³ *Id.* at 58.

⁷⁴ *Id.*

⁷⁵ Coquia, *supra* note 55, at 66.

the standpoint of justice between litigants or those broader considerations of social policy which conflicting laws may evoke.⁷⁶

On the other hand, the modern approaches include: 1) place of most significant relationship; 2) interest analysis; 3) comparative impairment; 4) functional analysis; and 5) choice-influencing considerations.

The 'most significant relationship' under the Second Restatement adopted an approach which identifies a plurality of factors that must be considered in light of choice-of-law principles, which include: the needs of interstates and international systems; relevant policies of concerned states; relevant policies of other interested states and the relative interest of those in the determination of the particular issue; the protection of justified expectations of the parties; the basic policies underlying the particular field of law; certainty, predictability and uniformity of result; and, ease in the determination and the application of the law to be applied.⁷⁷ For instance, in tort (and product liability cases as well), the following contacts are to be given consideration: the place where the negligent conduct occurred; the place where the injury occurred; the domicile, residence, and nationality of the parties; and, where the relationship between the parties was entered.⁷⁸ Ultimately, the contacts are evaluated on their relative importance and relevance to the issue at hand.⁷⁹

The 'interest analysis' approach urges the resolution of choice-of-law problems by looking at the policy behind the laws of the involved states and the interest each state has in applying its own law.⁸⁰ Thus, factual contacts are not the sole determining factor of a case but the policy echoed and advanced by a state.

An offshoot of the interest analysis approach is the standard of 'comparative impairment'. While the latter also weighs conflicting interests and looks into the precise issues and interests of each state, it calls for the subordination of the state objective least impaired. As such, it has been appropriately termed as the comparative impairment approach. Courts here

⁷⁶ Coquia, *supra* note 55, at 66.

⁷⁷ *Id.*, at 67, *citing* RESTATEMENT (SECOND), CONFLICT OF LAWS, § 6 (1971).

⁷⁸ *Id.*, at 67, *citing* RESTATEMENT (SECOND), CONFLICT OF LAWS, § 145 (1971).

⁷⁹ *Id.*, at 68.

⁸⁰ *Id.*, at 74.

are asked to weigh conflicting interests and look into the precise issue and precise interest of each state.⁸¹

The 'functional analysis' approach however, takes a different direction. This approach looks beyond the general policies of the state as reflected in its substantive law and instead into the policies and values relating to the effective and harmonious intercourse between states, such as reciprocity, advancement of multistate activity, protecting justifiable expectations, evenhandedness in dealing with similar cases, and effectiveness.⁸² Similar to comparative impairment and interest analysis, this theory also involves policy weighing, taking into consideration the relative strengths of each policy.

Lastly, 'choice-influencing considerations' works under the premise that courts prefer rules of law which make good socioeconomic sense and are sound in view of present day conditions.⁸³ These five major considerations are: predictability of results, maintenance of interstate and international order, simplification of judicial task, application of the better rule of law, and advancement of the forums governmental interest.

2. Choice-of-law in Torts and Product Liability Cases

In matters affecting conduct and safety, the determination of liability is guided by the doctrine of *lex loci delicti commissi* or the law of the place of tortuous conduct. A unique problem arises when the tortious conduct and the resulting injury occur in different jurisdictions. This becomes all the more difficult where one jurisdiction imposes a different or higher standard over the other.

In product liability cases, product liability laws and the multitude of varying judicial rulings interpreting the same places us in a sort of conundrum. For example, common law rules look into the place where the wrong, last event necessary to make the actor liable, i.e. the injury, occurs. Civil law countries however, consider the 'place of conduct' as the situs. While the legality or illegality of a person's act should be determined by the law of the state where he is at the time of the commission of such act,⁸⁴ the

⁸¹ *Id.*, at 79.

⁸² *Id.* at 80, citing Von Mehren and Trautman, *The Law of Multistate and Multinational Problems*, I-31 (1987) (temporary edition).

⁸³ *Id.*, at 81, citing R. Leflar, *Conflicts of Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

⁸⁴ *Id.* at 409.

traditional vested rights theory holds an actor liable by *lex loci delicti* everywhere, since damages arising from torts committed in one state are actionable in another.

It bears noting however, that the Hague Convention on the Law Applicable to Products Liability which was concluded on October 2, 1973, sets out some rules as to choice of applicable law for products liability which may be significant in conflicts-of-law situations. Article 4 thereof states that the law of the place of the injury shall apply if that State is also a) the place of the habitual residence of the person directly suffering damage, or b) the principal place of business of the person claimed to be liable or c) the place where the product was acquired by the person suffering the damage.⁸⁵

According to the abovementioned convention, the law of the place of habitual residence of the injured person may apply if that State is either the principal place of business of the person claimed to be liable or the place of acquisition of the product.⁸⁶ In case none of the elements above concurs, the principal place of business shall apply. An exception however, is when the claimant bases his claim on the internal law of the state where the injury occurred.⁸⁷ Furthermore, neither the laws in the state of injury nor residence of the plaintiff applies if the person claimed to be liable establishes the defense that he could not reasonably have foreseen that his product or products of the same type would be made available in that State through commercial channels.⁸⁸ This latest rule may have been influenced by the most significant relationship theory which has made headway in the United States as a result of the Second Restatement of Conflicts of Law.

The foregoing summarizes the general principles surrounding conflicts-of-law or private international law, with emphasis on the subject of torts and product liability. The subsequent sections of this article will thereafter utilize the framework herein presented in order to adequately examine the problems surrounding product liability in cross-border Internet transactions.

⁸⁵ Hague Convention on The Law Applicable To Products Liability (1973). [Hereinafter referred to as CONVENTION].

⁸⁶ CONVENTION, art. 5.

⁸⁷ CONVENTION, art. 6

⁸⁸ CONVENTION, art. 7.

III. CHALLENGES POSED BY THE INTERNET IN PRODUCT LIABILITY CASES

A. THE INTERNET: BACKGROUND

The Internet is a paradox. While many are fascinated by its seemingly limitless power to transcend temporal and spatial limitations of human interaction, many are equally puzzled at the significant challenges posed by this technology to the traditional world order, including in particular, the legal order.

In 1969, the precursor of today's Internet was launched: The Advanced Research Projects Agency Network (ARPANET), a networked series of computers.⁸⁹ The Advanced Research Projects Agency, an agency of the U.S. Department of Defense, created ARPANET as a communications system involving networked computers that would survive and function even if a nuclear attack were to destroy some of the networked computers and was used primarily by scientists and other researchers to exchange military and national security data.⁹⁰ Since then, the activity generated by the Internet, as well as the size of the Internet itself, has grown exponentially.⁹¹

As one United States court has described it, "the Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks."⁹² The court observed that "many networks ... are connected to other networks, which are in turn connected to other networks in a manner which permits each computer in any network to communicate with computers on any other network in the system. This global Web of linked networks and computers is referred to as the Internet." It enables communications to take place "almost instantaneously" that can be directed either "to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole."⁹³ The Internet has been compared to "a highway, consisting of many streets leading to places where a user can find information."⁹⁴ It is a

⁸⁹ D.T. Yokoyama, *You Can't Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DE PAUL L. REV. 1167 (2005), citing P. Gilster, *The Internet Navigator: The Essential Guide to Network Exploration for the Individual User* 14 (1994).

⁹⁰ *Id.*

⁹¹ *ACLU v. Reno*, 929 F.Supp. 824, 830-38 (E.D.Pa.) (1996).

⁹² *Id.*, at 830 (E.D. Pa.) (1996).

⁹³ *Id.*

⁹⁴ *Edias Software Int'l, L.L.C. v. Basis Int'l Ltd.*, 947 F. Supp. 413, 419 (D. Ariz.) (1996).

unique communications medium because of its ability to reach large audiences.⁹⁵

Our own Supreme Court has recognized the potential of the Internet in this wise:

[It is] a decentralized computer network linked together through routers and communications protocols that enable anyone connected to it to communicate with others likewise connected, regardless of physical location. Users of the Internet have a wide variety of communication methods available to them and a tremendous wealth of information that they may access. The growing popularity of the Net has been driven in large part by the World Wide Web, i.e., a system that facilitates use of the Net by sorting through the great mass of information available on it. Advertising on the Net and cyber-shopping are turning the Internet into a commercial marketplace.⁹⁶

There are six major categories of Internet communications: E-mail, Listservs, Newsgroups, Real time communication, Telnet, and the World Wide Web.⁹⁷ The most popular category is the World Wide Web, which allows a user to connect to an Internet "site" containing an individual domain name or address.⁹⁸ "Web pages" or "Web sites, which are easy to produce allow for the display of graphic materials, photos, text and audio. Information is "published" on the Internet by any individual working with the proper software in their home or business. Users access such information by either typing in an address or using any of several "search engines," software and database architectures that explore the Web.

The information and opportunities available on the Internet, coupled with its unparalleled accessibility, is astounding. Any individual possessing a personal computer, a telephone modem, and the proper software may gain access to the Internet, allowing him to retrieve the myriad home pages that have been created. Moreover, Internet users may shop for

⁹⁵ Adam R. Kegley, *Regulation of the Internet: The Application of Established Constitutional Law to Dangerous Electronic Communication*, 85 KY. L.J. 997, 1018 (1996-97).

⁹⁶ *Prihdas J. Mirpuri v. Court Of Appeals*, G.R. No. 114508. November 19, 1999, *citing* Maureen O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN L. REV. 609-611, 615-618 (1998).

⁹⁷ 59 Am. Jur. Internet Presence as a Basis for Personal Jurisdiction § 8 (2007).

⁹⁸ *Id.*

and directly order products or services online; a fact that has caused the Internet to be analogized to a shopping mall or supermarket.⁹⁹

Undeniably, the Internet functions as a very effective method of sales promotion. A Web site "can be visited repeatedly by any number of users on a given day, making the information on a Web page even more accessible to a greater number of people than other forms of publication or advertisement."¹⁰⁰ In addition, the Internet also serves as a medium for service providers and informational products through which consumers may subscribe to various services.

Service-related transactions have become as common as online shopping as well.¹⁰¹ "The global reach of the Internet has allowed businesses, both large and small, to expand through electronic commerce, or e-commerce. "E-commerce means advertising, selling and supporting products and services using a Web Store around the clock for customers worldwide."¹⁰²

1. A Hypothetical Situation

A buyer identifies a need for a good or service and proceeds to find a source via the Internet, utilizing various search engines. He comes across a seller's Web site which contains a catalogue of goods or services that suit his needs. He then proceeds to make selections, placing them into his virtual "shopping cart." The buyer fills out a secured online order form which typically requires a credit card or similar modes of payment and clicks on a "submit" icon. He is then shown an electronic contract form containing the terms and agreement of the purchase, including the price, quantity, description, shipping cost, and other pertinent information about the purchase and is then given the option of confirming his order by clicking the "buy" icon. This can be considered the seller's final offer. Once the buyer clicks on the "buy" icon and the Web site registers the click (i.e., the Internet service provider (ISP) registers the information), there is a valid acceptance and the contract is for all intents and purposes concluded. Two questions arise at this point: (1) whether a legally enforceable business transaction

⁹⁹ Edias Software Int'l, L.L.C. v. Basis Int'l Ltd., 947 F. Supp. 413, 419 (D. Ariz.) (1996).

¹⁰⁰ *Id.*, at 420.

¹⁰¹ See N.D. Leadstrom, *Internet Web Sites As Products Under Strict Products Liability: A Call For An Expanded Definition of Product*, 40 WASHBURN L.J. 532 (2001).

¹⁰² J.K. Coston, *Embrace The New, But Don't Forget About The Old: Asserting Personal Jurisdiction Over The New Internet Age*, S. U. L. REV., Summer, 2007, citing Mania Interactive, Webview by Mania Full E-Commere Suite, available at http://maniaweb.com/webview/ecom_frame.htm

occurred (a substantive law issue), and (2) who has jurisdiction over any dispute that may arise out of the transaction (a procedural law issue)?¹⁰³

Juan's transaction with Dell is parallel to the transaction above described. As adverted to earlier, even the Philippines has become part of this Internet bandwagon as evidenced by the mushrooming of Internet sites catering to wholesale, retail and other commercial transactions.

B. IMPLICATIONS OF INTERNET TRANSACTIONS ON PHILIPPINE CONSUMER RIGHTS

Growth and technology may present a number of novel legal questions. The Internet particularly, has given rise to a number of jurisdictional complications, which are highlighted by the following facts: First, information posted over the Internet, becomes available to all other Internet users worldwide.... Once a provider posts its content on the Internet, it cannot prevent that content from entering any community." Thus, "Internet technology necessarily gives a speaker a potential worldwide audience." Second, the number of those with access to the Internet has reached gargantuan proportions, and continues to grow.¹⁰⁴ Third, the varieties of goods and services that may be procured online are greater than what the world was accustomed to before the Internet came along. Fourth, numerous informational products and other intangible goods or services have spawned all over the Web, in addition to the conventional products sold over the Internet.¹⁰⁵

Given these realities, is Philippine law sufficiently equipped to handle product liability cases covering goods purchased online? Corollary to this, are local laws broad enough to cover Internet transacted products as the subject matter of Philippine product liability litigation? Assuming that such products and/or services are covered in this jurisdiction, are Filipino consumers adequately protected by local laws? Or can an Internet seller or dealer easily escape liability on jurisdictional grounds?

Hence, a detailed examination of Philippine product liability laws in is necessary to adequately address these questions.

¹⁰³ W.B. Chik, *U.S. Jurisdictional Rules of Adjudication over Business Conducted via the internet—Guidelines and a Checklist for the E-commerce Merchant*, TUL. J. INT'L & COMP. L., Spring 2002.

¹⁰⁴ M. H. Redish, *supra* note 76.

¹⁰⁵ See *supra* note 93.

IV. PHILIPPINE PRODUCT LIABILITY LAW: A CASE STUDY

A. ARTICLE 2187 OF THE CIVIL CODE

The entrance of product liability was marked by the enactment of Article 2187 of the Civil Code¹⁰⁶. The section provides that:

Manufacturers and processors of foodstuffs, drinks, toilet articles, and similar goods shall be liable for death or injuries caused by any noxious or harmful substances used, although no contractual relation exists between them and the consumers.¹⁰⁷

According to an eminent commentator on Torts and Damages, retired Judge Cezar Y. Sangco, this article was imported from the United States. The article is an adoption of the doctrine of strict liability in tort as first formulated by Justice Traynor in *Escola v. Coca-Cola Bottling Co.*, and *Greenman v. Yuba Power Products*¹⁰⁸.

The adoption of the doctrine of strict liability in tort in this jurisdiction ensconced Article 2187 as the statutory authority for allowing redress for product defects as specified therein without need of proving negligence on the part of the defendant and without requiring privity of contract between the parties. Sangco opines that the presence of Article 2187 neither precludes an action for breach of warranty under the law on sales in the Civil Code nor an action for negligence or quasi-delict under Article 2176 of the Civil Code.¹⁰⁹

The provision sets forth the following requisites: First, defendant must be a manufacturer or processor of foodstuff, drinks, toilet articles and similar goods. Second, the defendant must have used noxious or harmful substances in the manufacture or processing of the foodstuff, drink or toilet articles consumed or used by the plaintiff. Third, there must be a causal connection between the consumption or use of the product by the plaintiff and the death or injury. Finally the complainant must allege the damages sustained and claimed and the amount thereof.¹¹⁰ These requisites conform to the elements of strict liability in tort as formulated in American law

¹⁰⁶ Rep. Act No. 386 (1950).

¹⁰⁷ J. CEZAR SANGCO, PHILIPPINE LAW ON TORTS AND DAMAGES 714 (1994).

¹⁰⁸ C. Y. Sangco, PHILIPPINE LAW ON TORTS AND DAMAGES (Revised Edition, 1994), 715.

¹⁰⁹ *Id.*, at 715.

¹¹⁰ *Id.*

namely, 1) the defective and unreasonably dangerous condition of the product and 2) a causal connection between the defect and the damages.¹¹¹

However, contrary to the Second and Third Restatements, only manufacturers and processors may be defendants under this article. Furthermore, foodstuff, drink, toilet articles and similar goods are the only products contemplated therein. Under the general theory of strict liability as embodied in the Restatements, even sellers or distributors are covered. The products contemplated therein encompass practically any personal property so long as they are tangible and are commercially distributed for consumption or use.¹¹²

The exclusion of sellers in Article 2187 of the Civil Code has already been clarified in the case of *People v. Siy Cong Bieng*.¹¹³ The Philippine Supreme Court therein applied the Pure Foods and Drugs Act¹¹⁴ in holding a seller of adulterated and falsely branded coffee liable. Citing the Indiana case of *Groff v. State*,¹¹⁵ the High Tribunal opined in this wise:

The distribution of impure or adulterated food for consumption is an act perilous to human life and health; hence, a dangerous act, and

¹¹¹ RESTATEMENT SECOND.

¹¹² RESTATEMENT THIRD, §§ 19-20.

¹¹³ 30 Phil. 577 (1915).

¹¹⁴ Rep. Act No. 3720, § 11. The following acts and the causing thereof are hereby prohibited: (a) The manufacture, sale, offering for sale or transfer of any food, drug, device or cosmetic that is adulterated or misbranded. (b) The adulteration or misbranding of any food, drug, device, or cosmetic. (c) The refusal to permit entry or inspection as authorized by Section twenty-seven hereof or to allow samples to be collected. (d) The giving of a guaranty or undertaking referred to in Section twelve (b) hereof which guaranty or undertaking is false, except by a person who relied upon a guaranty or undertaking to the same effect signed by, and containing the name and address of, the person residing in the Philippines from whom he received in good faith the food, drug, device, or cosmetic or the giving of a guaranty or undertaking referred to in Section twelve (b) which guaranty or undertaking is false. (e) Forging, counterfeiting, simulating, or falsely representing or without proper authority using any mark, stamp, tag label, or other identification device authorized or required by regulations promulgated under the provisions of this Act. (f) The using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the Department or to the courts when relevant in any judicial proceeding under this Act, any information acquired under authority of Section nine, or concerning any method or process which as a trade secret is entitled to protection. (g) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) and results in such article being adulterated or misbranded. (h) The use, on the labeling of any drug or in any advertising relating to such drug, of any representation or suggestion that an application with respect to such drug is effective under Section twenty-one hereof, or that such drug complies with the provisions of such section. (i) The use, in labeling, advertising or other sales promotion of any reference to any report or analysis furnished in compliance with Section twenty-six hereof.

¹¹⁵ 171 Ind. 547 (1908).

cannot be made innocent and harmless by the want of knowledge or the good faith of the seller.¹¹⁶

Prescinding from this pronouncement of the court, it can be inferred that there is strong local public policy against the distribution or sale of defective or adulterated food. Sangco suggests that this policy be taken into consideration in applying Article 2187 to sellers even if the text does not support such. The writers opine however that we are limited by the strict letter of the law, for the text of the law shall govern and resort to policy can be made only when there is ambiguity.

Article 2187 thus became the cornerstone of strict liability in Philippine product liability law. However revolutionary the provision may appear, it remains circumscribed that the limitations it possesses may prove to be more of a hindrance rather than an effective remedy for the injured consumer. From the foregoing, it would appear that Juan has no relief under this provision, as a laptop computer is neither foodstuffs, drinks, toilet articles nor is it analogous to the terms enumerated herein.

B. THE CONSUMER ACT OF THE PHILIPPINES

A major innovation in Philippine law governing product liability is Republic Act 7394¹¹⁷ embodying the avowed State policy of protecting the interests of the consumer, promoting his general welfare and establishing standards of conduct for business and industry.¹¹⁸ It defines the term "consumer" as a natural person who may be a purchaser, lessee, recipient or prospective purchaser, lessor or recipient of consumer products, services or credit.¹¹⁹ "Consumer products and services" are on the other hand goods, services and credits, debts or obligations which are primarily for personal, family, agricultural or household purposes including but not limited to food, drugs, cosmetics and devices.¹²⁰

A product is considered defective when it does not offer the safety rightfully expected of it, taking relevant circumstances into consideration, including but not limited to: presentation of product; use and hazards reasonably expected of it; and, the time it was put into circulation. However, a product may not be considered defective due to the presence of a better

¹¹⁶ *People v. Siy Cong Bieng*, 30 Phil. 577, 583 (1915).

¹¹⁷ Effective April 13, 1992. Known as THE CONSUMER ACT OF THE PHILIPPINES. [hereinafter cited as Consumer Act.]

¹¹⁸ Rep. Act No. 7394, § 2.

¹¹⁹ Rep. Act No. 7394, § 4(n).

¹²⁰ Rep. Act No. 7394, § 4(q).

quality product on the market.¹²¹ In the same vein, a service is defective when it does not provide the safety consumers may rightfully expect of it, taking the following relevant circumstances into consideration, including but not limited to: the manner in which it is provided; the result of hazards which may reasonably be expected of it; and the time when it was provided.¹²² Moreover, a service is not considered defective because of the use or introduction of new techniques.¹²³

Any Filipino or foreign manufacturer, producer, and any importer, may be himself liable, independent of any fault, for damages caused to consumers by defects resulting from design, manufacture, construction, assembly and erection, formulas and handling and making up, presentation or packing of their products, as well as for the insufficient or inadequate information on the use and hazards thereof.¹²⁴ However, said manufacturer, builder, producer or importer shall not be held liable upon proof that it did not place the product on the market; or that although it did place the product on the market such product has no defect; or that the consumer or a third party is solely at fault.¹²⁵

Likewise, the service supplier may be held liable for redress independent of fault for damages caused to consumers by defects relating to the rendering of service and for insufficient or inadequate information on the fruition and hazards thereof.¹²⁶ However he shall not be held liable upon proof of any defect in the service rendered or that the consumer or third party is solely at fault.¹²⁷

Furthermore, the inclusion of a clause preventing, exonerating or reducing the obligation to indemnify for damages effected is prohibited.¹²⁸ If there is more than one person responsible for the cause of the damage, they may be held jointly liable. However, if the damage is caused by a component or part incorporated in the product or service, the manufacturer, builder or importer along with the person who incorporated the component or part may also be held jointly liable.¹²⁹

¹²¹ Rep. Act No. 7394, § 97, par. 3

¹²² Rep. Act No. 7394, § 99, par. 2

¹²³ Rep. Act No. 7394, § 99, par. 3

¹²⁴ Rep. Act No. 7394, § 97, par. 1

¹²⁵ Rep. Act No. 7394, § 97, par. 4

¹²⁶ Rep. Act No. 7394, § 99, par. 1

¹²⁷ Rep. Act No. 7394, § 99, par. 4

¹²⁸ Rep. Act No. 7394, § 106

¹²⁹ *Id.*

Notice that although both the Civil Code and the Consumer Act revolve around the theory of strict liability or liability independent of fault and of contract, the latter has a broader scope with respect to both subject matter and persons liable. While the Civil Code is limited to foodstuffs, drinks, toilet articles and similar goods, under the new law, the purpose or use intended for the products controls. The new law even includes services which previously were neither contemplated under the Civil Code nor even under the Restatements in the United States. As to the persons liable, manufacturers and processors are not the only ones exposed to liability but may include intermediaries like importers. In order to understand the rationale behind the broader expansive scope of the Consumer Act, we must explore the legislative intent behind its formulation.

1. Legislative History

Representative Salvador Escudero III, in his sponsorship speech, characterized House Bill No. 33757 as being unlike other bills that affect only certain sectors of the society. The Consumer Act directly affects the lives of all 64 million Filipinos. He stressed that the economic hardships felt by the poor are complicated not only by the high prices of basic commodities but also by financial shortages. He disclosed that the upper-lower class and lower-lower class comprise of 7 percent of Metro Manila. Furthermore, He emphasized that what is more deplorable and painful than the high cost of commodities is the shortchanging of consumers in view of the absence of an integrated and workable law to protect them.

Thereafter, Rep. Escudero introduced the important features of this legislative measure, which mandates the following: the establishment of standards for consumer goods and services; proper accreditation of these consumer services and repair firms and proper disclosures in cases of consumer loans; minimum requirements for the labeling and packaging of consumer goods; testing of local and imported goods; a quick response mechanism for goods which pose immediate danger to the public; the creation of a coordinating body which can educate the public and formulate policies and guidelines regarding consumer goods and transactions, with representation from the government, business, industry and consumer sectors; and, the strengthening its implementation and the quasi-judicial administrative bodies presently involved in consumer protection.¹³⁰

¹³⁰ H. No. 33757, 9th Cong. Sponsorship speech of Representative Salvador Escudero III, May 16, 1991. Journal p. 291.

According to Representative Tanjuatco the Consumer Act is a substitute Bill consolidating various bills protecting the health, safety and rights of consumers. He stressed the need for enacting a "Consumer Act of the Philippines" integrating numerous laws dealing with the production, traffic, sale and credit transactions of consumer goods and services. Furthermore, he explained that various agencies are in charge of enforcing these laws and noted that despite these laws, there exists the sad plight of various consumers who end up disgusted with the inferior quality of products they buy. Moreover, he added that these consumers endure shoddy repair jobs and are deceived by the conditions found in fine print common in credit documents.

The helplessness of the consumers, Mr. Tanjuatco submits, lies in the fact that laws, rules, and regulations meant to protect them are either confusing or ineffective or both. In addition, he observed that there were too many laws which may apply to numerous combinations of consumer transactions. He underscored that ordinary consumers do not know their rights under the law and even if they do, would not care to deal with the inconvenience of sorting through the maze of consumer laws and regulations.

Thereafter, Mr. Tanjuatco emphasized the duty of the Legislative to safeguard the people's health, safety and rights and ease their daily burden. The Committee had consulted with the widest possible spectrum of consumers, business and industry sector representatives, as well as concerned government agencies. He reasoned that the intended measure should have general application to as many consumer goods and transactions as possible. However, he noted that the implementing agency should likewise be given flexibility with regard to these goods in order to be responsive to the fast pace of development in science and technology. Finally, the measure was intended to facilitate the continuing education of the people on free, intelligent and beneficial consumerism.¹³¹

2. Jurisprudence

The Supreme Court in the recent case *Air Philippines Corporation v. Pennswall, Inc.*¹³² had the occasion to rule on the meaning of "consumer

¹³¹ H. No. 33757, 9th Cong. Sponsorship speech of Representative Tanjuatco, May 16, 1991. Journal p. 291

¹³² *Air Philippines Corporation v. Pennswall, Inc.*, G.R. No. 172835, Dec. 13, 2007.

products” within the purview of the Consumer Act. The abovementioned case involved a complaint for a sum of money filed by the respondent Pennswell, Inc, a manufacturer and seller of industrial chemicals, solvents, and special lubricants due to the failure of Air Philippines Corporation to comply with its obligation under a contract of purchase. Petitioner therein contended that its refusal to pay was prompted by respondent’s misrepresentation that the items being sold by the latter belonged to a new line, when in fact they were identical to the products petitioner had previously purchased from Pennswell. Respondent therein merely altered the names and labels off the subject goods.

The Court ruled that the purchaser couldn’t rely on § 77¹³³ of the Consumer Act in order to compel the seller to reveal the chemical components of its products. The law mandating all consumer products domestically sold, whether manufactured locally or imported, to indicate their general make or active ingredients in their packaging labels, was inapplicable to the respondent-seller whose specialized lubricants -- namely, Contact Grease, Connector Grease, Thixohtropic Grease, Di-Electric Strength Protective Coating, Dry Lubricant and Anti-Seize Compound -- are not consumer products.

The Court expounded that “consumer products,” as defined in Article 4(q), refers to “goods, services and credits, debts or obligations which are primarily for personal, family, household or agricultural purposes, which shall include, but not be limited to, food, drugs, cosmetics, and devices.” Furthermore, it ruled that respondent’s products were not intended for personal, family, household or agricultural purposes. Rather, they were for *industrial use*, specifically for the use of aircraft propellers and engines.

This ruling therefore reinforces the shift in scope of Philippine products liability law. The emphasis is now on the purpose or intended use of the product or service, rather than the make of the product itself. Going back to our hypothetical example, can it then be argued that the Dell computer which Juan purchased online falls within the purview of the Consumer Act as a good or device for personal use?

¹³³ Minimum Labeling Requirements for Consumer Products.

C. THE E-COMMERCE ACT

Republic Act 8792¹³⁴, known otherwise as the Electronic Commerce Act, presents a caveat regarding the liability of persons along the distribution chain particularly in Internet transactions. In an Internet transaction such as in our hypothetical example, Juan the buyer seeks to hold Dell the manufacturer liable. Under the Consumer Act, assuming that the Dell laptop is purchased online and assuming jurisdiction is acquired over Dell a product liability case may prosper. However, the question remains: how can the state exercise jurisdiction over Dell? What if there are problems as to vesting jurisdiction over Dell? Can Juan for instance go after his Internet Service Provider (ISP)?¹³⁵

The law in this case exempts such service provider from liability if founded on the obligations of the parties under an electronic data message or document, on contract or law, a licensing or regulatory regime under written law, and the civil liability of any party to the extent that such liability forms the basis for injunctive relief against the service provider to take or refrain from action regarding access to a material or preservation of evidence of a violation of the law. This exemption from liability essentially deprives A of a cause of action against his ISP and would be limited to seek remedies for his damages against Dell or some importer with whom he can trace the distribution of the product he purchased.

D. PHILIPPINE PROCEDURAL AND CONFLICT OF LAW RULES

In examining Juan's situation, the following questions must be answered: how could the Philippine consumer obtain jurisdiction over the seller Dell, presumably a nonresident defendant, for purposes of filing a suit for damages? Assuming that jurisdiction over the seller is obtained, what is the applicable law that would govern the determination of the issues of the case?

At the outset, it is important to characterize the nature of a product liability suit. There must first be a determination whether the action is *in*

¹³⁴ Effective June 19, 2000.

¹³⁵ "service provider" refers to a provider of: I. Online services or network access or the operator of facilities therefore including entities offering the transmission, routing, or providing of connections for online communications, digital or otherwise, between or among points specified by a user, of electronic documents of the user's choosing; or II. The necessary technical means by which electronic documents of an originator may be stored and made accessible to designated or undesignated third party. (Rep. Act No. 8792, sec. 5(f)).

personam, *in rem*, or *quasi in rem* because the rules on acquisition of jurisdiction differ according to the nature of the action.

An action *in personam* is one made on the basis of personal liability. An action *in rem* meanwhile is an action against the thing itself instead of against the person.¹³⁶ An action *quasi in rem* is one wherein an individual is named as defendant and the purpose of the proceeding is to subject his interest therein to the obligation or lien burdening the property.¹³⁷

While actions *in personam* are directed against specific parties and seek personal judgments, actions *in rem* are directed against the thing or property or status of a person, seeking judgments binding against the whole world.¹³⁸ More explicitly, an "*action in personam*" is a personal action seeking redress against a particular person. Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof.¹³⁹ An online purchaser, who later seeks damages against his seller via an action based on product liability, is in effect seeking a personal judgment against the latter.

In actions *in personam*, jurisdiction over the person of the defendant is necessary for the court to validly try and decide the case. Jurisdiction over the person of a resident defendant who does not voluntarily appear in court may be acquired by personal service of summons.¹⁴⁰ If he cannot be personally served with summons within a reasonable time, substituted service may be resorted to by leaving copies of the summons at the defendant's dwelling house or residence with some person of suitable age and discretion residing therein, or by leaving the copies at the defendant's office or regular place of business with some competent person in charge thereof.¹⁴¹ If he is temporarily out of the country, any of the following modes of service may be resorted to: (1) substituted service set forth in Section 8;¹⁴² (2) personal service outside the country, with leave of court; (3) service by publication, also with leave of court;¹⁴³ or through (4) any other manner the court may deem sufficient.¹⁴⁴ Otherwise stated, service of summons upon the defendant shall be by personal service first and only

¹³⁶ *Dial Corp. v. Soriano*, 161 SCRA 737, 742 (1988), *citing Hernandez vs. Rural Bank of Lucena, Inc.*, 76 SCRA 85).

¹³⁷ *Brown v. Brown*, 3 SCRA 451, 456 (1961).

¹³⁸ 1 C.J.S., 1148

¹³⁹ R.S. Vasan (Ed.), *Latin Words and phrases for Lawyers*, *cited in Vivencio M. Ruiz, ET AL. v. Court Of Appeals*, et al, G.R. No. 116909, Feb. 25, 1999.

¹⁴⁰ RULES OF COURT, Rule 14, § 7.

¹⁴¹ RULES OF COURT, Rule 14, § 8.

¹⁴² *Montalban v. Maximo*, 22 SCRA 1070, 1074-1075 (1968).

¹⁴³ RULES OF COURT, Rule 14, § 17 in relation to § 18; *Montalban v. Maximo*, 22 SCRA 1070 (1968).

¹⁴⁴ *Id.*

when the defendant cannot be promptly served in person will substituted service be availed of.¹⁴⁵

However, in an action *in personam* against a non-resident defendant who refuses to voluntarily submit himself to the authority of the court, personal service of summons within the state is necessary to the acquisition of jurisdiction over his person.¹⁴⁶ This method of service is only possible if the defendant is physically present in the country. If he is not found therein, the court cannot acquire jurisdiction over his person and therefore cannot validly try and decide the case against him.

This is the problem Juan would face if he tries to sue Dell in a Philippine court, since Dell in our hypothetical scenario has no branch or resident agent in our jurisdiction. Otherwise, the alternative means of service would be available: leaving copies at the Dell's branch office or regular place of business with some competent person in charge thereof or with his resident agent

1. Definition of "doing business"

The root of Juan's problem in suing Dell for product liability is the latter's physical absence from the Philippines. However, Juan may allege that Dell's act of posting advertisement online, with the knowledge that Filipino consumers may have access to it, constitutes "doing business" under a long list of jurisprudence, thereby making itself amenable to the compulsory processes of our courts.

There is no general rule or governing principle which adequately defines what "doing" or "engaging in" or "transacting" business means. Each case must be judged in light of its own peculiar circumstances.¹⁴⁷

However, with respect to foreign corporations, "doing," "transacting," "engaging in," or "carrying on" business in the State means engaging in, carrying on or transacting business through agents in a continuous manner distinguished from transactions which are merely casual, sporadic, or occasional and isolated.¹⁴⁸

¹⁴⁵ Talsan Enterprises, Inc. v. Baliwag Transit, Inc., 310 SCRA 156, 162-163 (1999).

¹⁴⁶ Boudart v. Tait, 67 Phil. 170 (1939).¹⁹ SCRA 45 (1967).

¹⁴⁷ 36 Am. Jur. 2d, Foreign Corporations, Sec. 317, 312-313, *cited* in National Sugar Trading Corporation, et al. v. Court of Appeals, et al., G.R. No. 110910, Jul. 17, 1995.

¹⁴⁸ Columbia Pictures, Inc., et al v. Court of Appeals, G.R. No. 110318, Aug. 28, 1996.

The Corporation Code does not itself define or categorize which acts constitute doing or transacting business in the Philippines. Jurisprudence has, instead filled this gap. In *Mentholatum Co. v. Mangaliman*¹⁴⁹, the Supreme Court had the occasion to determine whether a foreign corporation is "doing business" in the Philippines, to wit:

...The true test, however, seems to be whether the foreign corporation is continuing the body or substance of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another...The term *implies a continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of, the purpose and object of its organization...*¹⁵⁰

This traditional case law definition has been adopted with certain qualifications in various legislative enactments.

For instance, Republic Act No. 5455¹⁵¹ provides:

...and the phrase "doing business" shall include soliciting orders, purchases, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totaling one hundred eighty days or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in-progressive prosecution of, commercial gain or of the purpose and object of the business organization.

Article 65 of Presidential Decree No. 1789, defines "doing business" to include soliciting orders, purchases, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totaling one hundred eighty days or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines, and

¹⁴⁹ 72 Phil 524, 528-529 (1941).

¹⁵⁰ *The Mentholatum Co. v. Mangaliman*, 72 Phil. 524, 528-529 (1941).

¹⁵¹ Effective September 30, 1968.

any other act or acts that imply a continuity of commercial dealings or arrangements and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization.

The implementing rules and regulations of the aforementioned decree reiterates the acts constituting "doing business" as abovementioned and even includes a catch-all definition:

'Doing Business' shall be any act or combination of acts enumerated in Article 65 of the Code. In particular 'doing business' includes:

...

(10) Any other act or acts which imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, or in the progressive prosecution of, commercial gain or of the purpose and object of the business organization.

Republic Act No. 7042¹⁵² embodies the same all-encompassing definition in this wise:

...the phrase "doing business" shall include soliciting orders, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totaling one hundred eight(y) (180) days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization...¹⁵³

The true test however, seems to be whether the foreign corporation is continuing the body or substance of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another.¹⁵⁴ It bears noting however, that the issue on the suability of

¹⁵² "An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines, and for Other Purposes;" approved on Jun. 13, 1991.

¹⁵³ Rep. Act No. 7042, § 3 (d).

¹⁵⁴ *Columbia Pictures, inc., et al. v. Court of Appeals*, G.R. No. 110318, Aug. 28, 1996.

a foreign corporation whether or not doing business in the Philippines has already been adequately resolved in the case of *Wang Laboratories, Inc. v. Mendoza*.¹⁵⁵

The Court therein categorically ruled that while a foreign corporation may not be doing business in the Philippines, it may still be sued for acts done against persons in the Philippines. Thus, the Court made the following pronouncement:

Indeed if a foreign corporation, not engaged in business in the Philippines, is not barred from seeking redress from courts in the Philippines, *a fortiori*, that same corporation cannot claim exemption from being sued in Philippine courts for acts done against a person or persons in the Philippines.¹⁵⁶

The doctrine laid in the *Wang* case serves as a potential deterrent against e-commerce merchants, as they are now susceptible to legal action in Philippine courts.

2. Choice-of-law tendencies

The decision of the Supreme Court in *Saudi Arabian Airlines v. Court of Appeals*¹⁵⁷ creates the impression that Philippine jurisdiction has adapted to modern choice-of-law theories. Although the *Saudi Arabian* case revolves around a cause of action under Article 19 and 21 of the Civil Code, the principles enunciated therein are *pro tanto* relevant to the situation earlier contemplated as strict liability is in essence a tort action.

The case at bar involved a female Filipino flight attendant employed by Saudi Arabian Airlines (Saudia), a resident foreign corporation. According to the allegations in her original complaint some of her colleagues who were Saudi nationals attempted to rape her. Instead of assisting her, Saudia allegedly tricked her into signing a document which subjected her to imprisonment under Saudi law. Upon filing a complaint against her employer, the latter moved to dismiss the case on the ground that the Regional Trial Court of Quezon City had no jurisdiction and that Philippine law was not applicable.

¹⁵⁵ *Wang Laboratories, Inc. vs. Hon. Rafael T. Mendoza, et al.*, G.R. No. 72147, Dec. 1, 1987.

¹⁵⁶ *Citing Facilities Management Corporation v. De la Osa*, 89 SCRA 131 (1979).

¹⁵⁷ 297 SCRA 469 (1998).

In upholding the trial court's jurisdiction, the High Tribunal held that the most significant relationship theory was applicable. Furthermore, in determining which state has the most significant relationship, the Court enumerated the following contacts which requires consideration: a) the place where the injury occurred; b) the place where the conduct causing the injury occurred; c) the domicile, residence, nationality, place of incorporation and place of business of the parties and d) the place where the relationship, if any, between the parties is centered.

The Court took the following contacts into consideration: 1) the overall injury having occurred here; 2) the fact that the plaintiff was a Filipino; 3) the defendant was a resident foreign corporation engaged in business here; and 4) that the relationship between the parties was "centered" here. Applying the significance relationship theory, it ruled that the Philippines had the most significant contacts and as such Philippine law applied.

Interestingly, the Court also somewhat applied the interest-analysis approach in determining the choice of law:

Prescinding from the premise that the Philippines is the situs of the tort complained of and the place 'having the most interest in the problem,' we find, by way of recapitulation, that the Philippine law on tort liability should have paramount application to and control in the resolution of the legal issues arising out of this case.¹⁵⁸

While some confusion may have been raised with respect to the court's hybrid application of two distinct modern choice of law theories i.e., Significant Relationship and Interest Analysis, what the case clearly demonstrated is the court's preference for upholding Philippine Jurisdiction. Reference to state interest in the *Saudi Arabian* case bodes well for the Filipino tort victim, who may very well be an Internet product liability victim, as enactment of the Consumer Act provides strong protection to the Philippine consumer. Juan would then have no problem asking the trial court for an application of Philippine product liability law even if the defendant is a multinational based abroad.

It can be gleaned from the discussions above that Philippine jurisdiction has indeed developed a regime of product liability law which is generally both consumer-friendly and consumer-protective. The broadened

¹⁵⁸ *Id.*, at 494

applicability of strict liability covering both tangible and intangible products has allowed Philippine courts to reasonably stretch the law in order to protect the greater demands of justice, equity and fairness. This development has provided the law with greater flexibility which clearly surpasses the limitations inherent in U.S. product liability.

In *Saudi Arabian* the Court's inclination to uphold local jurisdiction and to apply forum has clearly evoked its strong interest in protecting Filipino plaintiffs. Finally, the Court's pronouncement in the *Wang* case that a foreign entity may be sued in the Philippines despite not physically doing business therein has given product liability plaintiffs therein more latitude to pursue foreign defendants. It is this author's contention that abovementioned developments have made the application of product liability laws on Internet transactions possible.

V. UNITED STATES PRODUCT LIABILITY LAW: ITS CURRENT STATE

The Internet has been referred to as a many-splendored thing: a tool for shopping, a venue for commerce, a borderless paradise. The United States Internet scene is a living embodiment of these descriptions, as people across that vast nation have increasingly engaged in both business and personal transactions online. Considering that interstate transactions figure mostly over the Internet, U.S. jurisprudence is replete with cases tackling legal issues such as tort and product liability and personal jurisdiction.

As the authors herein seek to examine Philippine product liability law and ultimately suggest certain changes to improve its adaptability to Internet transactions, a review of related U.S. jurisprudence is necessary. Hence, we first take a look at both the substantive and remedial aspects of current American product liability law.

A. THE THIRD RESTATEMENT – MIRRORING STATE PRODUCT LIABILITY LAW

Restatements of the Law published by the American Law Institute try to capture the current state of product liability law prevailing in most states of the American Union. These Restatements while not binding,¹⁵⁹ have become highly persuasive in the formation of jurisprudence among states as well as the codification of their local statutes. As such,

160 See Michael Sandmire, *The Restatements of Product Liability: Which One Should Oregon Follow?*, Ater Wynne LLP, at 3 (2003).

Restatements are considered authoritative or persuasive with respect to the contemporary state of products liability law.

As stated earlier, § 402(A) was revised in the Third Restatement of the Law: Products Liability in 1998. § 402(A) is now scattered over four chapters consisting of a total of twenty-one sections. The trends and shifts in product liability jurisprudence across many states with respect to actions grounded on design and warning defects have spawned this new revision.

The general rule on liability for defective products is stated as follows in § 1:

Liability of Commercial Seller or Distributor for Harm Caused by Defective Products. One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

A major modification of § 402(A) refers to the limitation of strict liability in tort to design defects and failure to warn defects. The difference in treatment as can be seen by a mere perusal of the definitions of the types of defects.

§ 2 of the Third Restatement defines the kinds of defects recognized under product liability suits:

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

The principle of strict liability in tort with respect to manufacturing defects is evident in the text of the provision above. A manufacturing defect occurs when there is a departure from the design intended by the manufacturer regardless of the exercise of possible care. It is the manufacturer's norm,¹⁶⁰ design¹⁶¹ or intended result¹⁶² which is the benchmark or standard which determines the existence of a defect. This criterion has been upheld¹⁶³ in at least seven other states. Considering that many states have adopted § 402 (A) of the Second Restatement which in essence does not differ from subsection (a) as quoted above, there is reasonable ground to conclude that strict liability for manufacturing defects is the prevailing product liability rule across the United States.¹⁶⁴

In contrast to subsection (a), subsections (b) and (c) on design defects and inadequate instructions require a specific degree of negligence on the part of the defendant for product liability to apply: that any foreseeable harm could have been reduced or avoided by a) a reasonable alternative design which the defendant omitted to make or b) a reasonable instruction by the seller or predecessor in the distribution chain. This requirement places design defects and inadequate warnings beyond the scope of strict liability.

The terms "could have been avoided or reduced" and "omission" connote that failure on the part of the defendant to take into account possible solutions which with due care and caution it could have implemented. The subsections therefore employ a negligence theory for product liability as exercise of due care by the defendant in incorporating reasonable designs or warnings is implied therein. "Reasonableness" is one of the hallmarks of negligence actions.¹⁶⁵

In both design defects and inadequate instructions, the risk-utility balancing test is applied where the degree of risk or safety in the design is weighed against the cost and utility of the latter and the precautions to be undertaken,¹⁶⁶ rather than a strict liability test as used in manufacturing

¹⁶⁰ *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 881 (Alaska) (1979).

¹⁶¹ *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 673 (Ga.) (1994).

¹⁶² *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 454 (Cal.) (1978).

¹⁶³ *Singleton v. International Harvester Co.*, 685 F.2d 112, 115 (4th Cir.) (1981) (applying Maryland law); *Back v. Wickes Corp.*, 378 N.E.2d 964, 970 (Mass.) (1978); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 182 (Mich.) (1984); *Rix v. General Motors Corp.*, 723 P.2d 195, 200 (Mont.) (1986); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 207 (N.Y.) (1983).

¹⁶⁴ See Ruff & Jurado, *supra* note 27.

¹⁶⁵ Comment d, RESTATEMENT THIRD, § 2.

¹⁶⁶ David Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 754-755.

defects or personal expectations test which was previously applied by states following the Second Restatement on design defects and failure-to-warn cases. Most of the states have adopted this test for product liability actions based on design defects, although their approaches have been varied.¹⁶⁷

More importantly, the Third Restatement affirms the prevailing view that the term products in product liability covers only tangible personal property distributed commercially for use and consumption, unless such other items are sufficiently analogous to the use or distribution of tangible personal property.¹⁶⁸ Services, and human body and tissue are excluded from the term “products.”¹⁶⁹

Comment F of § 402(A) of the Second Restatement, regarding the applicability to manufacturers, wholesalers and retailers was likewise adopted in the Third Restatement.¹⁷⁰ Finally, the rules on compensable harm (to the person, to the property, commercial if coupled with harm to person or property) as previously featured in the Second Restatement have been included as part of § 21 of the Third Restatement.

In short, prevailing American law on products liability follows strict liability theory for manufacturing defects of products but more of a negligence approach for design defects and inadequate warnings. Furthermore, products are limited to tangible personal property and exclude intangibles such as services and specific property like human tissue. Lastly, the principles of non-privity and on compensable harm were retained like that of the original formulation of strict liability and product liability originated in *Greenman*.

Both federal and state courts have upheld the tangibility standard in Internet-related product liability actions. In *Joe James v. Meow Media*,¹⁷¹ the United States Court of Appeals Sixth Circuit did not consider Internet sites

¹⁶⁷ Alabama, Delaware, DC, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New York, Pennsylvania, Texas, Utah, West Virginia, Oregon, Colorado, Georgia, Minnesota, Montana, North Carolina, Ohio follow the requirement of risk-utility theory with a requirement of proving a reasonable alternative design. Those following a risk-utility theory without need of explicitly proving a reasonable alternative design are Arizona, Florida, Kansas, Kentucky, Maine, Missouri, New Hampshire, New Mexico, South Carolina and Virginia. Connecticut, Iowa and Washington utilize a consumer expectations test which is based ultimately on risk-utility analysis. The rest of the states seem to continue using the consumer expectations or strict liability approach as embodied in the Second Restatement. (Reporters Note to Comment D, RESTATEMENT THIRD, § 2)

¹⁶⁸ RESTATEMENT THIRD, at § 19.

¹⁶⁹ *Id.*

¹⁷⁰ RESTATEMENT THIRD, § 20.

¹⁷¹ 300 F.3d 683 (2002).

as products for purposes of product liability suits, applying Kentucky law. Products, according to Judge Boggs, must be sufficiently tangible and that Internet transmissions do not fall within this restriction. Their communicative content, whether they be in words or pictures, have to be separated from the tangible containers of such communicative ideas.¹⁷² The aforementioned case serves as an affirmation of the Third Restatement's formulation of what a product is, despite Kentucky's adoption of the Second Restatement. As explained above, the nature of the "product" had remained the same from the Second to the Third Restatement.

Meanwhile, the United States District Court in Connecticut had the occasion to discuss the applicability of strict products liability to commercial Intellectual property cases (regarding misinformation resulting to injury). In the case of *Andre Wilson v. Midway Games, Inc.*,¹⁷³ the District Court opined that most courts in the Union are highly reluctant to apply strict product liability on such cases. A factor which was cited was the intangible nature of the product subject of the action, citing § 19 of the Third Restatement. The court concluded that an interactive video game was not a product for purposes of product liability because of the absence of tangibility.

Referring to Juan's situation, it appears that a laptop purchased through the manufacturer's website would still entitle him to an action based on strict liability if the laptop departs from the intended design (manufacturing defect). However he must prove that there was an omission on the part of the manufacturer the absence of which could have led to the avoidance of the damage sustained as a result of the defective design.

In our second hypothetical however, Juan would appear to have no cause of action against the company maintaining the online technical support under American products liability law as it is highly probable that the subject matter causing the damage may be classified as a service.

Having discussed the substantive area of prevailing products liability law in the United States in the context of the Internet, we must now examine how such courts have treated interstate Internet commerce vis-à-vis suability and jurisdiction.

¹⁷² *Id.* at 701.

¹⁷³ *Andre Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (2002).

B. THE ZIPPO "SLIDING SCALE" RULE IN INTERNET CASES

The law of personal jurisdiction based on Internet contacts, or "Internet-jurisdiction", has developed rapidly in the last decade. Personal jurisdiction during the pre-Internet era was addressed in Part IV, *supra*. The Internet-jurisdiction field, in contrast, involves jurisdictional issues arising out of Internet contacts of any and all kinds. Obviously, this is a very broad category. Within it are many sub-categories such as: defamation cases, copyright-infringement cases, trademark dilution, domain name disputes, and this paper's main concern, business activities.

It bears noting that leading Internet-jurisdiction cases have attempted to solve the problems presented in all these different categories under a single umbrella of Internet- jurisdiction. The *Zippo* "sliding scale" is the prevailing framework in the entire Internet-jurisdiction field, even in cases of trademark infringement.¹⁷⁴

The "sliding scale" analytical framework, introduced in the groundbreaking case *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*¹⁷⁵, provides that personal jurisdiction which can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. Under the *Zippo* analysis, a given website occupies a position on a spectrum ranging from "interactive" to "passive," and may be classified into business transaction websites, passive websites, and interactive websites.

At one end of the spectrum are situations where a defendant clearly does business over the Internet. This is illustrated by "interactive" websites, wherein contracts are completed online with residents of a foreign jurisdiction, and involves the knowing and repeated transmission of computer files over the Internet. As such, the defendant receives profit directly from web-related activity. Such websites have been purposefully directing their business activities to the forum state. Therefore, courts in the forum state can exert specific jurisdiction.

At the opposite end of the spectrum are purely "passive" websites in which defendants has simply post information regarding their company or activities on an Internet website accessible to users in foreign jurisdictions.

¹⁷⁴ Bicknese, *supra* note 5, at 830-832

¹⁷⁵ 952 F. Supp. 1119 (1997).

Generally, these are held to be insufficiently directed at the forum state to result in the exertion of specific jurisdiction.

In between lies interactive Web sites where users can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and the commercial nature of the exchange of information that occurs on the Web site.¹⁷⁶

The case of *CompuServe, Inc. v. Patterson*¹⁷⁷ illustrates a situation where a defendant clearly does business over the Internet. Patterson, a Texas resident, entered into a contract to distribute shareware¹⁷⁸ through CompuServe's Internet server located in Ohio. From Texas, Patterson electronically uploaded thirty-two master software files to CompuServe's server in Ohio via the Internet. One of Patterson's software products was designed to help people navigate the Internet. When CompuServe later began to market a product that Patterson believed to be similar to his own, he threatened to sue. CompuServe brought an action in the Southern District of Ohio, seeking a declaratory judgment. The District Court granted Patterson's motion to dismiss for lack of personal jurisdiction which prompted CompuServe to appeal. The Sixth Circuit reversed the lower court's ruling, reasoning that Patterson had purposefully directed his business activities toward Ohio by knowingly entering into a contract with an Ohio resident and then "deliberately and repeatedly" transmitted files to Ohio.¹⁷⁹

On the opposite end of the spectrum is the case of *Bensusan Restaurant Corp. v. King*¹⁸⁰, where the Court held that a passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The operator of a New York jazz club in said case sued the operator of a Missouri jazz club for trademark infringement. The Internet Web site contained general information about the defendant's club, such as a calendar of events and ticket information. However, the site was not interactive. If a user wanted to go to the club, he would have to call or visit a ticket outlet and then pick up tickets at the club. The court refused to exercise jurisdiction based on the

¹⁷⁶ *Zippo Mfg. Co.* 952 F. Supp. 1124 (1997).

¹⁷⁷ 89 F.3d 1257 (1996).

¹⁷⁸ "Shareware" is software which a user is permitted to download and use for a trial period, after which the user is asked to pay a fee to the author for continued use, *cited in* *CompuServe, Inc.*, 89 F.3d 1257, 1260 (1996).

¹⁷⁹ *CompuServe, Inc.*, 89 F.3d 1257, 1264-66 (1996).

¹⁸⁰ 937 F.Supp. 295 (1997).

Web site alone, reasoning that it did not purposefully avail of that jurisdiction's laws. The court distinguished the case from *CompuServe, supra*, where the user had "reached out" from Texas to Ohio and 'originated and maintained' contacts with Ohio."¹⁸¹

In contrast, an interesting example of a middle ground situation could be found in *Maritz, Inc. v. Cybergold, Inc.*¹⁸² The defendant had put up a Web site as a promotion for its upcoming Internet service. The service consisted of assigning users an electronic mailbox and then forwarding advertisements for products and services that matched the users' interests to those electronic mailboxes. The defendant planned to charge advertisers and provide users with incentives to view the advertisements. Although the service was not yet operational, users were encouraged to add their address to a mailing list to receive updates about the service.

The court rejected the defendant's contention that it operated a "passive Web site." The court reasoned that the defendant's conduct amounted to "active solicitations" and "promotional activities" designed to "develop a mailing list of Internet users" and that the defendant "indiscriminately responded to every user" who accessed the site.¹⁸³

In *Zippo*, the Court held that Zippo Dot Com's online computer news service purposefully availed itself of doing business in Pennsylvania by operating an Internet site to advertise and solicit customers for its service and by entering into contracts with approximately 3000 individuals and seven Internet access providers in said state. The site, being for the purpose of providing those individuals with its service, makes it subject to personal jurisdiction there. Moreover, it was found that the service's contacts with the state residents were not "fortuitous," and an allegedly small quantity of contacts was not dispositive.¹⁸⁴

¹⁸¹ *Bensusan Restaurant Corp.*, 937 F.Supp. 295, 301 (1997).

¹⁸² 947 F.Supp. 1328 (1996).

¹⁸³ *Maritz, Inc.*, 947 F.Supp. 1328, 1333-34 (1996).

¹⁸⁴ *Zippo Mfg. Co.*, 952 F. Supp. 1124, 1126-1127 (1997).

1. Certain State Rulings

a. Louisiana, on Sale of a Recreational Vehicle

The very recent¹⁸⁵ case of *Crummey v. Morgan*¹⁸⁶, involved Crumme, a Louisiana resident, who was the buyer of a recreational vehicle who learned of its availability by viewing it on eBay, an Internet auction site. He brought action against the sellers for damages, alleging that the vehicle was defective, after it quit running about 40 miles into his journey back to Louisiana from Texas where he picked it up. The sellers filed a “declinatory exception” raising the objection of lack of jurisdiction over the person. The Court of Appeals denied the motion to dismiss, on the ground that the nonresident sellers had minimum contacts with Louisiana.

The court held that the contract to sell the vehicle was entered into through an Internet auction website, which greatly expanded the seller’s market. They accepted the original down payment through the Internet, and provided the buyer with a telephone number which allowed him to engage in additional conversations with the sellers while he was in Louisiana. Using the *Zippo* scale, the court ruled that the defendants’ use of eBay to sell the RV does not involve a merely passive website.

b. Michigan, on sale of paintings

In this recent case¹⁸⁷, a Michigan federal court held that it had personal jurisdiction over a New York eBay seller accused of breach of contract, fraud, and misrepresentation, since the defendant’s auction listing stated he would ship paintings anywhere in the United States. The court noted that the listing also provided customers with a toll-free telephone number and an e-mail address to allow them to contact the New York eBay seller. Since the defendant did not limit buyers from Michigan from participating in his auction and displayed a willingness to communicate with buyers from any state, the court concluded that the defendant had purposefully availed himself of the benefits of conducting business in Michigan. The number of e-mails and phone calls between the parties, the intentional and misleading nature of the communications between the parties, and the defendant’s acceptance of payment from Michigan were

¹⁸⁵ La.App. 1 Cir. (2007).

¹⁸⁶ 965 So.2d 497.

¹⁸⁷ *Dedvukaj v. Maloney*, 447 F.Supp.2d 813, (E.D.Mich.) (2006)..

other factors that influenced the court's finding of "purposeful availment" on the part of the New York eBay seller.

c. Oklahoma, on sale of computers

In *Lively v. IJAM, Inc.*¹⁸⁸, Lively, an Oklahoma resident, purchased a laptop computer after receiving contact information on the Internet. He brought action against the Georgia computer manufacturer and Georgia seller after the defendants allegedly failed to return the computer he bought after he sent it in for repairs. The District Court denied defendants' motion to dismiss on the ground of lack of *in personam* jurisdiction. The Court of Civil Appeals reversed and remanded for further proceedings, holding that there was insufficient evidence to establish that minimum contacts existed to support personal jurisdiction over defendants.

According to the court, the only alleged contact that defendants had with Oklahoma was the sale of the computer to Lively. Lively found IJAM's website and subsequently called and made a purchase, claiming that IJAM advertised its business online. However, Lively did not specifically indicate how he found IJAM's website or the nature of IJAM's advertising. More importantly, neither the seller nor the manufacturer maintained any offices in Oklahoma. They didn't even have any employees or agents in the state. The question facing the court was whether single transactions over the Internet gave rise to personal jurisdiction.

The Court maintained that if the ability of an out-of-state resident to access a website was enough to establish jurisdiction, then the same could be established in any jurisdiction. Furthermore, it held that a more reasonable approach would be to analyze a foreign business' activities which are directed at the state of Oklahoma. There was insufficient evidence on record to determine the nature and quality of defendants' contacts with Oklahoma to establish whether the purported activity constitutes the minimum contacts required by Oklahoma's long-arm statute and the Due Process Clause.

Since *Lively* did not even purchase the computer through the website, there is no indication on record that even one Oklahoma resident ordered via the Internet from defendants' site. The fact that defendants had a web site that anyone in Oklahoma could access, in and of itself is not

¹⁸⁸ 114 P.3d 487 (2005).

enough to permit the court to exercise personal jurisdiction over defendants.¹⁸⁹

d. Georgia, on sale of an automobile

In *Aero Toy Store, LLC v. Grieves*,¹⁹⁰ Grieves, a Georgia resident, sued Aero Toy Store, a Florida limited liability company, for fraud and breach of contract arising from Grieves' purchase of an automobile from Aero over the Internet. While conducting an Internet search of the eBay Motors auction website, Grieves identified a 2001 BMW car being offered for sale. The website contained a lengthy description of the BMW and its features. Furthermore, it provided an "Ask seller a question" button that, when activated, identified a seller's agent. Grieves began making e-mail inquiries to the agent concerning the car, who responded through e-mail. The seller moved to dismiss the action for lack of personal jurisdiction and improper venue. The State Court however, denied the motion, which the Court of Appeals affirmed on the ground that the seller had sufficient minimum contacts with Georgia to warrant exercise of personal jurisdiction under a long arm statute.

The Court found that the defendant Aero Toy operated an interactive website through which it has reached out to, and done business with, persons in Georgia. The car was shipped into Georgia by the nonresident seller and not by a carrier acting as the resident buyer's agent. Although Aero does not have officers, employees, offices, or business affiliates in Georgia, and although the revenue it derives from goods sold there may not be substantial in relation to its overall revenue, it does regularly solicit business in Georgia through the Internet.

Applying a more expansive interpretation of the "transacting any business" provision of their Long-Arm Statute, the Court held that the revenue defendant derived from shipping cars to Grieves and other persons in Georgia is substantial enough to establish sufficient minimum contacts with the state of Georgia in a case involving the exercise of specific jurisdiction.¹⁹¹

¹⁸⁹ Lively, 114 P.3d 487, 497-498 (2005).

¹⁹⁰ 279 Ga.App. 515 (2006).

¹⁹¹ Aero Toy Store, 279 Ga.App. 515, 523-524 (2006).

e. Oregon, on sale of compact discs

The case of *Millennium Enterprises, Inc. v. Millennium Music, LP*¹⁹² involved a South Carolina company, which maintained a website that allowed Oregon customers to purchase compact discs. The District Court found that the court did not have personal jurisdiction over said defendant, pursuant to the following reasoning:

While the Internet allows businesses to engage in international communication and commerce, those businesses, -whether they be one-person operations or multi-national corporations- remain entitled to protection of the Due Process Clause, which mandates that potential defendants be able to structure their primary conduct with some assurance as to where the conduct will and will not render them liable to suit.¹⁹³

The court went on to explain that, unlike other forms of media, Internet advertisements and solicitations are not targeted to a specific geographic location. Instead, “advertising on the Internet targets no one in particular and everyone in any given geographic location.”¹⁹⁴ The court found that the capability to sell compact discs on the defendant's website could arguably constitute ‘doing business’ on the Internet”; however, the designation of ‘doing business’ as set out in cases like *Zippo*, was “intended for those businesses which conduct a significant portion of their business through ongoing Internet relationships; for example, by entering ‘into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet.’” The court concluded that the defendant did not repeatedly exchange files and, therefore, was not “doing business” over the Internet.

f. Texas, on trademark infringement

In another case, an eyewear seller located in Texas sued a Minnesota eyewear seller, and its New York parent, alleging that the Minnesota seller's use of the Texas seller's trademark online constituted trademark infringement. Defendants moved to dismiss for lack of personal jurisdiction.¹⁹⁵ American Eyewear, Inc., a Texas corporation, owns the stylized trademark Peeper's, which is registered under federal trademark law

¹⁹² 33 F.Supp.2d 907 (1999).

¹⁹³ *Id.*, at 914.

¹⁹⁴ *Id.*, at 920.

¹⁹⁵ *American Eyewear, Inc. v. Peeper's Sunglasses and Accessories, Inc.*, 106 F.Supp.2d 895 (2000).

as well as Texas trademark and service mark law. Defendant Peeper's Sunglasses and Accessories, Inc., with principal place of business in Duluth, Minnesota, owns the Internet domain name "peepers.com" and sells sunglasses and related accessories via this web.

The District Court held that the court had specific personal jurisdiction over the Minnesota seller, based on its maintenance of an Interactive website allowing for direct purchases of eyewear products by Texas Internet users. The Court found that while the defendants had none of the following: (1) offices, sales agents, or other representatives who live or work in Texas; (2) a registered agent, owns or leases real or personal property, or has bank accounts or telephone listings in Texas; (3) has not marketed its optical products in, directly advertised in, or sent sales representative to Texas; or (4) is licensed to do business or has paid taxes in Texas, and its *sole source of contact* with Texas residents is via the "peepers.com" web site, the fact that the defendant receives and processes orders for eyewear over an interactive website available to Texas Internet users, even though the computers hosting the website were not located in the state, enables the Court to exert specific personal jurisdiction the non-resident defendant.

The court, in reaching its decision, stressed that "anyone with Internet access can at anytime connect with the "peepers.com" site and make purchases. Like many other e-commerce sites on the Internet, the "peepers.com" site allows customers to log on and browse interactively until they find the type of eyewear they wish to purchase. Customers complete order forms that specify the shipping address and credit card to be billed. The form is electronically submitted to the defendant over the Internet, and the product is packaged and shipped to the customer. An e-mail message that confirms the purchase is also sent to the customer.

The defendant regularly sells products to Texas customers in this manner. According to records, sales to Texas residents occurred almost daily and typically involved multiple transactions each day.¹⁹⁶ Thus, the Court held that the web site is the type that falls in the middle of the continuum as per the *Zippo* 'sliding scale', which ruled that interactive web sites--in which users can exchange information with host computer and communicate with person or company that runs web site--are in the middle category.

¹⁹⁶ American Eyewear, Inc. v. Peeper's Sunglasses and Accessories, Inc., 106 F.Supp.2d 895 (2000).

g. California, on patent infringement

In another case¹⁹⁷, a California federal court exercised specific personal jurisdiction over a Connecticut defendant in a declaratory judgment action that sought to invalidate the defendant's patent for a self-adhesive compact disc labeling system. The court found that although defendant's web site "merely provided information about the company, customer service, and technical support, a substantial portion of the site was dedicated to facilitating on-line purchases of defendant's products."¹⁹⁸ The court concluded that the site functioned as a "virtual store" where "consumers could view descriptions, prices, and pictures of various products ...and could add items to their 'virtual shopping cart' and 'check out' by providing credit card and shipping information."

Furthermore the court held that "by maintaining a commercial website through which it markets and sells its goods, NeatO has reached out beyond its home state of Connecticut to avail itself of the benefits of the California forum.

Although the actual number of sales to California citizens may be small, the critical element in determining whether there was a purposeful availment of the forum state is the quality, not merely the quantity, of the contacts. By advertising and offering its products for sale via the Internet, NeatO has placed its products into the stream of commerce with the intention of selling to online consumers which includes California citizens. By engaging in Internet commerce with California citizens, NeatO has established the minimum contacts necessary for jurisdiction to be exercised over it."¹⁹⁹

The above-cited cases show the pervading influence that the *Zippo* scale has had in Internet-jurisdiction issues. What remains to be seen is how it would fare if such scale were to be adopted in the Philippines.

2. Current Choice of Law Regime Among States

As adverted to in Part III of this paper, choice of law theories have been classified into both traditional and modern approaches. In the United States, different jurisdictions approach actions based on product liability in

¹⁹⁷ *Stomp v. NeatO, LLC*, 61 F.Supp.2d 1074 (C.D.Cal.) (1999).

¹⁹⁸ *Id.*, at 1078

¹⁹⁹ *Stomp v. NeatO, LLC*, 61 F.Supp.2d 1074 (C.D.Cal.), 1078 (1999).

different ways. In Indiana for instance, the *lex loci delicti* approach is followed. However, in New Jersey the most significant relationship theory is the governing doctrine.²⁰⁰ In California on the other hand, an interest-analysis approach is followed as the said state has admitted a strong interest in the protection of its consumers.²⁰¹

It can be reasonably inferred that there is no one prevailing theory which covers a majority of the jurisdictions within the United States. One thing certain, however, is that it is possible to apply foreign law to the cause of action of a local product liability plaintiff, which traditionally does not bode well for a plaintiff who wants to pursue a foreigner defendant.

VI. COMPARISON/CONTRAST OF THE TWO JURISDICTIONS

Point by point, an examination of the relative strengths and weaknesses of the Philippine and U.S. legal systems on certain categories is necessary in order to arrive at well-reasoned and calculated proposals for reform to Philippine product liability law. In line with the substantive-procedural approach previously adopted, the comparison and contrast of the two legal systems shall be undertaken.

A. COVERAGE OF SUBJECT MATTER AND THE THEORIES OF PRODUCT LIABILITY

Placing Philippine product liability law and United States product liability law side by side, one can easily observe that Philippine law, particularly the Consumer Act, covers a broader range of products subject to product liability under strict liability. § 4(q) of the said Act includes “services” in the term “consumer products” as enumerated by the Philippine Supreme Court in the *Air Philippines* case.

§ 99 of the same Act provides for liability, independent of fault, for damages due to the services rendered as well as the defendant’s failure to provide consumers with adequate or sufficient information on possible hazards of the service. The aforementioned provision also covers other intangible items such as credits, debts or obligations.

²⁰⁰ Ena, Michael. *The tale of American choice of law principles has become the story of a thousand and one inconsistent tort cases*, FORDHAM U. L. J. (2007).

²⁰¹ *Kasel v. Remington Arms Co., Inc.*, 24 Cal. App. 3d 711, 733 (2d Dist.) (1972).

The coverage of services, credits and other intangibles under the purview of the Consumer Act goes without saying that the traditional scope of products liability, referring to tangible products are also covered, as evidenced by the term goods and services. As earlier explained in Part V, the Consumer Act serves to enhance the rights of consumers in the realm of product liability suits by broadening the range of possible causes of action and subject matter in response to the limited latitude given to consumers should they wish to avail of their rights under Article 2187 of the Civil Code.

Under U.S. product liability law, the term “products” is limited to tangible personal property. § 19 of the Third Restatement affirms this constraint on subject matter. In Internet transactions, under the *Joe James* and *Midway Media* cases, federal and state courts alike refuse to apply product liability to intangibles such as Internet media and other such analogous transmissions. In other words, tangibility is the test, under American law, for determining the applicability of product liability principles to a particular subject which may cause damage to another.

The scope of strict liability under the Philippine system is further underscored by its applicability to design, manufacturing, construction, assembly, erection and information-related defects.²⁰² In stark contrast, the trend in American law as evidenced by the Third Restatement is to limit strict liability to manufacturing defects only. Other types of defects in American law are subject to causes of action which lean towards negligence rather than the more consumer-friendly strict liability in tort.

Hence, it can be argued that Philippine product liability law has become textually more progressive compared to U.S. Law. It is more consumer-friendly. The disparity becomes even more evident when it is applied to Internet commerce.

Returning to our first hypothetical scenario, where Juan buys a laptop through the Dell website any damages he may have sustained from defects, whether due to manufacturing of the hard drive or the design or even assembly, the laptop can be recovered easily under Philippine law as negligence on Dell's part need not be proven. Dell would be liable independent of any fault which it may commit.

²⁰² Rep. Act No. 7394, § 97.

However under American law, only an injury resulting from a manufacturing defect of the laptop would spare Juan of having to prove fault on Dell's part. The requirement of a reasonable alternative design and an omission to include such design by Dell stands in the way of an easier cause of action for Juan under American law.

The greater disparity lies in the second hypothetical situation. Damages which Juan may have sustained after following erroneous and defective technical support services would be actionable under Philippine Consumer Act as the tangibility of the subject causing injury is not a requisite for an action to prosper. Services such as these are in fact expressly within the purview of the law. However, where American law is applied, the intangible nature of the technical support services Juan had availed of, prevents the latter from filing a product liability claim against Dell. Juan may have to resort to an action based on negligence. The implication thus is that as Internet-transmitted services become more prevalent, the consumers are less protected under American law.

At the very least substantively, Philippine law protects the consumer at a greater degree by giving him quicker and less burdensome remedies against product and even service defects as compared to the predominant law in the United States on product liability. Overall therefore, it can be said that from a substantive law viewpoint Philippine law is in fact broader and more adept to the Internet consumer as evidenced by the foregoing reasons.

B. DEVELOPMENT OF CONFLICT OF LAW RULES CONCERNING INTERNET TRANSACTIONS

1. Approach in jurisdiction

The popularity of the World Wide Web provides courts the opportunity to examine their traditional reaches based on a corporation's Internet-based contacts. To date, United States case law in this area is limited. A review of the cases involving the World Wide Web and personal jurisdiction reveals the courts that have had conflicting results in this area.²⁰³ However, perusal of the most recent cases on the matter show that the "sliding scale rule" first laid down in *Zippo* is still the predominant mode of analysis utilized by both state and federal courts.

²⁰³ G. M. Kalow, *From the Internet to Court: Exercising Jurisdiction Over World Wide Web Communications*, 65 *FORDHAM L.R.* 2241 (1997).

Since a website can be accessed by anyone with the proper hardware, websites have a ubiquitous electronic presence, viewable anywhere and at any time. Internet forums such as eBay literally open the seller's market to the world. Sellers know that. Thus, they avail themselves of the benefits of this greatly expanded marketplace. It should, in the context of these commercial relationships, be no great surprise to sellers-and certainly no unfair burden to them-if, when a commercial transaction formed over and through the Internet does not meet a buyer's expectations, they might be called upon to respond in a legal forum in the buyer's home state. Sellers cannot expect to avail themselves of the benefits of the Internet-created world market that they purposefully exploit and profit from without accepting the concomitant legal responsibilities that such an expanded market may bring with it.²⁰⁴

In the Philippines, there is a dearth of cases specifically dealing with Internet transactions much less product liability sustained over Internet transactions. As such the courts will merely resort to categorizing the website operator as either 'doing business' or not. The website would most probably fall under the following catch-all provision: "any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization."

In one perspective, the Filipino complainant would be placed in a more convenient position, since he could invoke (and our courts would have no reason not to adhere) the ruling in *Facilities Management Corporation v. De la Osa*²⁰⁵ that a corporation cannot claim exemption from being sued in Philippine courts for acts done against a person or persons in the Philippines, despite a finding that it is not doing business in the Philippines, since it is not barred from seeking redress from our courts in the same situation. If the *Zippo* scale is followed, suability against Dell would not be automatic as there are certain levels of website activity which would vest jurisdiction and otherwise.

Hence Juan may have an easier task in obtaining jurisdiction over Dell by invoking the abovementioned Philippine rulings regardless of

²⁰⁴Crummey v. Morgan, 965 So.2d 497.

²⁰⁵ 89 SCRA 131 (1979).

whether Dell is “doing business.” However, if the Zippo scale is applied Juan will have to prove that Dell is an interactive website, a burden which is obviously tougher to hurdle. Juan would have to show that Dell is in some way soliciting business in its site and not merely advertising in a passive manner.

2. Approach in choice of law

For reasons of practicality and convenience, a Philippine court is predisposed to apply its own law (the forum law) in the event a Filipino plaintiff seeks redress in our courts, for reasons of practicality and convenience. Rarely do we see our courts applying Delaware Law, in determining the extent of a website operator’s liability for a defective product merely because it is either the operator’s state of incorporation or the place where it conducts its principal business. Taking into consideration the pronouncement in *Saudi Arabian*, Philippine courts would more likely assert a “compelling state interest” since the damage was sustained by a national or domiciliary, and any similar future circumstances would have to be decided in the same way.

This choice of forum law would find support in the legislative intent behind the Consumer Act: stringent consumer protection. ²⁰⁶ Part VI.B (ii) shows that at different times, state jurisdictions have deferred application of the forum law even if the plaintiff is one of their subjects.

It would appear that the Philippine approach has an advantage over the choice-of-law theories employed in U.S. state jurisdictions. Where the objective is to reform Philippine product liability law and protect the Philippine consumer, U.S. state laws barely offer the requisite latitude to adequately meet them. Juan should therefore rely instead on Philippine law to come to his aid.

Prescinding from the question earlier adverted to: whether Philippine Internet consumers can effectively seek remedy for product liability under the existing laws, it appears that the remedies under prevailing conflicts-of-law doctrines are even easier to obtain as compared to United States law. For reasons stated in the Recommendations however, the invocation of liberal conflicts-of-law rules as shown above may ultimately prove to be detrimental to the Filipino consumer. To repeat, the overall and not merely nominal or superficial benefits to the Filipino Internet consumer must be the goal.

²⁰⁶ See *supra* Part V. B (i).

VII. RECOMMENDATIONS

After having compared and scrutinized Philippine product liability law vis-à-vis its American counterpart, the question to be asked is what do we do to improve our law? As emphasized in the beginning, the ultimate aim of this paper is to suggest the most effective product liability remedy that a Filipino consumer over the Internet may avail, giving him the maximum overall benefit.

However, utilizing the convenience of the plaintiff as the sole standard in gauging the appropriate remedy would be injudicious, in light of the exponential expansion of Internet commerce. The rapid increase in Website transactions is due to its 1) cost-efficient and speedy nature, 2) effective reach through fast and efficient communications support, and 3) popularity over conventional trade methodologies and business models. All these benefits would inure to Filipinos *only* if website providers feel secure in the conduct of their business and know that they are subject to Philippine jurisdiction with utmost fairness and reasonability defined by the clearest of statutory parameters.

Although it may be said that from a substantive-law standpoint Philippine product liability law has greatly improved with the enactment of the Consumer Act, other improvements may still be made especially on its procedural aspects. Taking into account the analysis conducted throughout this paper regarding the nature of the Internet and its effect on product liability, the following recommendations are respectfully submitted.

A. RETENTION OF SUBSTANTIVE CONSUMER ACT PROVISIONS

First, it is suggested that the breadth of the coverage of the subject matter of product liability under the Consumer Act as well as the adoption of strict liability for any type of defect should be retained. This is so because as seen from the analysis in Part VII Philippine consumers are more protected with the wider scope of remedies in contrast to American law.

B. INTERNET-GEARED AMENDMENTS

At the outset, the Consumer Act should include a definition of the terms "Internet" and "Website". This may be included under Article 4,

subparagraph (by) and (bz). The present definitions are already set out in both American and Philippine jurisprudence²⁰⁷

For good measure, the definition of “consumer goods or services” should include a reference to Internet-purchased goods as covered thereby. Such an addition would reflect the Philippines’ faithfulness to the strong consumer-protective policy embodied in the Act as the country becomes more involved in electronic and Internet commerce.

C. CODIFICATION OF THE “SLIDING SCALE” ANALYSIS

Whether or not a party’s web site can be a basis for personal jurisdiction is a new but burgeoning area of law.²⁰⁸ The modern development of the Internet represents a technological change that calls for the modification of the law of jurisdiction over the person, in particular. The previous jurisdictional standard, the purposeful availment test, cannot effectively deal with the dramatic socio-economic implications of the Internet’s development, since in many situations web-site operators may have no idea from where their site is being accessed. It is thus humbly recommended that the ‘sliding scale’ analysis under *Zippo* be adopted in our statute despite the criticisms it has faced.²⁰⁹

In Chapter III on Consumer Complaints of the Consumer Act, Article 162 thereof, provides for the jurisdiction of consumer arbitration officers, to wit:

Article 162. Arbitration Officers; Jurisdiction.— The consumer arbitration officers shall have original and exclusive jurisdiction to mediate,

²⁰⁷ *Pribhdas J. Mirpuri vs. Court of Appeals*, see *supra* note 92.

²⁰⁸ *Origin Instruments Corp. v. Adaptive Computer Sys., Inc.*, N.D.Tex. (Feb. 3, 1999).

²⁰⁹ Professor Allan R. Stein has criticized the *Zippo* “sliding scale” as an “egregious failure of legal imagination” because it reverts back to evaluating jurisdiction in terms of physical presence rather than from a conceptual standpoint. A.R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U.L.REV. 411, 430 (2004); Regardless of whether the *Zippo* “sliding scale” analysis is employed or not, it should not be relied upon *exclusively*, to determine the appropriateness of personal jurisdiction over the nonresident defendant.” Welch, J., dissenting, *Crummey v. Morgan*, 965 So.2d 497. Courts should use *Zippo* within its limitations... to determine specific jurisdiction issues that involve a nonresident’s Internet contacts with the forum state to help determine the sufficiency of the defendant’s contacts. It should not be the sole inquiry in a personal jurisdiction analysis; and it should not be relied upon so heavily that traditional principles of personal jurisdiction become faint. Furthermore, the interactivity of the middle spectrum of *Zippo* should be uniformly defined as to allow courts to render consistent decisions. *Zippo* and other mechanical tests should be used for a standardized set of personal jurisdiction disputes such that each test fits the aspects of the lawsuit. see also J.K. Coston, *supra* note 110, at 271-75 (2007); The result of extending *Zippo* has transformed it into an “all-purpose test for Internet jurisdiction issues, which is too simplistic since the traditional model of personal jurisdiction encompasses a variety of approaches based on the substantive and factual aspects of the lawsuit to determine purposeful availment. D. T. Yokoyama, *supra* note 97, at 1167 (2005).

conciliate, hear and adjudicate all consumer complaints, Provided, however, That this does not preclude the parties from pursuing the proper judicial action.

It is proposed that an amendment be made, as follows:

Article 162-A. Consumer Complaints on Internet Transactions; Jurisdiction Over Internet Defendants. - The consumer arbitration officers shall have original and exclusive jurisdiction over a nonresident, natural or juridical, that enters into a contract directly or by an agent, with a Filipino resident over the Internet, for consumer products and services as defined in this Act, provided that such contract involves the knowing and repeated transmission of computer files over the Internet. Provided further, that mere posting of information for advertising shall not be deemed as entering into a contract. Provided finally, that interactive Web sites where a Filipino user can exchange information with the host computer, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

This amendment serves as a recognition that subjecting any and all kinds of Internet websites to Philippine jurisdiction, without distinction as to the character of such site, would serve as a deterrent to websites who would rather not make available their products and services to potential Filipino buyers than expose themselves to the possibility of suit in an inconvenient forum by merely advertising or posting information. Such probability of suit will be high if we apply the current Philippine doctrine of suability as stated in *Wang* (see Part V, *supra*).

Not only will such standard be a deterrent to Internet sellers, it is likewise repugnant to the traditional notion of fair play, the cornerstone of due process, for being too loose a standard. The *Zippo* scale ensures that a website owner could reasonably expect being subjected to a foreign jurisdiction by serving as a parameter to evaluate the nature and quality of commercial activity conducted over the Internet. In contrast, the *Wang* standard sanctions the exercise of personal jurisdiction despite the absence of any significant activity or even mere commercial presence in the Philippines, justified only by the broad concept of equity which would otherwise not prevail over the clear letter of the law.

D. AVOIDANCE OF PHILIPPINE JURISDICTION

The people most concerned with the subject of jurisdiction, i.e. e-commerce merchants, entrepreneurs, and businessmen, face the daunting

challenge of having to wade through legal jargon to decipher their legal obligations when setting up their businesses on the Internet. In order for them to know and predict, to some extent, the scope and chances of jurisdiction over their transactions, and to enable them to tailor their way of doing business to "control" the limits of his potential liability--to avoid, be prepared for, or manage and better confine it, a checklist for prevention has been suggested, to wit:

- (1) Define the market and minimize potential grounds for dispute.
- (2) Forum selection clauses as the contractual term of trading and jurisdiction.
- (3) Choice of law clauses or substantive law application.
- (4) Disclaimer and liability notices.
- (5) Alternative dispute resolution.²¹⁰

Forum selection clauses may be undertaken by incorporating into the web site purchase order form a "clickwrap agreement"²¹¹ that contains a choice of venue clause. A disclaimer should specifically state that it would not sell products in the Philippines²¹². In fine, a nonresident entity operating a website always has the option to reduce, if not completely avoid, subjecting itself to personal jurisdiction in the Philippines. Avoidance can be maintained by simply disabling the site so that it would not accept orders from, or allow shipments to, Philippine residents.²¹³

VIII. CONCLUSION

The exchange of information and transaction of business via the Internet may be swift and economical; but it has its flaws. Dissatisfied consumers look to the courts for relief; however, relief that may be granted is dependent upon the court's ability to assert personal jurisdiction over the

²¹⁰ W.B. Chik, *U.S. Jurisdictional Rules of Adjudication over Business Conducted via the internet—Guidelines and a Checklist for the E-commerce Merchant*, TUL. J. INT'L & COMP. L., Spring 2002.

²¹¹ A "clickwrap agreement" allows a consumer to assent to the terms of a contract by selecting an "accept" button on the web site. If the consumer does not accept the terms of the agreement, the web site will not complete the transaction. *As cited in American Eyewear*, 106 F.Supp.2d 895 (2000).

²¹² Instead of advertising "we will ship product anywhere.", the web site operators can make it clear that 1) it will not take orders nor enter into contracts, and 2) it will not conduct on-line transactions and that consumers who wished to purchase its products were required to print out order form and either fax, telephone, or send form by traditional mail to its offices.

²¹³ There has been a proposed modification to the interactive Web site in the gray area on the *Zippo* continuum. The proposed Web-contacts test recommend that if a site does not expressly aim or target the plaintiff, it will not subject the defendant to personal jurisdiction in another state's court. Under *Zippo*, this gray area on the continuum is troublesome because courts have few guidelines for assessing the quality and nature of these contacts. However, if the interactive Web site were viewed in conjunction with a requirement that the defendant expressly aim or target the plaintiff in the state, courts would be given firmer guidance. Amanda Reid, *Operationalizing The Law Of Jurisdiction: Where In The World Can I Be Sued For Operating A World Wide Web Page?* Communication Law and Policy, Spring 2003.

manufacturer, seller, or producer. The court's exercise of personal jurisdiction over nonresidents whose contacts with the forum state are Internet-based has become a very complicated process in the United States. To ensure uniformity, simplicity and convenience of decisions, the determination of jurisdiction over entities who are conducting business via the Internet should be measured by a clear-cut statutory standard. Since e-commerce businessmen are reaping the benefit of conducting business anywhere in such a borderless world, they must, in the same vein, be made amenable to a court's jurisdiction, to provide recompense for transactions that proved to be detrimental to the buyer.

While the Internet has opened new frontiers of information, communication, and commerce, issues involving Internet jurisdiction must be resolved in ways that are faithful to due process. While it is indubitable that protection of the Filipino consumer is, as it must be, at the forefront of our laws, a chilling effect on e-commerce should be avoided. In order to avoid wary sellers from being haled into Philippine courts by a Filipino buyer, he should refrain from selling goods on eBay and other similar Internet websites, should their merchandise later be judged by the buyer as unsatisfactory or otherwise not in conformity to the advertised online representations. Thus, Juan must be able to receive either a replacement laptop or the return of the purchase price, but at the same time Dell must be also assured that it would only be subject to Philippine jurisdiction – and potential liability – upon evaluation of the nature of its website based on reasonable statutory parameters.