CASE NOTE

Products Liability—Application of State Long-Arm Statute to Suits for Injuries Caused by Negligent Foreign Manufacture—*Duple Motor Bodies, Ltd. v. Hollingsworth.*[1]—Duple Motor Bodies, Ltd. the defendant-appellant, was an English manufacturer of motor coach bodies. All of Duple's manufacturing was done in England, and the company had no offices or representatives in the United States. Duple received an order from Vauxhall, Ltd., another English company, to build a number of coach bodies to be placed on Vauxhall chassis. The coach bodies were designed and manufactured by Duple with the knowledge that they were to be used in Hawaii and were constructed with modifications for use there. The completed bodies were placed on the chassis, shipped by Duple to Vauxhall, and then delivered in Hawaii to Haleakala Motors which, in turn, sold the buses to Maui Island Tours. The plaintiff-appellees alleged that they had been injured due to Duple's negligent manufacture of a coach owned by Maui Island Tours which overturned while the plaintiffs were passengers. In an action brought in the United States District Court for the District of Hawaii, the court concluded that Duple was personally subject to the court's jurisdiction through the application of Hawaii's "long-arm" statute.[2] The district court denied Duple's motions to dismiss for want of jurisdiction and to quash return of service of the summons.[3] From this judgment, Duple took an interlocutory appeal[4] which challenged the in personam jurisdiction of the district court.

On appeal from denial of its motion to dismiss for lack of jurisdiction, Duple first argued that since the alleged negligent manufacture took place wholly in England, there was no "tortious act" committed in Hawaii and, therefore, Hawaii's long-arm statute was not applicable. Secondly, Duple contended that the requirements of due process prevented Hawaii from asserting in personam jurisdiction in

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1 Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969).

2 Id. at 234. This statute provides in pertinent part:

(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 his 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 the acts:

. . . (b) The commission of a tortious act within this State;

. . . (2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by serving the summons upon the defendant outside this State, as provided in section 230-33, with the same force and effect as though summons had been personally served within this State.

Hawaii Rev. Laws § 230-41.5 (Supp. 1965).

3 417 F.2d at 232, n.1.

4 Id. The appeal was taken pursuant to an order of the court of appeals under 28 U.S.C. § 1292(b) (1964).

the present case. On Duple's interlocutory appeal, the court of appeals HELD: Negligent manufacture outside Hawaii which gives rise to an injury within that state is a tortious act within the meaning of Hawaii's long-arm statute. Furthermore, the presence of coach bodies in Hawaii, manufactured with the knowledge that they would be delivered to and used there, satisfies due process requirements for Hawaiian in personam jurisdiction over the manufacturer.

That a tortious act within the terms of Hawaii's long-arm statute includes injuries caused by acts committed outside the state appears to be well settled. The Hawaii statute was modeled upon an Illinois statute,[5] which had been clarified through the decision in *Gray v. American Radiator and Standard Sanitary Corp.*[6] as applicable to injuries caused by negligence arising outside the state. On this basis, the court's rejection of Duple's argument that the Hawaiian statute did not apply seems correct. However, the *Duple* court's resolution of the issue of due process standards of exercising jurisdiction is less satisfactory. It is submitted that, while the court in *Duple* correctly interpreted the presently available Supreme Court rulings as to the due process requirements of in personam jurisdiction, the court's strict adherence to these domestic, interstate standards was ill-advised in the international situation which was presented in *Duple*.

The constitutional limitations of a state court's in personam jurisdiction have been liberalized through a series of Supreme Court decisions.[7] In *International Shoe Co. v. Washington*,[8] the Court upheld Washington jurisdiction over a foreign corporation which had employed salesmen and solicited orders within that state. In affirming the application of the Washington Unemployment Compensation Act[9] requiring corporations doing business within the state to contribute to state unemployment funds, the Court held that in personam jurisdiction meets due process requirements if the out of state defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not 'offend traditional notions of fair play and substantial justice'."[10] The Court noted that due process is satisfied when the "contacts" between a defendant and a state have been "continuous and systematic."[11] The Court expressly disclaimed, however, any attempt to measure due process standards quantitatively.[12] The test for compliance with due process was instead described as requiring an examination of the nature and quality of the foreign cor-

[5] Ill. Rev. Stat. ch. 110, § 17 (1959).

[6] 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

[7] For a full discussion of the liberalization of the limits placed upon state in personam jurisdiction see Kurland, The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts, 25 U. Chi. L. Rev. 569 (1958).

[8] 326 U.S. 310 (1945).

[9] Wash. Rev. Stat. § 9998-103a-123a (Supp. 1941).

[10] 326 U.S. at 316.

[11] Id. at 317.

[12] Id. at 319.

poration's contacts with the forum state in light of the state's need for the orderly administration of its laws.[13]

The minimum contacts test that was enunciated in *International Shoe* was further refined in *McGee v. International Life Ins. Co.*[14] In *McGee*, it was contended that the California state courts had jurisdiction over an insurance contract dispute involving an Arizona corporation whose only contact with California was the issuance of the policy in dispute.[15] The Supreme Court, after noting the expanded scope of state jurisdiction over foreign corporations, held that the "substantial connection" represented by the disputed contract was in itself enough to satisfy due process requirements for in personam jurisdiction.[16] This result appeared to extend substantially the scope of state jurisdiction by moving from the broad balancing test presented in *International Shoe* to a more objective standard based upon a single contact.[17] However, such a liberalization of jurisdictional requirements must be evaluated in light of the later language in *Hanson v. Denckla*,[18] which held that the courts of Florida did not have jurisdiction in a dispute over a trust which had been created in another state between out of state parties. The Court held that neither the subsequent residency of the settlors and beneficiaries in Florida,[19] nor the execution of the contested powers of appointment in Florida,[20] gave that state in personam jurisdiction over the nonresident trustees. The Court in *Hanson* noted that a state cannot submit an out of state defendant to its jurisdiction unless ". . . there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State. . . ."[21]

The *Duple* court reviewed these requirements of due process and found them satisfied when an allegedly defective product was present in the forum state after having been manufactured with the knowledge that the product would be used in that state.[22] In so holding, the court adopted the rationale expressed in *Keckler v. Brookwood Country Club*.[23] In *Keckler*, the court upheld Illinois jurisdiction over an Indiana corporation which had manufactured and sold a golf cart in Indiana. The cart was later delivered to Illinois where personal injuries were sustained because of an alleged defect in the cart. The *Keckler* court held that due process standards of fairness were met since a manufacturer who sells his product with the knowledge that

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13 Id.

14 355 U.S. 220 (1957).

15 Id. at 221-22.

16 Id. at 223.

17 Comment, In Personam Jurisdiction Over Nonresident Manufacturers In Product Liability Actions, 63 Mich. L. Rev. 1028, 1029 (1965).

18 357 U.S. 235 (1958).

19 Id. at 254.

20 Id. at 253.

21 Id.

22 417 F.2d at 235.

23 248 F. Supp. 645 (N.D. Ill. 1965), cited in 417 F.2d at 235, n.8.

it will be resold from dealer to dealer in an interstate transaction cannot claim surprise at being held to answer in any state for damage caused by his product.[24] If the distributing volume of his product supports a reasonable inference that "national channels of commerce"[25] have been chosen, he cannot deny the interest of the state where the injury occurred in providing a forum. Following the holding in *Keckler,* such a manufacturer ". . . not only submits himself to jurisdiction in all states where his product causes injury but also to the law of those states."[26]

An essential element, however, in the "affirmative act" rationale expressed in *Hanson* and expanded in *Keckler* is the fluidity of the present day American commercial market. This economic structure was emphasized in *McGee* in the Court's enumeration of factors such as transportation, communication and mail services as contributing to the fairness of extending jurisdiction to out of state manufacturers.[27] It is doubtful that this same closely-knit economic community is to be found in the international market.[28] Nevertheless, the majority in *Duple* dismissed without discussion the problem of the practical application of a domestic standard in an international economic context.[29] Such a strict application of the *Hanson* and *Keckler* rationale without a reconciliation of the economic factors underlying those decisions with international market practices would seem to be an unfair extention of the liberalized jurisdictional rule to a foreign defendant. However, the court in *Duple* departed from a strict economic approach by stressing the fact of Duple's actual knowledge that its product was to be used in Hawaii.[30] To the extent that *Duple* does apply an interstate jurisdictional standard, however, the decision raises the question of the propriety of this standard in the international sphere.

A threshold question in any instance of a state asserting jurisdiction over a foreigner is whether the state's activity intrudes upon an area of national policy reserved exclusively for federal action. As the dissent in *Duple* points out, a state may not extend its jurisdiction in a manner that would adversely affect international relations.[31] However-

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[24] Id. at 649.

[25] Id. at 650. The Fifth Circuit has adopted a "stream of commerce theory" which is patterned after the "channels of commerce" approach used in *Keckler.* See Eyerly Aircraft v. Killian, 414 F.2d 591, 595 (5th Cir. 1969). The most recent application of the "stream of commerce" theory was in Coulter v. Sears, Roebuck & Co., 411 F.2d 1189 (5th Cir. 1970), which upheld Texas jurisdiction over an out of state television manufacturer who had no place of business within the state, and who sold T.V. sets only on a wholesale basis to Sears. The court held that the presence of T.V. sets in Texas, coupled with the manufacturer's knowledge that Sears had been reselling the manufacturer's sets in Texas, was sufficient contact to submit the manufacturer to Texas jurisdiction for injuries caused in that state. 411 F.2d at 1189.

[26] 248 F. Supp. at 650.

[27] 355 U.S. at 223.

[28] 417 F.2d at 239 (dissenting opinion).

[29] Id. at 236.

[30] Id. at 234.

[31] Id. at 239 (dissenting opinion).

ever, the holding in *Duple* does not involve such a direct impact upon foreign affairs.[32] The *Duple* court's extension of jurisdiction to cover foreign manufacturers whose negligence has resulted in injuries within the state itself falls far short of an improper attempt of a state to "establish its own foreign policy."[33] This type of state activity, aimed only at protecting its citizens from injuries due to defective products, is not an improper attempt by a state to alter national foreign policy to suit the policies of the state.[34] The effect of such a ruling would appear to be within the appropriate limits of state activity which may have "some incidental or indirect effect in foreign countries."[35] Thus, the holding in *Duple* does not so directly affect foreign affairs that the jurisdictional issue should have been reached as a matter of national policy[36] rather than by unilateral state judicial action.

Establishing the constitutional validity of the *Duple* holding, however, does not resolve the question of whether a foreign manufacturer should be required to defend in the United States in the *Duple* situation. A decision to impose jurisdiction upon a foreign defendant must take into consideration the problems of recovering upon a judgment rendered against the foreigner. While the Full Faith and Credit Clause requires that a judgment of one state be honored in the courts of another state,[37] no such certainty attends the judgments of the courts of the United States in a foreign country. The recognition of an American judgment by a foreign court depends in part upon considerations of international duty and convenience.[38] These principles of comity were developed to avoid conflicts of jurisdiction.[39] While comity is largely a rule of practice,[40] the ultimate recognition of another country's judgment is an extension of the res judicata effect of the judgment itself to the territory of the forum nation "applied to."[41] Recognition of a judgment by a foreign court rests primarily upon the determination by the foreign court that the rendering court had proper jurisdiction.[42] However, in making this determination the forum utilizes the full discretion of its sovereign powers,[43] and may refuse enforcement of a

32 See Zschernig v. Miller, 389 U.S. 429 (1968) for an example of such a direct impact.

33 389 U.S. at 441.

34 Bethlehem Steel Corp. v. Board of Commissioners, 276 A.C.A. 266, 274 80 Cal. Rptr. 800, 801 (1969).

35 Clark v. Allen, 331 U.S. 503, 517 (1947).

36 417 F.2d at 239 (dissenting opinion).

37 Reese, The Status In This Country of Judgments Rendered Abroad, 50 Colum. L. Rev. 783 (1950).

38 Hilton v. Guyot, 159 U.S. 113, 164 (1895).

39 Fantony v. Fantony, 21 N.J. 525, 533, 122 A.2d 594, 597 (1956).

40 Johnston v. Compagnie Générale Transatlantique, 242 N.Y. 381, 387; 152 N.E. 121, 123 (1926).

41 Nussbaum, Jurisdiction and Foreign Judgments, 41 Colum. L. Rev. 221, 222 (1941).

42 Id. at 22. See also Schibsby v. Westenholz, L.R. 6 Q.B. 155 (1870).

43 Nussbaum, supra note 41 at 223.

jurisdictionally valid foreign judgment that markedly departs from notions of fairness or public policy of the forum.[44]

The probability of a British court granting comity and enforcing a judgment on the *Duple* facts was considered remote by the dissent in *Duple* because of the minimal contacts between the defendant and the Hawaiian court.[45] However, the attitude of British courts toward American judgments does not support the dissent's conclusion. In *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*,[46] an American company awarded patent rights to a British company, which, in turn, awarded exclusive licensing privileges to another British company. The original patent contract was then held to be in violation of the Sherman Act[47] by an American court.[48] The American court issued an order requiring that the initial patent be reconveyed. The action in *British Nylon* was brought by the English licensee to prevent the English licensor from obeying the American order to reconvey. The court in *British Nylon* held that the American judgment would not be honored, and upheld an injunction granted against reconveyance of the patent.[49] In so holding, the court noted that the American court had attempted to regulate the internal contractual affairs of a British company which was not a party to the American proceedings.[50] However, the opinion in *British Nylon* points out that foreign judgments, even if they affect British trade, would generally be honored if the action arose ". . . between persons who are either nationals or subjects of that country or are otherwise subject to its jurisdiction."[51] In *Duple*, the fact that the foreign defendant knew of the intended destination and use of his product[52] provides grounds for jurisdiction over a defendant "otherwise" beyond reach.

The decision in *Duple*, grounded upon domestic due process requirements as the basis for jurisdiction, would therefore support an enforceable judgment. In the international situation, however, this approach should not be applied without flexibility. One alternative available in cases such as *Duple* is the possible application of the rule of *forum non conveniens*. This doctrine permits a court to decline to entertain a case, appropriately filed under prevailing rules of competence, if the court is an extremely inconvenient forum for presentation of the action.[53] Through this doctrine, which is purely discre-

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44 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 449 (1964).

45 417 F.2d at 239 (dissenting opinion).

46 2 All E.R. 780 (1952).

47 15 U.S.C. §§ 1-7 (1964).

48 United States v. Imperial Chemical Indus., Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952).

49 2 All E.R. at 783-784.

50 Id. at 782.

51 Id.

52 417 F.2d at 235.

53 Ginsberg, The Competent Court In Private International Law: Some Observations On Current Views In The United States, 20 Rutgers L. Rev. 89, 98 (1965).

tionary,[54] a court may resist imposition of its jurisdiction, even though it has power to hear the case, if it feels it is an inappropriate forum for trial.[55] The suitability of a particular court rests upon a consideration of factors such as access to proof, availability of compulsory process to obtain the attendance of unwilling witnesses, the cost of obtaining the attendance of witnesses, and all of the other problems that make the trial expeditious and inexpensive.[56]

Forum non conveniens will not be applied, however, unless an appropriate forum is available to the plaintiff.[57] Thus, while *forum non conveniens* remains a viable doctrine when the alternative forum falls outside the United States, it has been described as a harsh rule and courts have rarely applied it[58] because they must dismiss rather than transfer the action. In *Burt v. Isthmus Development Co.*,[59] it was stated that a court should require positive evidence of extreme circumstances and should be convinced that material injustice will occur "before it denies a citizen access to the courts of this country."[60] Similarly, in *Vanity Fair Mills, Inc. v. T. Eaton Co.*,[61] the court stated that although an American citizen does not have an absolute right to sue in an American court,[62] where application of *forum non conveniens* would limit redress to a foreign court, American courts are reluctant to force United States citizens to appear in a foreign forum.[63]

This reluctance, however, should not foreclose investigation of possible grounds for application of the doctrine. The use of *forum non conveniens* offers a means to avoid unfairness in actions commenced in a competent but inappropriate forum.[64] As the dissent in *Duple* points out, there were other local defendants in *Duple* who were available and amenable to suit.[65] The *Duple* court could have tempered its strict application of jurisdictional standards with a consideration of the availability of these other defendants in addition to its finding that basic due process requirements had been met. Particularly in such an international situation, it would not be unreasonable for a court to require that a plaintiff demonstrate some justification for inconveniencing one defendant among several that are available.[66] This more flexible approach would help to eliminate any unfairness that might exist notwithstanding compliance with due process guarantees.

54 Comment, Judicially Enacted Direct Action Statutes; Soundness of the New York Rule, 10 B.C. Ind. & Com. L. Rev. 711, 724 (1969).

55 Ginsberg, supra note 53, at 98.

56 Ciprari v. Servicos Aereos Cruzeiro do Sul, S.A. (Cruzeiro), 232 F. Supp. 433, 442 (S.D.N.Y. 1964).

57 Ginsberg, supra note 53, at 98.

58 232 F. Supp. at 443.

59 218 F.2d 353 (5th Cir. 1955).

60 Id. at 357.

61 234 F.2d 633 (2d Cir. 1956).

62 Id. at 645.

63 Id. at 646.

64 Ginsberg, supra note 53, at 98.

65 417 F.2d at 238 (dissenting opinion).

66 Ginsberg, supra note 53, at 100.

In conclusion, it is submitted that the court in *Duple* correctly interpreted presently available due process standards in its determination of the extent of its jurisdiction over foreign manufacturers for injuries caused by their defective products. The additional factor that the defendant had actual knowledge of where his product would be used further supports the court's finding. However, it is suggested that the due process standard applied in *Duple* should not be solely determinative of jurisdictional questions in an international situation. The use of these domestically developed standards could be profitably joined with the exercise of the court's discretion in avoiding unnecessary hardship through resort to the doctrine of *forum non conveniens*.

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