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COMMENTS

TORTIOUS ACT AS A BASIS FOR JURISDICTION IN PRODUCTS LIABILITY CASES

I. INTRODUCTION

Until recently it was very difficult for a plaintiff to bring an out-of-state manufacturer into New York to defend injury claims occasioned by his faulty products. The defendant manufacturer often found himself in the pleasant position of being able to claim that although he had distributed his product into the area, he had not "done business" in the forum state. Hence, he was not subject to the jurisdiction of New York courts. Complaints were regularly dismissed on this basis.

The underlying inequity behind such dismissals is that modern marketing methods often involve numerous, scattered, independent assemblers and wholesaler and, frequently, distribution on a nationwide scale without regard for state boundaries. Yet, courts have construed these same boundaries to be barriers when any attempt has been made to acquire jurisdiction over the foreign manufacturers. Thus, they have been able to send their products into the stream of interstate commerce while remaining suit-proof beyond New York's borders.

Suppose, for example, a Michigan corporation manufactures a safety device for an electric scaffold and then sells this component to a scaffold assembler in New Jersey. The New Jersey company sells the scaffolds to maintenance concerns to be used in washing the "glass walls" of New York City skyscrapers. While the scaffold is being used, the safety device fails, killing a workman, and suit is brought in New York against the Michigan corporation. Is it unfair to bring the Michigan corporation to trial in the area into which its product was distributed and caused injury?

Prior to the enactment of Section 302(a)(2) of the New York Civil Practice Law and Rules (hereinafter referred to as CPLR) the complaint against the

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1. The plaintiff's burden has been considerably eased with the enactment of the N.Y. Civ. Prac. Law & R. 302(a)(2) on September 1, 1963.
2. Under the "Tauza" rule a foreign corporation had to be "doing business" within the state before the New York courts could subject it to personal jurisdiction of the state. Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).
3. Numerous examples can be found in 19 Clark's Digest Annotator § 34:31.49.
4. "Of the hundred major metropolitan markets in the United States, eighteen are inherently interstate in character because of population in two or more states. At least thirty-one more of these markets are located within thirty miles of state boundaries so that news media which service them are interstate in character. Of the remaining fifty-one major markets, only a few are located where there is little possibility of an advertisement placed with media in the market being distributed to a neighboring state." Note, 33 Ind. L.J. 455, 457 (1963) (Footnotes omitted.)
6. N.Y. Civ. Prac. Law & R. 302 reads as follows:
Michigan corporation would have been dismissed for lack of jurisdiction. Since enactment, however, the appellate division has unanimously affirmed the denial of a motion to dismiss on precisely these facts, and, thus, has recognized the increased latitude granted to the courts of this state in acquiring jurisdiction over foreign manufacturers who commit "tortious acts" within the state.

Why is it so important that the trial be held in the state in which the tortious act occurred? The plaintiff received the goods in the forum state and generally has no interests beyond the forum. To expect a New York resident, for example, to travel to Michigan to bring suit involves transportation expenses for himself and his witnesses which might well deprive him of the fruits of his suit. Further, the forum state has a substantial interest in the outcome of the trial, especially in actions involving personal injury or property damage, where a losing plaintiff might thereafter be unable to support himself and become a ward of the state. On the other hand, since the manufacturer, albeit indirectly, channels goods into the forum state, he should be prepared to defend suits in the areas into which his goods are directed.

II. SUPREME COURT HISTORY

The nineteenth century concept of jurisdiction, both as to individuals and corporations, was that a state's power over a person existed only so long as he was within the state's borders. A state could seize only those physically

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Personal jurisdiction by acts of non-domiciliaries
(a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:
1. transacts any business within the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. owns, uses or possesses any real property situated within the state.
(b) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

Notice requirements have also been liberalized. N.Y. Civ. Prac. Law & R. 313.

7. As to what constitutes a "tortious act," see text accompanying notes 153-66 infra.

8. In breach of warranty actions, witnesses would be located in the state where the accident occurred, since due care is not an issue. In a negligence action, witnesses would be both at the situs where the accident occurred and at the situs of manufacture. See Atkins v. Jones & Loughlin Steel Corp., 258 Minn. 571, 104 N.W.2d 888 (1960).

9. Moreover, where the forum state has an interest in the case, as, for example, when the injury occurs in that state, the forum state's law will generally apply. See Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9, 12-14, 66-71 (1958); Restatement, Conflict of Laws § 377 (1934); Restatement (Second), Conflict of Laws § 84 (Tent. Draft No. 3, 1956); Restatement (Second), Conflict of Laws § 379 (Tent. Draft No. 9, 1964).

10. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839) (dictum); see McDonald v. Mabee, 243 U.S. 90 (1917). Common law procedure lies behind this restriction. At common law, subsequent to the issuance of a proper writ, service of a summons upon the defendant was required. Failure to comply with the summons resulted in an attach-
present within its territory,¹¹ and jurisdiction went hand in hand with the state's ability to seize.¹²

A. Jurisdiction Over Individuals

Until the early 1900's, when the mobility of the population increased through widespread use of the automobile, the problem of gaining jurisdiction over individuals was not pressing enough to require the reshaping of traditional jurisdictional concepts.¹³ A nonresident could enter, commit an act within a state, leave never to return, and be completely immune from suit in that state.¹⁴ Even if an agent were found within the state, jurisdiction could not be gained over his principal.¹⁵

B. Jurisdiction Over Corporations

Even during the nineteenth century, corporations had begun taking on a national character with greater mobility and far more widespread effects than individuals. For example, a railroad incorporated in Missouri might have tracks throughout the country. Accidents could occur in any number of states. Yet, jurisdiction over the corporation was traditionally limited to the state of its incorporation.¹⁶ States, therefore, began to require as a condition of doing any

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¹³ This fact is evidenced by the steadily increasing tempo of articles after 1905 dealing with service on nonresidents, many of which are cited in Barry, supra note 10, at 175 n.a. The first nonresident motorist statute was passed by New Jersey, N.J. Laws 1903, at 613, and construed in Kane v. State, 51 N.J.L. 594, 20 Atl. 453 (Cl. Err. & App. 1911), aff'd, 242 U.S. 160 (1916). This statute authorized New Jersey to compel nonresident motorists to sign certificates appointing the New Jersey Secretary of State as his agent for service of process as a condition to using New Jersey highways. A later New Jersey Statute, N.J. Laws 1924, ch. 232, was one of the first based on implied consent to appointment. See Scott, Jurisdiction over Nonresident Motorists, 39 Harv. L. Rev. 563 (1926).
¹⁴ Knowles v. The Gaslight & Coke Co., 86 U.S. (19 Wall.) 58 (1873). For an extensive listing of articles discussing the development of this point of law up to 1927, see Barry, supra note 10, at 175 n.a.
business within their borders that a corporation appoint a registered agent within the state and consent to be sued on any cause of action, whether related to its business transactions there or not,\textsuperscript{17} even if the cause of action did not arise within the state.\textsuperscript{18} Noncompliance with the condition of appointment was held to mean that the corporation was subject to suit on an implied consent theory.\textsuperscript{19}

This solution brought its own problems. For one, since a corporation supposedly did not exist beyond the borders of the state of its incorporation, allowing it to sue or be sued in a foreign state was an anomaly.\textsuperscript{20} For another, a corporation refusing such express consent would be in a far better position than one complying with the various state statutes. That is, the "outlaw" corporation could be sued only on causes of action related to its business dealings within the state, whereas a foreign corporation which expressly consented was also liable for unrelated causes of action.\textsuperscript{21}

To cure this defect the "presence" theory was developed. It sustained jurisdiction over corporations for acts outside the forum state,\textsuperscript{22} even where service was made upon an agent other than the one designated by statute.\textsuperscript{23}

17. N.Y. Sess. Law 1855, ch. 279, § 1, is an example of this requirement. An even earlier illustration can be found in Md. Laws 1834, ch. 89. This method was approved in 1855 in Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855).
19. Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855). Mr. Justice Curts reasoned that a state had control over activities within its boundaries. If a foreign corporation (in this case an insurance company) wished to send agents into the state for the purpose of transacting business there, it could be subjected to control by that state even in the absence of express consent. Id. at 408; see Simon v. Southern Ry., 236 U.S. 115 (1915); St. Clair v. Cox, 106 U.S. (16 Otto) 350, 356 (1882). A corporation which failed to appoint an agent but nevertheless carried on business within the state was deemed to have impliedly designated a public official as its representative for service on a cause of action related to the transaction of business within the state. For example, N.Y. Civl Practice Act Annotated § 229 (Gilbert-Bliss 1942) designated New York's Secretary of State as the proper official for such service.
22. The necessity of an appearance by the defendant or of personal service within the jurisdiction in order to give the forum in personam jurisdiction was illustrated in Pennoyer v. Neff, 95 U.S. 714, 741 (1877); see St. Clair v. Cox, 106 U.S. (16 Otto) 350 (1882).
In essence, presence meant that a corporation had to be transacting business in a systematic manner within the forum state.24

C. Single Act as a Basis for Jurisdiction

Thus, by 1927, through fictions of implied consent and presence, corporations were subject to suit in a foreign state provided they had "transacted business" within the state. Corporations were not, without express consent, subject to suit in a foreign state on the basis of a single act or isolated occurrences.25

Furthermore, individuals were not considered to fall within the implied consent test before Hess v. Pawloski.26 Nor were they subject to jurisdiction on the basis of a single act. Nevertheless, the Supreme Court in Hess held that in at least one situation jurisdiction could be based on the commission of a single act by a nonresident within the state.

1. Hess v. Pawloski

Massachusetts had a nonresident motor vehicle statute27 which authorized substituted service or process upon a nonresident involved in a collision in Massachusetts. A public official was designated to receive process. The plaintiff also was required to mail service and a copy of the process to the defendant.28 The Supreme Court held:

24. See note 22 supra; International Harvester Co. v. Kentucky, supra note 23; Kurland, supra note 12, at 583-88. The presence test was more limited than the consent theory in that a corporation which left the state prior to suit was not held to be amenable to the jurisdiction of the state for acts done before departure. Chipman, Ltd. v. Thomas B. Jeffery Co., 251 U.S. 373 (1920).


26. 274 U.S. 352 (1927). In Flexner v. Farson, 274 U.S. 289 (1919), the Supreme Court held that implied consent could not be stretched to include individuals transacting business within a state, but it was practically overruled by the Court, relying on Hess, in Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 628 (1935). The basis for the Court's reasoning before Hess was that even though a state could exclude a foreign corporation from its territorial boundaries, a state could not exclude an individual because individuals were deemed protected by the privileges and immunities clause of the fourteenth amendment. The privileges and immunities clause guaranteed only to natural persons, not to corporations, the right to transact business in any state. The doctrine of implied consent was based on a state's ability to exclude corporations. Since this ability to exclude did not extend to individuals, neither did the doctrine.


28. Two cases paved the way for Hess v. Pawloski, 274 U.S. 352 (1927). In Hendrick v. Maryland, 235 U.S. 610 (1915), the Supreme Court held that a state had the power to regulate the use of its highways even as to nonresidents. In Kane v. New Jersey, 242 U.S. 160 (1916), the Court upheld a New Jersey statute authorizing actual appointment of an official (as distinguished from Hess which authorized implied appointment) before the nonresident's use of the New Jersey highways.
In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. . . . Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved.29

Mr. Justice Butler's language in Hess, couched as it was in nineteenth century terms such as "implied consent," was not nearly as significant as the doors it opened. His decision allowed expansion of the jurisdiction of Massachusetts to include a nonresident who had committed but one act within the state—an automobile collision. The Court relied on the state's interest in that one act.30

The Hess decision was the result of many states' attempts to control automobile travel within their borders,31 and followed the suggestions of an ever-increasing number of writers that nonresident motorist statutes were a logical way to cope with the problems caused by nonresidents over whom jurisdiction could not otherwise be effectively obtained.32

Hess, the first case which allowed jurisdiction on the basis of a single act, was the result of technological change. With additional changes came an increasingly complex society and there inevitably followed other statutes to cope with the changes.33

2. International Shoe Co. v. Washington

The case which clearly spelled out the rationale upon which single act jurisdiction should rest was International Shoe Co. v. Washington.34 The
International Shoe Company was not doing business in the State of Washington in the traditional sense of the term. Yet, its contacts were considered substantial. Mr. Justice Stone, writing for the Court, reassessed the value of dealing with fictions where the real test was reasonableness.

Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant’s person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him... But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’... Whether due process is satisfied must depend... upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.

Hence, a flexible standard, taking into account the nature of the activity, whether the suit arose from the activity, whether the activity was frequent or isolated, and whether the state had a need to exercise jurisdiction was formulated.

The state’s interest can be discerned from the existence of a statute covering the subject matter. For example, in *Mullane v. Central Hanover Bank & Trust Co.*, a New York statute which empowered New York courts to entertain a corporation actually sends an agent into a jurisdiction to transact business and that agent commits a tortious act there, jurisdiction could be grounded on either the transaction of business section, subdivision (1), or the tortious act section, subdivision (2). As a practical matter, the transaction of business section would be more feasible since the law is more clearly defined in this area. However, if a tortious act can be clearly shown from the activities of the nonresident (which activities may or may not constitute a transaction of business), it might well be more practical to move under the tortious act section, thus alleviating the evidentiary problem of proving a transaction of business and also gaining the advantage of the wider latitude of section 302(a)(2).

35. These contacts, as found by the Court, were: (a) there were thirteen salesmen physically present within Washington who were paid commissions based on their volume of sales within the state; (b) such commissions for each year were in excess of §31,600; (c) the salesmen periodically rented office space for the purpose of displaying their goods; and (d) the salesmen solicited business within the forum state. 326 U.S. at 313-14; see Reese & Galston, “Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction,” 44 Iowa L. Rev. 249 (1959).

36. See note 10 supra and accompanying text.

37. 326 U.S. at 316.

38. Id. at 319.


40. 326 U.S. at 319.

41. Id. at 320.


43. Ibid.
suit for accounting by the trustee of a trust established under New York law, against nonresident beneficiaries, was said to be constitutional. The statute permitted the acquisition of jurisdiction over the beneficiaries based on service outside the state. The Supreme Court felt that the state's interest in settling the affairs of its trusts was pressing enough to allow New York to gain what could amount to in personam jurisdiction over nonresidents in order to adjudicate matters concerning common trusts in the state.14

Where a Virginia Blue Sky Law46 subjected any insurance company failing to comply with its provisions of filing to suit and to a cease and desist order in Virginia courts, the Supreme Court held in Travelers Health Ass'n v. Virginia,46 that although the acts of petitioner were outside the state, Virginia had the power to protect its citizens from the consequences of such acts. Although the contacts in this case were quite substantial in that 800 policyholders lived in Virginia, the essential element in this decision, as in Mullane, was Virginia's interest in protecting its citizens.

III. THE SINGLE ACT STATUTE

Statutes using the language "tortious act" exist in seven states47 besides New York, and analogous statutes, basing jurisdiction on a single tort (e.g., tort in whole or in part) exist in several others.48

44. While the Supreme Court reversed on the ground that it would be unconstitutional to serve by publication where the addresses of the beneficiaries were known, 339 U.S. at 318-19, Mr. Justice Jackson stated, for the Court, that service outside the state by mail was constitutional. Also, service by publication was held constitutional where the addresses of those to be served were not known. Id. at 317.


In some states where no "single act" statutes exist, other statutes such as substituted-service acts and so-called "doing business" statutes, have sometimes been interpreted to take advantage of the International Shoe minimum contacts test. E.g., California, Cal. Civ. Proc. Code § 1018; Gordon Armstrong Co. v. Superior Court, 160 Cal. App. 2d 211, 325 P.2d 21 (1958); Eclipse Fuel Eng'r Co. v. Superior Court, 148 Cal. App. 2d 736, 307
A. Early Single Act Statutes

1. Generally

Maryland, Vermont, and Illinois were among the first states to have their legislatures enact, and their courts construe, broad single act statutes. An excellent example of the attitude of the lower courts in those states after 1945 is *Johns v. Bay State Abrasive Prods. Co.* In that case a federal district court was faced with a negligence suit against two out-of-state manufacturers neither of which was found to have “done business” in the traditional sense of the term. Maryland had a 1937 single act statute, apparently the first of its kind in the country. Judge Chesnut decided that one of the defendant corporations, which had sent into the state an agent who actually contracted with plaintiff’s employer and solicited the sale of machinery, part of which was the defective grinding wheel in question, had committed an act under the Maryland statute which subjected it to suit in Maryland. The cause of action was deemed to have arisen from the corporation’s business dealings within Maryland, but the main question was whether application of the statute would be a denial of due process. The court held that, based on the convenience and sufficient contacts tests laid down in *International Shoe*, this application of the statute would not violate the fourteenth amendment.

My conclusion of law is that these circumstances make it just and not unreasonable to require the foreign corporation to defend the suit here in the absence of further facts which would indicate the great relative inconvenience to the defendant.

Similarly, Vermont had a statute, passed in 1947, which provided that if a foreign corporation committed a tort in Vermont, it would be subject to suit in the state by service upon the Secretary of State. In 1951, in *Smyth v. Twin State Improvement Corp.*, a foreign corporation which had negligently reroofed a house claimed the statute was in violation of the fourteenth amendment. The Supreme Court of Vermont held that since *International Shoe*,

...
one act was sufficient to subject a foreign corporation to the jurisdiction of Vermont under its statute, provided the nature and quality of the act was such that it was reasonable to subject the corporation to suit there.

Justice Blackmer, writing for a unanimous court, recognized that the Supreme Court's criteria were general, at best.

We are of the opinion that the United States Supreme Court has left undecided whether isolated tortious activity could result in a proper subjection of a foreign corporation to suit in the forum when the cause of action arose out of that activity; no generally applicable standards can be ascertained from the decisions beyond the statements in the International Shoe case . . . .

Using those same statements, and finding that a contract had been made within the state and that a foreign corporation's agents had gone into Maryland, a majority of the Maryland Court of Appeals in *Compania de Astral, S.A. v. Boston Metals Co.* held that whether there was a contract or a tort, Maryland's statute would apply and the exercise of jurisdiction would not be unconstitutional.

Mr. Justice Black, writing for the Supreme Court, substantiated this view in *Watson v. Employers Liab. Assur. Corp.*, and gave persuasive reasons for the existence of a statute specifically covering the acquisition of jurisdiction over defendants potentially liable to injured persons.

Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. . . . Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages. Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases. . . . In this case efforts to serve the Gillette Company were answered by a motion to dismiss on the ground that Gillette had no Louisiana agent on whom process could be served. If this motion is granted, Mrs. Watson, but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and her claim is for injuries from a product bought and used there. What has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there. In view of that interest, the direct action provisions here challenged do not violate due process.

The Joint Committee Comments following the Illinois single act statute

59. Id. at 573, 80 A.2d at 666.
62. The majority was apparently correct. This case was cited with approval in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 n.2 (1957).
64. Id. at 72-73.
cite both Smyth v. Twin State Improvement Corp.\textsuperscript{67} and Compania de Astral, S.A. v. Boston Metals Co.\textsuperscript{68} The Illinois historical and practice notes\textsuperscript{53} emphasize that this is a new area and that "while the Court's language is admittedly confined to bodily injury actions, its philosophy\textsuperscript{70}—that a state may provide a means by which its citizens may bring the non-resident transgressor to book—is applicable to all tort actions.\textsuperscript{71}

This reasoning seems justified under the Watson case, and has been borne out by later Supreme Court and state court decisions. Thus, the simple words "the commission of a tortious act within this state" were designed to give Illinois the same type of protection over such areas as products liability that the nonresident motor vehicle statute had given a number of states, thirty years before, in the automobile field.\textsuperscript{72}

2. New York

Attempts were made toward a broad expansion of New York's jurisdictional power in 1944, and again in 1945, but the 1944 bill was withdrawn to study criticisms\textsuperscript{73} and the 1945 bill was not approved by the Governor.\textsuperscript{74} Their purpose was to confer jurisdiction over corporations which committed acts, not amounting to transaction of business, from which a cause of action arose.\textsuperscript{75}

In 1945, spurred by federal law,\textsuperscript{76} Section 59(a) of New York Insurance Law was enacted\textsuperscript{77} to enable New York to gain jurisdiction over an insurance company that merely solicits in this state. New York's arsenal of single act statutes was thus broadened from specific laws on motor vehicles,\textsuperscript{78} airplanes,\textsuperscript{79} boats,\textsuperscript{80}

\begin{itemize}
\item 67. 116 Vt. 569, 30 A.2d 664 (1951).
\item 69. Jenner & Tone, in Second Preliminary Report 471.
\item 72. A full discussion of the need for legislation such as the Illinois "single act" statute can be found in Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).
\item 73. N.Y. Leg. Doc. No. 65L (1944).
\item 74. N.Y. Leg. Doc. No. 65B (1945). This proposal, as well as N.Y. Leg. Doc. No. 65L (1944), sought to expand jurisdiction solely over foreign corporations and was the predecessor of the 1959 New York Law Revision Commission Report by Professor Reeder reiterating the need for an expanded "single act" statute. 1959 N.Y. Law Rev. Comm'n Rep. 69 (discussing proposed amendment to N.Y. Civil Practice Act § 229-a (Gilbert-Bliss 1942)).
\item 75. See N.Y. Civil Practice Act § 229 (Gilbert-Bliss 1942).
\item 77. See N.Y. Ins. Law § 59(a).
\item 78. N.Y. Vehicle and Traffic Law §§ 253, 254.
\item 79. N.Y. Gen. Bus. Law § 250, N.Y. Sess. Laws 1952, ch. 748, was formerly concerned with accidents arising from the operation of airplanes within or without the state, so long as the flight originated or terminated in New York. The statute, as phrased, was unambiguously held unconstitutional in Peters v. Robin Airlines, 281 App. Div. 903, 120 N.Y.S.2d 1 (2d Dep't 1953) (memorandum decision). The present § 250 is applicable only to accidents occurring in New York.
\item 80. N.Y. Nav. Law § 74.
\end{itemize}
workmen's compensation,\textsuperscript{81} banking,\textsuperscript{82} and limited statutes of service of foreign corporations,\textsuperscript{83} all requiring an act within this state, to an insurance law which was based on a mere consequence within New York rather than physical presence of the actor or his agent.\textsuperscript{84} The present tortious act section, CPLR 302(a)(2), is not directly related to the motor vehicle statute since "tortious act" can be applied to consequences occurring in this state from acts performed elsewhere.\textsuperscript{85} In this sense it more closely resembles the insurance statute. Jurisdiction based upon single act statutes should be considered to have become a test of convenience of the parties and interest of the state as a result of \textit{International Shoe}, and New York statute\textsuperscript{86} to have been designed to make suit possible in New York whenever this convenience and interest dictate New York to be the better forum.

B. Constitutional Limitations Upon the Single Act Statute

1. \textit{McGee}: A Liberal Approach

\textit{McGee v. International Life Ins. Co.},\textsuperscript{87} decided in 1957, is the most recent Supreme Court case to expand a state's powers over a nonresident defendant. Although the defendant never physically entered the state, Mr. Justice Black, writing for a unanimous Court, held that it was reasonable that the trial held in California should bind the defendant. Three factors influenced this finding. \textit{First}, California's manifest interest was expressed in its comprehensive insurance statute,\textsuperscript{88} providing an effective means of redress for residents when their insurers refuse to pay claims. Without this statutory aid an insured could find himself unable to pursue a small claim, and the insurer could remain judgment proof because of the expense involved in a foreign litigation.\textsuperscript{89} Whether redress

\textsuperscript{81} N.Y. Workmen's Comp. Law § 150-a.
\textsuperscript{82} N.Y. Banking Law § 200(3).
\textsuperscript{83} See note 75 supra.
\textsuperscript{84} N.Y. Ins. Law § 59(a).
\textsuperscript{85} See text accompanying note 150 infra.
\textsuperscript{86} Its predecessors were similarly designed. See N.Y. Leg. Doc. No. 65L (1944); N.Y. Leg. Doc. No. 65B (1945); 1959 N.Y. Law Rev. Comm'n Rep. 71.
\textsuperscript{87} 355 U.S. 220 (1957).
\textsuperscript{88} Cal. Ins. Code § 1611:

Acts constituting commissioner's appointment. The acts referred to in Section 1610 are:
(1) The issuance or delivery to residents of this State of contracts of insurance insuring (a) the lives or persons of residents of this State physically present herein at the time of such issuance or delivery or (b) property or operations located in this State. (2) The solicitation of applications for such contracts. (3) The collection of premiums, membership fees, assessments or other considerations for such contracts. (4) Any other transaction of business arising out of such contracts.

See text accompanying notes 106-110 infra.

In Trippe Mfg. Co. v. Spencer Gifts Inc., 270 F.2d 821, 822 (7th Cir. 1959), the court stated in dictum that McGee was limited to insurance. Contra, Wisconsin Metal & Chem. Corp. v. DeZurik Corp., 222 F. Supp. 119, 123 (E.D. Wis. 1963). The reiteration of the
was effective would depend upon a consideration of the burdens which would be placed upon the plaintiff were suit to be brought in Texas. Such burdens included the expenses plaintiff would incur in traveling to Texas to sue and in transporting his witnesses from California, where they were located, to Texas for the trial. Second, the insurance company could foresee that its acts in Texas would have consequences in California. Defendant mailed a reinsurance certificate to insured and possibly accepted premiums mailed from California. Third, the forum was not so inconvenient as to impose a burden upon defendant such that it would be denied due process, since witnesses for its defense of suicide were located in California.

Mr. Justice Black summed up the situation by discussing the trend toward expansion of the states’ jurisdictional powers:

Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

2. Hanson: A Restrictive Approach

Less than a year after McGee, the Supreme Court decided Hanson v. Denckla, in which the Court stated that although states could increase their jurisdictional powers, definite limitations to such increase still existed. In Hanson the settlor, a domiciliary of Pennsylvania, executed an inter vivos trust naming a Delaware trust company as trustee. She subsequently moved to Florida and while there executed her will and exercised her power of appointment in the inter vivos trust. Beneficiaries under the will brought suit in Florida to declare the trust invalid. Mr. Chief Justice Warren, writing for a majority of five, held that Florida had no jurisdiction over the trustee.

The majority relied upon a failure to find a voluntary act between the trustee and Florida, while Mr. Justice Black, writing for three of the four dissenting Justices, relied, as he had in McGee, upon the overall reasonableness of having the matter adjudicated in Florida.

The premise of the majority opinion was that state boundaries are more than rules laid down in McGee by the majority in Hanson v. Denckla, 357 U.S. 235 (1958), would seem to bear out the latter view.

90. The decision rests on an overall finding of reasonableness as opposed to a numerical listing of contacts between defendant and the forum state. This is abundantly clear because it was not shown whether the insured mailed his premiums from California.

91. 355 U.S. at 222-23.
93. Id. at 251.
94. Id. at 258-59 (dissenting opinion). Justices Burton and Brennan dissented with Mr. Justice Black; Mr. Justice Douglas dissented in a separate opinion.
a guarantee of immunity from inconvenient or distant litigation. "They are a consequence of territorial limitations on the power of the respective States,"95 Since the trustee had no office in Florida, transacted no business there, and did not solicit either in person or by mail in the state, the requisite minimal contacts were found to be absent. Further, the cause of action was found not to have arisen out of an act done or consummated in the forum state.96 The nature of the necessary contact to be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws . . . .97

Such a restrictive view could hamper the liberalization of jurisdiction which has developed since International Shoe. It would require a court to look for a voluntary contact between a nonresident defendant and the forum state to the exclusion of a general consideration of reasonableness, including the interest of the forum state in the suit; defendant's knowledge that its acts could result in forum consequences, hence a suit in the state; and the possibility that the forum is not inconvenient to the defendant. The rule laid down in International Shoe was broader than the interpretation given by the Hanson Court, since the former stated that due process depended "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure," and added that "that clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations."98

The following paragraph of Mr. Justice Stone's International Shoe decision, on which the Hanson majority relied, stated not that a voluntary contact is essential but that some contact is necessary. Whereas in Hanson it was deemed "essential"99 that the contact between the defendant and the forum state be voluntary, in International Shoe it was considered a factor in justifying the forum state's procedure for gaining jurisdiction over the nonresident defendant.100

Mr. Justice Black's dissent in Hanson was grounded upon reasonableness as derived from an analysis of all the factors in the case. He dealt with the interest of Florida in probating and administering the settlor's will,101 including the convenience in disposing of this case in Florida, and the settlor's dealings with the trustee while the settlor was in Florida. In referring to Florida's interest, he pointed out that the settlor died domiciled in Florida, the legatees were in Florida, Florida law would probably apply, and multiple suits would be necessary if Florida's jurisdiction were not upheld. In weighing the burdens imposed on

95. Id. at 251. See note 10 supra.
96. Id. at 251.
97. Id. at 253.
99. 357 U.S. at 253.
100. 326 U.S. at 319.
the parties involved, he concluded that not only could the trustee easily go to Florida, but that there was some question as to whether the trustee was an indispensable party under Florida law. 102

3. Application of Hanson to Products Liability

There is a conflict as to whether Hanson marks the outer limits of jurisdiction in all cases, 103 or should be confined to its facts. 104 In addition, the submission test of Hanson has been criticized, and rightly so, because it minimized consideration of Florida's interest and the inconvenience to the defendant. 105 The wiser policy, at least as to product liability actions under single act statutes, 106 would be to adopt an expanded jurisdictional test emphasizing the interest of the state and the relative convenience of the parties. A strict application of Hanson, a trust case, to product liability situations would limit the test of reasonableness where breadth is most needed.

One reason jurisdiction was denied in Hanson even though it had been upheld in International Shoe Co. v. Washington, 107 Mullane v. Central Hanover Bank & Trust Co., 108 Watson v. Employers Liab. Assur. Corp., 109 Travelers Health Ass'n v. Virginia, 110 and McGee v. International Life Ins. Co., 111 was the lack of a state statute in Hanson dealing with the type of activity at issue and the existence of a specific state statute in these other cases. But surely the presence or absence of a statutory basis for the states' assertion of jurisdiction has no relevance to the constitutional question involved.

The Supreme Court, in upholding jurisdiction, has indicated the importance of the possibility that an injured plaintiff might become a ward of the forum state, 112 whether or not the plaintiff is a resident of the state. 113 Where the state might have to support the plaintiff in the event he is uncompensated, it is in the state's interest to make certain that redress is available. Perhaps in Hanson, Florida's interest was not substantial enough to overcome the tenuous-

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102. Id. at 261-62 (dissenting opinion).
105. Reese & Galston, Doing an Act or Causing Consequences as a Basis of Judicial Jurisdiction, 44 Iowa L. Rev. 249, 256-57 (1959). Justice Black, in his dissent in Hanson, criticized the majority for relying on "principles stated the better part of a century ago in Pennoyer v. Neff . . . ." 357 U.S. at 259-60 (dissenting opinion).
106. No such products liability case has as yet been decided by the court. See, e.g., Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541 (1943), both of which dealt with obtaining jurisdiction over nonresident defendants in domestic relations situations.
111. 355 U.S. 220 (1957).
ness of the contacts between the state and the nonresident trustee. In a products
liability situation this would not be the case.

The emphasis which the majority in Hanson placed on voluntary acts by
which the defendant must purposefully avail "itself of the privilege of con-
ducting activities within the forum state" should not be carried over to a
products liability situation. To require a nonresident to defend in a state where
the plaintiff unilaterally entered and where the defendant neither intended nor
foresaw that he would become involved, would contravene due process not
only as defined in Hanson, but also, barring some overriding state interest, as
defined in McGee. But, where it appears, as in Hanson, that the defendant
has foreseen that he might become involved in another jurisdiction, even though
he never purposefully enters there, the absence of voluntary contact should
not automatically cause jurisdiction to fail.

If the limitation which requires a voluntary contact with the state is em-
phasized, such cases as Feathers v. McLucas and Atkins v. Jones & Laughlin
Steel Corp. are difficult to justify. In fact, an argument could be made
that any manufacturer which does not purposefully avail itself of the forum
state would remain judgment proof. The trend of state cases, however, espe-
cially those involving personal injury to residents of the forum state, is to
consider the reasonableness of the defendant's acts in a more general sense,
including such factors as the existence of a state statute designed to provide
a means of redress for its citizens, the hardship of an out-of-state trial to the
plaintiff, the place and nature of the injury, and the nature of defendant's
defective product. This solution would find a violation of due process only
at the point where trial in the forum state would come completely unexpectedly
to the defendant and inconvenience him to an unreasonable degree.

114. 357 U.S. at 253.
115. See cases cited note 206 infra.
116. See Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), appeal dis-
missed per curiam sub nom. American Fed'n of Musicians of the United States & Canada
v. Atkinson, 357 U.S. 569 (1958), in which jurisdiction was upheld on facts which differ-
red only slightly from Hanson, perhaps indicating that Hanson should be closely confined to
its facts.
117. 21 App. Div. 2d 558, 251 N.Y.S.2d 548 (3rd Dep't 1964) (per curiam).
118. 258 Minn. 571, 104 N.W.2d 888 (1960). Compare Mann v. Equitable Gas Co., 209
119. For further discussion of both see text accompanying notes 196-202 infra.
121. See Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963) (interpreting Vermont
law); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761
(1961); Adamek v. Michigan Door Co., 260 Minn. 54, 108 N.W.2d 607 (1961); Atkins v.
Jones & Laughlin Steel Corp., 258 Minn. 571, 104 N.W.2d 888 (1960); Feathers v. McLucas,
21 App. Div. 2d 558, 251 N.Y.S.2d 548 (3rd Dep't 1964) (per curiam); Nixon v. Cohn, 62
122. See Agrashell Inc. v. Bernard Sirotta Co., 229 F. Supp. 98 (E.D.N.Y. 1964); Tyee
IV. LEGISLATIVE HISTORY OF NEW YORK'S TORTIOUS ACT STATUTE

Products liability cases so often involve out-of-state manufacturers that it is no surprise that section 302(a)(2) has been frequently used to gain jurisdiction over a manufacturer who sends faulty products into New York. Two problems arise in every case: What act is needed to satisfy the statute and whether there are enough factors present to satisfy the "reasonableness" requirement of the due process clause.

A. New York Courts' Failure to Expand Jurisdiction

Prior to the enactment of CPLR 302(a)(2), New York courts were loath to expand their jurisdictional power independently. Justice Breitel, in 1961, bluntly put this matter up to the legislature: "[U]nfortunately for plaintiff, there is no statute in this State which extends the jurisdiction of the courts of this State to an action based upon any contract which may have significant contacts within the State . . . ." Where a tortious act was committed in New York and service made, the cause of action was dismissed on the grounds that defendant was not doing business in the state. But, the same cause of action was upheld after the enactment of the CPLR.

B. Aims of CPLR 302: Legislative Intent

By 1958, the Advisory Committee on Practice and Procedure had drafted a single act statute, with a tortious act provision similar to that enacted in Illinois in 1956. Both statutes contained language alluding to the commission of "a tortious act within the state." The aim of the Illinois statute was to

124. Id. at 239, 222 N.Y.S.2d at 693.
126. Second Preliminary Report 38-39. Research and drafting were under the direction of Professor Jack B. Weinstein.
127. Ill. Rev. Stat. ch. 110, § 17 (1963) provides:
(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:
(a) The transaction of any business within this State;
(b) The commission of a tortious act within this State;
(c) The ownership, use, or possession of any real estate situation in this State;
(d) Contracting to insure any person, property or risk located within this State at the time of contracting.

Because of the facility with which a newspaper article or a television broadcast may find its way into the state, although its origin may be far removed, considerations of public policy prompted the legislature to exclude defamation from the tortious acts which subject defendants to jurisdiction under this section. See Insull v. World-Telegram Corp., 273 F.2d 166 (7th Cir. 1959), cert. denied, 362 U.S. 943 (1960); cf. New York Times Co. v. Sullivan, 376 U.S. 254, 294 (1964) (Black, J., concurring). However, if the defamation grows out of the transaction of business in New York, the preceding subdivision would ensnare the defendant since no exceptions are made for defamation. For example, the mailing by the author of a libelous article from Spain for publication in a New York:
exploit the expansion of the state's jurisdictional power to the fullest. Similarly, the stated aim of the New York statute, at its introduction, was to take "full advantage" of the recent expansion. The word "full" was deleted, however, and does not appear in the printed notes of the Committee. Discussion in the Weinstein, Korn and Miller treatise points out that the Advisory Committee's intent was for New York courts to break away from prior restrictions but to exercise restraint, especially in products liability cases.

1. Application to Corporations

The importance of analyzing the breadth of CPLR 302(a)(2) becomes obvious when no more than the injury occurs in New York. Suppose a foreign manufacturer sells defective goods to a retailer outside the state and the goods, brought into New York for resale, cause injury here. First, does the statute newspaper was a sufficient transaction of business to support an action against the defendant for defamation. Totero v. World Telegram Corp., 41 Misc. 2d 594, 245 N.Y.S.2d 870 (Sup. Ct. 1963). A potential limitation in the draft presented in 1958 was the inclusion of the words "resulting in physical injury to person or property." Second Preliminary Report 39. By 1960, this phrase was deleted and the defamation exception added. N.Y. Leg. Doc. No. 15, § 302, p. A-155 (1961) (Final Report of the New York Advisory Committee on Practice and Procedure) [hereinafter cited as Final Report]. Whereas the intention of the draftsmen was to exclude defamation, only the original provision designed to accomplish this could also have been interpreted to exclude conversion and possibly fraud actions.

Since its enactment, CPLR 302(a)(2) has been applied to torts other than negligence and breach of warranty. E.g., Kramer v. Vogl, 23 App. Div. 2d 577, 256 N.Y.S.2d 706 (2d Dep't 1965) (memorandum decision) (denying jurisdiction in a fraud case because no tortious act was committed within the state; the concurring opinion denying for lack of minimum contacts); Nexsen v. Ira Haupt & Co., 44 Misc. 2d 629, 254 N.Y.S.2d 637 (Sup. Ct. 1964) (upholding jurisdiction in a conversion action); Lebensfeld v. Tuch, 43 Misc. 2d 919, 252 N.Y.S.2d 594 (Sup. Ct. 1964) (denying jurisdiction for failure to show agency in a fraud action); Platt Corp. v. Platt, 42 Misc. 2d 640, 249 N.Y.S.2d 1 (Sup. Ct. 1964) (upholding jurisdiction in an action for corporate waste). Although an action for mental distress might have been close under the physical injury requirement, in its present form the tortious act section seems to cover it. See Final Report A-155-56.


129. Second Preliminary Report 37; see Weinstein, Korn & Miller, New York Civil Practice ¶ 302.01, at 3-29 (1964) [hereinafter cited as Weinstein, Korn & Miller]. In 1960 Professor Weinstein said: "The provisions governing jurisdiction and methods of service have been drawn with two main objectives: first, to take full advantage of the state's constitutional power to exercise jurisdiction over persons and things, and second, to provide methods of service that are simple and inexpensive and at the same time best calculated to give actual notice to a defendant." Weinstein, Proposed Revision of New York Civil Practice, 60 Colum. L. Rev. 50, 66 (1960).

130. Second Preliminary Report 39-41; see Weinstein, Korn & Miller ¶ 302.01, at 3-29.

131. Id. ¶ 302.10, at 3-41.
include foreign corporations; and second, was there a tortious act committed within the state so as to satisfy the statute?

Unquestionably, the use of masculine pronouns and the reference to an executor or administrator in CPLR 302(a) do not preclude reference to corporations and, as the court held in Steele v. DeLucca, nondomiciliary "includes a foreign corporation not licensed to do business in this State . . . .” This seems logical, since the statute would be completely emasculated if it could not be applied to foreign corporations. Corporations are responsible for the vast majority of the goods shipped into New York and for a great portion of the economic activity directed into this area.

2. Application to Consequences Within the State

The basic problem in every products liability case has been to ascertain exactly how much is needed to satisfy the tortious act section. Should the section be stretched to the fullest extent possible?

If the Law Revision Commission’s proposal to amend the Civil Practice Act had been enacted, there would have been no question. The amendment provided for jurisdiction over foreign corporations:

[W]here the action . . . arises out of any of the following activities . . . (c) Commission of any act resulting in this state in death or in injury to person or property, if the corporation expected or should reasonably have expected that the act would have consequences in this state; (d) Production, manufacture, sale, leasing, distribution or delivery of goods or furnishing of services, where the goods or services are used, consumed or resold in this state or received in this state for use, consumption or resale in this state, and the corporation expected or should reasonably have expected that they would be so used, consumed, resold or received.

The proposal clearly indicated that distribution into the state through an out-
of-state wholesaler would subject a foreign manufacturer to New York jurisdiction whether the goods were for consumption\textsuperscript{137} or resale\textsuperscript{138} there.

C. The Illinois View of the Tortious Act

The Advisory Committee chose to draft a statute similar to that of Illinois. In 1958, when the Committee first drafted the statute, there were two principal cases in Illinois to which the draftsmen could refer when speculating on the application of a tortious act section. One was \textit{Nelson v. Miller},\textsuperscript{139} where the out-of-state manufacturer had sent an agent into Illinois who injured the plaintiff while in the state, directly satisfying the criterion of "tortious act within the state." The other was \textit{Hellriegel v. Sears Roebuck \& Co.},\textsuperscript{140} in which the federal district court explained that the negligent act of manufacturing and failing to properly label a dangerous product (power mower) took place at the manufacturer's plant in Ohio. The manufacturer's last contact with the product was in Wisconsin, where it was sold to, and picked up by, the retailer for resale in Illinois. Only the resale and injury took place in Illinois.\textsuperscript{141} Chief Judge Campbell found "that all the acts constituting the alleged tort of defendants . . . occurred outside Illinois" and refused to uphold jurisdiction since only the injury\textsuperscript{142} occurred there.

Nevertheless, by 1961, the Supreme Court of Illinois had decided \textit{Gray v. American Radiator \& Standard Sanitary Corp.}.\textsuperscript{143} In a fact situation almost identical with \textit{Hellriegel}, jurisdiction was upheld on the grounds that "the statute contemplates the exertion of jurisdiction over nonresident defendants

\begin{itemize}
  \item[140.] 157 F. Supp. 718 (N.D. Ill. 1957).
  \item[141.] Id. at 721. In McMahon v. Boeing Airplane Co., 199 F. Supp. 908, 909 (N.D. Ill. 1961), Chief Judge Campbell, in upholding jurisdiction, said: "In Hellriegel v. Sears Roebuck \& Co. . . . I was presented with a similar factual situation and the same legal issue. In the Hellriegel case the plaintiff alleged his personal injuries were caused by the defendant's negligent manufacture of a lawn mower in Ohio and Wisconsin. The injury occurred in Illinois. I was then, as I am now, of the opinion that the words 'tortious act' as used in Section 17 are not synonymous with the word tort. The former term, more restrictive than the latter, refers only to the act or conduct and does not include the consequence thereof. I did not then believe, nor do I now believe, that the Illinois Legislature intended the Illinois Courts to assume jurisdiction over non-resident defendants in cases such as this." See Anderson v. Penncraft Tool Co., 200 F. Supp. 145 (N.D. Ill. 1961), where the court upheld jurisdiction without Chief Judge Campbell's reluctance.
  \item[143.] 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
\end{itemize}
to the extent permitted by the due-process clause."\textsuperscript{144} The court relied not so much upon technicalities in the wording of "commits a tortious act within the state" as upon the general purpose and effect of the statute. Particular emphasis was placed upon the fact that "in law the place of a wrong is where the last event takes place which is necessary to render the actor liable."\textsuperscript{145}

D. Effect of Illinois Interpretation in New York

The New York Advisory Committee made a change in its proposal in 1960,\textsuperscript{146} and in 1961 its final report was presented and bills were introduced for study in both houses of the Legislature. Undoubtedly, a change could have been made either before enactment of the Committee's proposals or certainly before the effective date of the CPLR (September 1, 1963) if serious objections had been raised to the application by Illinois of its own tortious act provision.

No such limitation was placed on the application of the New York statute. But the Weinstein, Korn and Miller treatise suggests that it is not clear whether the assertion of jurisdiction in \textit{Gray} would be found constitutional by the Supreme Court.\textsuperscript{147} The authors then suggest that justification for not following \textit{Gray} could also be based upon the ambiguity of the Advisory Committee, on the subject of manufacturer's liability.\textsuperscript{148}

Professor McLaughlin, however, begins his commentary on section 302 by stating that "with the enactment of this statute, New York has decided to exploit the fullest jurisdictional potential permissible under federal constitutional restraints."\textsuperscript{149} Professor McLaughlin, like the court in \textit{Gray}, looked to the spirit of the statute and anticipated many cases where it would be applicable even though the tortious act actually occurred \textit{without} the state. The "niagara" of New York decisions which he anticipated have almost all borne out this view.\textsuperscript{150}

V. Interest of the State

A. An Applicable Statute in New York

1. Strict Construction

The state courts had no trouble deciding that CPLR 302(a)(2) was constitutional\textsuperscript{151} and could be applied retroactively in most cases.\textsuperscript{152} But the New

\textsuperscript{144} Id. at 436, 176 N.E.2d at 763.
\textsuperscript{145} Id. at 435, 176 N.E.2d at 762-63. The court cited the Restatement, Conflict of Laws § 377 (1934). It is interesting to note that although the latest draft gets away from the view that the place of injury is the sole factor, the place where the injury occurred is considered of more importance than the place where the conduct occurred, Restatement (Second), Conflict of Laws §§ 379, 379a, ch. 9, Introductory Note at 2 (Tent. Draft No. 9, 1964).
\textsuperscript{146} Final Report A-156.
\textsuperscript{147} Weinstein, Korn & Miller § 302.10, at 3-43.
\textsuperscript{148} Id. § 302.10, at 3-43-45.
\textsuperscript{149} McLaughlin, Practice Commentary, McKinney's CPLR 302, at 428. (Emphasis added.)
\textsuperscript{151} E.g., Totero v. World Telegram Corp., 41 Misc. 2d 594, 245 N.Y.S.2d 870 (Sup.
York courts were inclined, at least initially, not to follow the reasoning of Gray in construing the meaning of tortious act. In Feathers v. McLucas, the New York Supreme Court was faced with only an injury in New York when a truck trailer exploded injuring an onlooker. The trailer was a cargo pressure tank, manufactured by the defendant Kansas corporation at its plant in Kansas, and sold in 1956 to a Missouri corporation, which affixed wheels to the trailer. In 1957 the unit was sold to a Pennsylvania corporation which was in the business of transporting goods in Pennsylvania, New York, New Jersey, Vermont.
and other states. In 1962 the trailer exploded while passing through New York on its way to Vermont with a cargo of propane gas. Suit was brought to recover for personal injury and property damage. The court reasoned:

If the words "commits a tortious act" are synonymous with the words, "commits a tort" jurisdiction should be sustained since it is the general rule that "the place of the wrong is in the State where the last event necessary to make an actor liable for an alleged tort takes place. . . ." If, however, the words require the presence within the State of the actor or his agent, the service herein made was ineffective to subject . . . [defendant] to the jurisdiction.154

The court then held that the single act statute requires that the tortious act rather than the tortious injury must occur in New York before in personam jurisdiction can be obtained, that "tortious act" and "tortious injury" are not synonymous, and that jurisdiction could therefore not be obtained over the defendant manufacturer.155

2. Liberal Construction

The appellate division reversed156 the supreme court, holding that the single act statute was designed to codify the minimum contacts test of International Shoe and did not intend to separate "foreign wrongful acts from resulting forum consequences."157

Admittedly, if the Legislature had used the words "tort in whole or in part" or "tort," rather than "tortious act," it would have been clearer that an injury alone within the state would confer jurisdiction over a nondomiciliary, since a tort occurs at the place of injury.158 Use of the word "tort," however, connotes legal liability and, hence, a trial on the merits. The result might have been unworkable, since a court would have had to determine legal liability before jurisdiction.159 It has been suggested160 that this was the reason for using "tortious act" instead of "tort" in the Illinois statute.

Had the Legislature used the words "tortious injury," the statute would have

154. 41 Misc. 2d at 501, 245 N.Y.S.2d at 285. (Citation omitted.)
155. Id. at 504, 245 N.Y.S.2d at 287.
156. 21 App. Div. 2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964) (per curiam).
157. Id. at 559, 251 N.Y.S.2d at 550.
159. The only determination that must be made in applying the tortious act test is whether the actor's conduct is of such a nature as to warrant a trial on the merits in the forum state, not whether the actor will be subject ultimately to tort liability. Nelson v. Miller, 11 Ill. 2d 378, 392, 143 N.E.2d 673, 681 (1957). The Supreme Court has declared that a jurisdictional determination by an appellate court (Forsyth v. Hammond, 166 U.S. 506, 517-18 (1897)), or even by a trial court from which an appeal might have been but was not taken, may not be reopened and litigated in any other court, federal or state (see Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525-26 (1931)), and has indicated that such res judicata effect should be extended, as with respect to questions of the merits, to jurisdictional facts which might have been but were not actually litigated (e.g., Chicot County Drainage Dist. v. Baxter State Bank, 303 U.S. 371, 377-78 (1940)).
been limited to exclude a situation such as that in Singer v. Walker,\(^1\) where the injury occurred outside New York, but the tortious act (i.e., the circulation of a mislabelled hammer) occurred within New York.

The lower court's distinction in *Feathers* between tortious act and tortious injury is unfortunate. If we assume that there is a need for a statute enabling New York to protect its citizens in the products liability area,\(^2\) and that the Legislature provided New York courts with a means to expand jurisdiction, adherence to such a distinction would defeat any attempts to satisfy this need. In the absence of a specific statement by the Legislature that a nondomiciliary must commit the negligent act within the state, the courts should be free to assume jurisdiction where the situation warrants, as it is clearly in the interest of New York to take jurisdiction over a nondomiciliary who is responsible for the shipment of faulty products into the state.

Suppose the tortious act section is construed as limited to situations where the conduct of the manufacturer occurs within New York. If a manufacturer negligently produces goods in this state, the statute will obviously apply. The manufacturer's tortious conduct was the negligent manufacture in New York. But suppose the manufacturer is located in New Jersey. If it sends an agent into New York to deliver goods pursuant to a contract, the manufacturer has not acted negligently within New York, hence 302(a)(2) will not apply. An exception would be where the agent himself is negligent while in this state,\(^3\) but this is not the usual products liability situation.

In fact, where the manufacturer of faulty goods is in the state or sends an agent into the state, it is subject to in personam jurisdiction under the transaction of business section, CPLR 302(a)(1).\(^4\) Hence, the construction placed

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\(^1\) 21 App. Div. 2d 285, 250 N.Y.S.2d 216 (1st Dep't 1964). The Uniform Interstate and International Procedure Act uses the phrase tortious injury:

\section*{§ 1.03. [Personal Jurisdiction Based upon Conduct].}

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's...

(3) causing tortious injury by an act or omission in this state;

(4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state . . . .

Uniform Interstate and International Procedure Act § 1.03 (Supp. 1964). The Commissioners' Note states that section 1.03(a)(3) is narrower than "tortious act" and "tort in whole or in part" because some of these statutes have been interpreted to cover acts or omissions outside the state (citing Ill. Ann. Stat. ch. 110, § 17(1)(b) (Smith-Hurd 1956); Vt. Stat. Ann. tit. 12, § 855 (1959)), and that section 1.04 is more restrictive because (citing Gray) conditions are imposed within the statute before jurisdiction can be taken. Uniform Interstate and International Procedure Act § 1.03, Commissioners' Note at 79.


\(^4\) Physical presence in the state is apparently a requisite for jurisdiction under 302(a)(1). Where the defendant sent an agent to make repairs in New York, pursuant to a sale consummated in Illinois, jurisdiction was sustained. Viewlex Inc. v. Molon Motor &
on CPLR 302(a)(2) by the lower court in *Feathers* would make the section superfluous, since 302(a)(1) would cover tortious acts actually committed by the nonresident within the state.

The appellate court's construction of 302(a)(2) in *Feathers* has prevailed in the first department\(^6\) and in various lower court cases.\(^6\) In each case, however, there remains the problem of construing the statute broadly while keeping within the bounds of due process.

**B. Residence of the Plaintiff**

Just as the residence of the plaintiff is a factor in determining choice of law,\(^{167}\) it is also an important criterion in determining whether the forum state can exercise jurisdiction. It does not seem logical that a New York resident injured in New York should be forced to go to Michigan, for example, only to have the Michigan court apply New York law, when a New York court could not only hear its resident's case but apply its own law.

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Restatement (Second), Conflict of Laws §§ 379, 379a (Tent. Draft No. 9, 1964) provides:

§ 379. The General Principle.

(1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.

(2) Important contacts that the forum will consider in determining the state of most significant relationship include:

(a) the place where the injury occurred,

(b) the place where the conduct occurred,

(c) the domicile, 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.

§ 379a. Personal Injuries.

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless some other state has a more significant relationship with the occurrence and the parties as to the particular issue involved, in which event the local law of the latter state will govern.\(^{19}\)
In *McGee v. International Life Ins. Co.*, the United States Supreme Court reasoned that California's interest in regulating insurance depended upon protecting its citizens from misconduct in that industry and in seeking redress where small or moderate claims made suit in a foreign state fruitless. This same reasoning can be applied with even greater force to justify a state's interest in regulating tortious conduct of nonresidents which either occurs within the forum state or results in injury to its residents. Since the place of injury is often fortuitous, on the basis of *McGee*, residence alone may be considered enough to sustain jurisdiction. This holds true whether the injury occurs within or without the forum state. For example, in *Singer v. Walker*, a resident of New York was injured in Connecticut due to the circulation of a defective and mislabelled hammer in New York. In the absence of an injury in New York, residency was an important factor in sustaining jurisdiction.

The state's interest could well extend beyond protecting its own residents. Where a plaintiff could become a public charge in the absence of recompense for an injury, it is in the forum state's interest to provide proper redress for his claims. This theory rests upon principles stated thirty years ago by Mr. Justice Stone in *Alaska Packers Ass'n v. Industrial Acc. Comm'n*.

CPLR 302(a) (2), unlike Minnesota's single act tort section, is not restricted to residents. A nonresident bringing suit in New York, however, will have to show far stronger reasons why New York courts should sustain jurisdiction. Failure to do so will result in dismissal for reasons quite similar to those given where forum non conveniens is at issue. In fact, given the recent expansion of jurisdiction, the doctrine of forum non conveniens will have to become more fully developed to prevent forum shopping and the resultant frivolous or unfairly burdensome suits against nonresident defendants.

C. Hardship to Plaintiff

When a state makes available a means of redress for its citizens, it is also in the interest of the state to see that remuneration is not lost because expenses

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174. See Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223 (1923). Jurisdiction was not in issue, but in dealing with a foreign cause of action and a nonresident defendant, the New York residency of the plaintiff was considered an important factor in New York's retaining jurisdiction. See also N.Y. Bus. Corp. Law § 1314.
175. See text accompanying notes 210-12 infra.
and difficulties deny the plaintiff a fair trial. For example, the prosecution of a claim in a distant forum could become unduly expensive, as could the multiple litigation which might be necessary to reach numerous, potentially liable defendants.

The Supreme Court has spoken of the difficulty of conducting a trial in a distant forum. "The probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully prosecute their claims for compensation."\(^\text{170}\)

In addition, dismissal from a forum with a single act statute and some contact with multiple defendants, requiring suit in a jurisdiction where neither contact nor statute exists, would necessitate a series of suits in a number of states. In *Ewing v. Lockheed Aircraft Corp.*,\(^\text{177}\) this was unquestionably the motivating factor for retaining jurisdiction in Minnesota.

**D. Interest in Defendant's Activities**

1. Breach of Warranty Liability and the Single Act

One area of products liability which has been rapidly expanding is breach of warranty.\(^\text{178}\) Unlike negligence, which is governed by the tort rule that

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the law of the place of injury controls\textsuperscript{170} and that the cause of action does not arise until there has been injury,\textsuperscript{180} the breach of warranty occurs and the cause of action arises at the time of tender of the faulty product.\textsuperscript{181} For section 302(a)(2) to apply, a tortious act must be alleged. Hence, two questions must be answered before jurisdiction can be sustained: first, is there a tortious act committed when a warranty is breached; and, second, if there is, does the actionable consequence occur within the state?

Let us assume a faulty out-of-state manufacture, a sale to a New York retailer, purchase by a resident of New York and injury therein. In New York, breach of warranty is considered a tort.\textsuperscript{182} Variously labelled "strict liability,"\textsuperscript{188} "special liability of seller of product to user or consumer,"\textsuperscript{184} and "breach of warranty,"\textsuperscript{185} this hybrid cause of action sounds in tort to the extent that a user or a consumer who sues the manufacturer or seller need not be in privity with the defendant.\textsuperscript{186}

The trend of judicial opinion in various jurisdictions has been that the breach of an implied warranty of fitness is actionable without privity, because it is a tortious wrong upon which suit may be brought by a non-contracting party.\textsuperscript{187} The action for breach of warranty was originally only for breach of express warranty, sounding in tort and closely related to deceit. It was not until after the writ of assumpsit was created that an action for breach of implied warranty was recognized. Implied warranty was then classified as a contract cause of action.\textsuperscript{188} With the recent trend toward sustaining breach of implied warranty without an underlying contract (i.e., eliminating the privity requirement), the nature of the cause of action has shifted from one of contract to one of tort.\textsuperscript{189}
If breach of warranty is sufficiently tortious to abolish privity, it would be inconsistent not to consider the manufacturer of a faulty item a tort-feasor, hence one who has committed a tortious act. As to the immediate buyer a cause of action against the manufacturer occurs upon tender of the faulty product; it is then that the breach occurs. The ultimate user or consumer, however, has no cause of action until injury because he has made no contract with the manufacturer. As in tort, the wrong as to a third party actually occurs upon injury. Thus the tortious consequence of a nonresident’s faulty manufacture as to a remote user occurs not at the place of tender to a wholesaler or retailer but at the place of injury. Moreover, jurisdiction should not be made to depend upon the theory of action pleaded. The result should be the same in both negligence and warranty actions since the jurisdictional test does not rest upon the merits of the plaintiff’s case, but rather on the defendant’s contact with the state. It is as much in the state’s interest to control the introduction of defectively manufactured goods into the state as it is to control the introduction of negligently manufactured products.

2. Nature of the Injury

New York courts have been quite consistent in upholding jurisdiction over nonresident defendants served under CPLR 302(a)(2) where personal injury to residents was involved and in denying it where the injury has been to property. The statute itself is broad enough to include actions involving

190. An inconsistency would arise if the contract statute of limitations were to be applied to breach of warranty cases, since the injured party’s right to bring the action would not arise until injury. See Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953).


193. Where third parties are impleaded, whether on a theory of negligence or breach of implied warranty, precisely the same results should follow. It is to be expected that, through the utilization of impleader, defendants will be able to avoid being forced into multiple suits to recover from their indemnitor (a common situation even where “vouching in” is used). One action should now be sufficient to determine ultimate warranty liability except in rare cases in which the indemnitor’s connection with the forum state is totally unforeseeable.

Where indemnification is based upon a contract, it is unclear whether the indemnitee’s liability on the main claim is sufficient nexus for jurisdiction over the indemnitor without an independent predicate upon which the forum state can rely. The majority’s opinion in Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954), couched as it is in terms of state interest (injury to a domiciliary within the forum state) and convenience of the defendant, indicates that no such independent predicate is required. If state interest and convenience are sufficient grounds to override a contract, why should they not be sufficient grounds upon which to base jurisdiction?

damage to property as well as personal injury, but the state's interest in providing a forum for plaintiffs who have suffered personal injury has been considered greater than providing a forum for plaintiffs who have only suffered property damage.

If, however, through faulty manufacture, a propane tank explodes, as in Feathers v. McLucas, resulting only in extensive property damage, perhaps the distinction would prove ill founded. Certainly every reason the state has to control activity which results in personal injury would exist, and, further, a damaged plaintiff who was not compensated and had no other personal resources would become a charge of the state as surely as if he were in a state hospital. The Supreme Court in McGee allowed California to extend its jurisdiction to provide redress for a claimant who was unable to collect as the beneficiary of decedent's insurance policy. The claim involved was merely monetary, not for any physical injury, personal or property. Hence, the distinction made by the New York courts would not seem to be a substantial reason for denying jurisdiction.

Another distinction upon which New York courts have relied is the inherently dangerous nature of the product involved. In Feathers, it was a defective propane tank, and in Singer v. Walker, a defective and mislabelled hammer. The distinction between products which are inherently dangerous and those which are not has become ludicrous. It hardly seems to be a valid criterion upon which to rest jurisdiction. A sounder approach would be an examination of the result which the defective instrumentality causes in the state and an assessment of the state's interest in protecting its citizens from such effects.

VI. FORESEEABILITY BY THE DEFENDANT

A. Industrial

1. Purposeful Availment

In Feathers v. McLucas, the defendant corporation sold its tank to the Missouri assembler and the assembler sold the trailer to a Pennsylvania trucker.
The tank exploded while the truck was being driven through New York. The court held that the contacts required by *International Shoe* were met as the manufacturer had reason to foresee that the Pennsylvania trucker would use this tank in the New York area and, hence, faulty construction by the manufacturer could have disastrous effects in New York.200

Under the *Hanson* test, requiring purposeful availment of the benefits and protection of the laws of the forum state before jurisdiction can be obtained over a nonresident, the appellate division's decision in *Feathers* would have to be reversed.201 The "essential" contact required in *Hanson* is clearly absent.

The *Feathers* court, however, applying a test of foreseeability, found the requisite minimum contacts:

The record demonstrates that it [the corporation] had knowledge that the instant tank was constructed for its ultimate consignee, a Pennsylvania domiciliary, and was intended for use in interstate commerce. In these times of modern transportation it is a fair inference that respondent, despite a lack of precise knowledge of the range and extent of . . . [the trucker's] activities, could be expected reasonably to foresee that its acts, if wrongful, might well have potential consequences in adjoining New York.202

*Hanson* is not mentioned in the decision. *Hanson* was a trust case. The interest of Florida in that case was not based on personal injury to Florida residents. The requisite minimum contacts in a personal injury action should be more flexible to enable the forum state to stress reasonableness in acquiring jurisdiction. The *Hanson* "purposefully avails itself" test places too much stress on requisite contact and too little on a general appraisal of the interest of the forum and foreseeability.203 To extend the *Hanson* test into the products liability field would be an unfortunate regression into strict nineteenth century concepts of jurisdiction.

2. Foreseeability

The test of foreseeability has been applied in a number of cases where products for commercial use, distributed beyond the borders of the manufacturer's state, caused injury to a resident of the forum. In New York, jurisdiction has been exercised over nonresident manufacturers, who have not shipped directly into the state, on the grounds that the defendant had foreseen that his product could be used in the state,204 even where the court strived to find substantial

200. Id. at 560, 251 N.Y.S.2d at 551.
201. Atkins v. Jones & Laughlin Steel Corp., 258 Minn. 511, 104 N.W.2d 893 (1960), would also have to be reversed.
202. 21 App. Div. 2d at 560, 251 N.Y.S.2d at 551. (Emphasis added.)
contacts. This same test has been applied in numerous out-of-state cases.

If defendant can be shown to have foreseen that his defective manufacture could result in serious forum consequences, it is not unreasonable to hold him for trial in that state. But there are limits in applying a test of foreseeability. For example, if in Feathers the defendant sold its tank to the Missouri assembler and the assembler dealt only with California truckers, the defendant would not expect involvement with New York. But suppose the assembler had sold to a national trucking company. Should it not then be subject to suit anywhere in the country? Quite probably it would not surprise the manufacturer to be sued in a remote state under these circumstances, and there would be less of a problem with foreseeability.

B. Consumer

1. Purposeful Availment

The most popular application of the tortious act provision has been, and will undoubtedly continue to be, in the ordinary situation where the goods pass from manufacturer to wholesaler to retailer to consumer. If the manufacturer is out of state and the wholesaler and retailer are in the forum state, the defendant can be said to have voluntarily entered the state, for he shipped directly into the jurisdiction. The test of purposeful availment would be an adequate yardstick with which to determine reasonableness.

At the other extreme, where a New York purchaser buys a stove and then moves to New Mexico, suit under New Mexico's single act statute would be a consequence of plaintiff's unilateral action of moving to New Mexico. Under Hanson, or even McGee, since the manufacturer neither availed itself of the benefits of the New Mexico market nor foresaw involvement there, suit in New Mexico is unreasonable.

2. Foreseeability

More difficult situations lie somewhere between the two extremes described above. Suppose a New York resident purchases by mail order from a Chicago mail-order house. The resident has received goods into the state, but he also sought to make the purchase out of the state. A close investigation of reasonableness, which should go beyond whether the defendant purposefully availed himself of the New York market, would be required. Perhaps the national mail-order house could be deemed to have purposefully availed itself of a national market. The better test, however, would be foreseeability, which permits consideration of such factors as the extent of interstate advertising and solicitation.


207. See Adamek v. Michigan Door Co., 260 Minn. 54, 108 N.W.2d 607 (1961), in which jurisdiction was upheld under the Minnesota single act statute ("tort whole or in part")
Where the marketing process involves various out-of-state intermediaries, the test in Hanson fails completely. For example, if a Wisconsin manufacturer sells a stove to a New Jersey wholesaler, who in turn sells the stove to Macy's in New York, and Macy's sells the stove to a New York resident who brings a negligence suit against the nonresident manufacturer when the stove explodes, the defendant could not seriously claim that it did not foresee use of its product in New York. The manufacturer did not voluntarily enter the state. It shipped its product to another state, New Jersey. But it certainly placed its product into a stream of commerce directed toward New York. Thus, the manufacturer foresaw that its product would enter the New York market; it is reasonable to expect it to defend against a "stay-at-home" purchaser.203

If a New York buyer were to go to Newark to buy his stove, without revealing that he was a New Yorker, the situation might favor dismissal in New York. It might well depend on whether the seller aimed solely at a local market. The buyer went out of state to purchase. Why should he not return there to sue? On the other hand, if a Connecticut resident were to come to New York to buy from a large store like Macy's, which can probably point to a tri-state market, it is not unforeseeable that its goods might cause injury out of state, and hence, suit in Connecticut would be reasonable. One distinction is whether the seller is catering to a market local or interstate in character.204


Thus, the test of foreseeability involves more than either a numerical addition of contacts or the finding of an act directed to the forum state. It is a flexible standard depending upon a finding of reasonableness. It goes beyond a requirement of conscious availment to a consideration of whether the defendant could anticipate injury in the forum state in the event that his products were faulty.

VII. SHOULD THE COURT EXERCISE JURISDICTION?

A. Forum Non Conveniens

Traditionally, forum non conveniens is applied only after a state has obtained jurisdiction over the parties. The same factors, however, could be relevant where more than one state has a strong interest in a products liability case, and defendant has foreseen possible consequences in all the states involved. Flexibility in assessing the situation is essential, and the final decision might well rest upon a determination of the relative convenience of the possible forums. In *Gulf Oil Corp. v. Gilbert*, various tests were enumerated, such as "relative ease of access to sources of proof"; availability of compulsory process for, and the cost of obtaining the attendance of, witnesses; enforceability of a judgment; possibility of a fair trial; congestion of the court; and the ability to implicate other parties necessary for a just disposition of the matter. A consideration of these factors prior to a grant of jurisdiction under a tortious act provision might well provide a means to limit its unnecessary exercise.

B. Unfair Burden Upon Defendant

Judge Sobeloff, in *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, suggested an example where a tire dealer in California sold defective tires to a Pennsylvania resident who was on vacation in California. Would the dealer be considered on notice as to a possible suit in Pennsylvania because the buyer's license plates showed he was a Pennsylvania resident? The point does not seem to be that the garageman's contacts with Pennsylvania were too tenuous, but that his business was of a purely local nature. Thus, though foreseeability existed, consideration of the nature of the garageman's business might make

more often than not are interstate in character, even in small businesses. In determining jurisdiction there is no reason why a broad view could not be adopted.


