

STUDENT COMMENT

JURISDICTION OVER NON-RESIDENT MANUFACTURERS IN NEW YORK: THE LONG-ARM AMPUTATED

As a result of a study and recommendation by the New York Advisory Committee on Practice and Procedure,¹ the New York legislature, in 1962, passed CPLR 302—a single-act statute.² Modeled after the Illinois single-act statute,³ the New York law was designed to take advantage of the constitutional power of the state of New York to subject non-residents to personal jurisdiction “when they commit acts within the state.”⁴

Recently, the New York Court of Appeals rendered its initial appraisal of the scope of this statute.⁵ It is the purpose of this note to set forth these limitations, and to examine them in relation to those imposed on the single-act statutes of other states.

I

The states, suffering under the handicap of *Pennoyer v. Neff* and similar early decisions,⁶ and the restriction that in personam jurisdiction be limited by the state's physical power over the defendant,⁷ had found it exceedingly difficult to protect the interest of their citizens in an increasingly mobile economy. To overcome these limitations, there evolved a number of fictive devices upon which the states relied in obtaining jurisdiction over non-residents.⁸ Based on the concept that a corporation is a creature of the state, and

¹ N.Y. Advisory Comm. Rep., N.Y. Legislative Doc. No. 13, at 37-41 (1958).

² N.Y. Civ. Prac. Laws & Rules § 302 (1963):

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.

³ Ill. Rev. Stat. ch. 110, § 17 (1956).

⁴ N.Y. Advisory Comm. Rep., supra note 1, at 39. As will be noted, there is even some disagreement as to the meaning of these words. *Infra* pp. 139-42.

⁵ *Longines-Wittnauer Watch Co., v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). Actually, in one decision, the court of appeals also disposed of two other cases: *Feathers v. McLucas* and *Singer v. Walker*.

⁶ See, e.g., *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915); *Pennoyer v. Neff*, 95 U.S. 714 (1877). See also *Developments in the Law, State Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960).

⁷ See *McDonald v. Mabey*, 243 U.S. 90, 91 (1917).

⁸ In the period between *Pennoyer v. Neff*, supra note 6, and *International Shoe v. Washington*, 326 U.S. 310 (1945), many of these fictions were adopted and later abandoned, or left to wither by the Supreme Court. See generally, Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of the State Courts*, 25 U. Chi. L. Rev. 569 (1958).

that a foreign corporation cannot transact any business within a state without the state's permission, the states developed the "consent" theory: that the price for the state's permission could be the corporation's consent to be sued in the state's courts.⁹ Similarly, under the "presence" theory, it was argued that a corporation was amenable to state jurisdiction if it was doing business within the state such as to warrant the inference that it was "present" there.¹⁰ The "doing business" theory allowed jurisdiction when by application of either the "consent" or "presence" theories, a corporation could be said to be "doing business" within the state.¹¹

The single-act statutes originally resulted from the inability of the physical power standard to supply the states with a basis for providing a forum for residents in actions against non-residents in certain situations, the most obvious of which was the case of the non-resident tortfeasor (more particularly, the motorist) who commits a tort and leaves the state before he can be served with process. Thus, the earliest single-act statutes were the "non-resident motorist statutes,"¹² which were subsequently held valid by the Supreme Court in *Hess*

⁹ See *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1855). The "consent" was said to be limited to "... litigation arising out of its transactions in the state." *St. Clair v. Cox*, 106 U.S. 350, 356 (1882).

¹⁰ *Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264, 265 (1917).

¹¹ The cases tended to analyze given fact situations to determine whether by engaging in certain activities the foreign corporation was or was not "doing business." The concept itself was never really defined. See Kurland, *supra* note 8, at 584-86.

In 1945, the Supreme Court, in the famous case of *International Shoe Co. v. Washington*, *supra* note 8, decided to call a halt to this reliance on fiction. In sustaining the validity of a Washington in personam judgment over a non-resident corporate defendant, the Court there said:

[D]ue 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."

Id. at 316. The Court pointed out that since a corporation's presence can only be manifested by the activities of its agents, the term "presence" is only used to symbolize those activities of its agents within the state which would be necessary to meet the demands of due process. The Court also noted that different results would follow the corporation's casual or isolated presence than would follow continuous presence.

The Court in *International Shoe* did little to establish or define the new concept of "minimum contacts." Further clarification came with *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), where the Court declared: "It is sufficient for purposes of due process that the suit was based on a contract which had *substantial connection* with that state." (Emphasis added.) *Id.* at 223. See also *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950); Kurland, *supra* note 8, at 586-624.

Limitations were finally drawn in *Hanson v. Denckla*, 357 U.S. 235 (1958). Recognizing the evolution of a more flexible standard of requirements, the Court said that this still did not indicate an end to all such restrictions on the personal jurisdiction of the state courts. The Court did say, however, that "... [I]t is essential in each case that there 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." (Emphasis added.) *Id.* at 253.

¹² The current statutes are collected at Note, *Nonresident Motorist Statutes—Their Current Scope*, 44 Iowa L. Rev. 384 n.1 (1959).

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*v. Pawloski*¹³ as a proper exercise of the police power of the state over dangerous instrumentalities, and on the additional basis of implied consent.

Then in 1935, the validity of similar statutes aimed at the non-resident corporate defendant was established by *Henry L. Doherty & Co. v. Goodman*,¹⁴ when the Supreme Court upheld jurisdiction founded on an Iowa statute¹⁵ which provided for service of process on an agent of a non-resident corporation (in that case, a securities dealer) doing business in Iowa in a cause of action resulting from that business. The Court argued that Iowa treated the business of dealing in securities as exceptional in nature and subjected it to special regulation. Therefore, analogizing to the non-resident motorist statutes, since the state could regulate the activity, it could make consent to be sued in the state courts a condition for engaging in that activity in the state. In fact, then, the Iowa statute went no further than the (already approved) non-resident motorist statutes.¹⁶

The general acceptance of the single-act statutes¹⁷ before the decision of *International Shoe Co. v. Washington*¹⁸ may well have played a large part in that decision. In any event, *International Shoe* and the emergence of the "minimum contacts" standard led to the proliferation of the state single-act statutes, and an expansion of their scope and application.¹⁹ These statutes generally base jurisdiction on a single contract²⁰ or a single tortious act,²¹ although in the latter case there is a division between statutes calling for the commission within the state of "a tortious act"²² and those calling for the commission of "a tort, in whole or in part,"²³ a distinction which some courts seem to find significant.

II

In 1962, New York joined the list of states which had single-act statutes with the passage of CPLR 302. Clearly the statute was intended to broaden the jurisdiction of the New York courts—but the early legislative commentators could not agree how far. While the Advisory Committee said only that the statute was designed to "take advantage of [the state's] constitu-

¹³ 274 U.S. 352 (1927).

¹⁴ 294 U.S. 623 (1935).

¹⁵ Iowa Code § 11079 (1931) (now, Iowa Rules of Civ. Proc. 56(f), (g) (1951)): When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency.

¹⁶ *Henry L. Doherty & Co. v. Goodman*, supra note 14, at 628.

¹⁷ Developments in the Law, State Court Jurisdiction, supra note 6, at 998-1000.

¹⁸ Supra note 11.

¹⁹ For a partial listing, see Restatement (Second), Conflict of Laws § 84, Reporter's Note (Tent. Draft No. 3, April 19, 1956).

²⁰ See, e.g., Md. Ann. Code art. 23, § 92(d) (1957); Wis. Stat. Ann. § 262.05(5) (1965).

²¹ See, e.g., Ill. Rev. Stat. ch. 110, § 17(1)(b) (1956); Wis. Stat. Ann. § 262.05(5) (1965).

²² See, e.g., Ill. Rev. Stat. ch. 110, § 17(1)(b) (1956); N.Y. Civ. Prac. Laws & Rules § 302(a)2 (1963).

²³ See, e.g., Minn. Stat. § 303.13(3) (1961); Vt. Stat. Ann. tit. 12, § 855 (1958).

tional power under the leading case of [*International Shoe*],"²⁴ McLaughlin's Practice Commentary to CPLR 302 says: "With the enactment of this statute, New York has decided to exploit the fullest jurisdictional potential permissible under federal constitutional restraints."²⁵ On the other hand, Professor Weinstein, in his commentary on the new New York civil procedure, stated that the Advisory Committee's notes did not adopt the position that New York pursue its jurisdictional power to the extent done by Illinois under its substantially identical statute.²⁶ This, then, was the confused legislative legacy devised to the lower New York courts. Their decisions, in interpreting the scope and power of CPLR 302, were its echo.

a. "*Transacts any Business within the State.*"²⁷—Clearly the requirement of transaction of any business within the state demands a great deal less contact than what had been necessary under the old "doing business" standard. In *Patrick Ellam, Inc. v. Nieves*,²⁸ it was determined that the making of a single contract within the state by a non-resident "satisfies the minimum contract [sic] contemplated by the legislature by the enactment of Section 302(a) of the Civil Practice Law and Rules,"²⁹ irrespective of where the breach may have occurred.³⁰ Although the actual making of the contract within the state was held sufficient contact to be "a transaction of business" in *Ellam*, negotiations and discussions in New York prior to the signing of a contract in North Carolina were not sufficient in *Irgang v. Pelton & Crane Co.*³¹ However, execution of the contract plus some other activity within the state was sufficient contact to be a "transaction of business within the state."³²

²⁴ N.Y. Advisory Comm. Rep., supra note 1, at 39.

²⁵ McLaughlin, Practice Commentary 428 (7B McKinney's Consol. Laws of N.Y. (1963)).

²⁶ Weinstein posited the theory that the New York statute

"is designed to take advantage of the constitutional power of the state of New York to subject non-residents to personal jurisdiction, *when they commit acts within the state.* . . ." This is not to say that CPLR 301 and 302 when read together do not *permit* the courts to extend jurisdiction to its outer limits. . . . The advisory committee's intention seems to have been to compel the courts to break free from past restrictive interpretations of their powers, but it does permit them to draw a line that veers in from place to place from due process boundaries.

¹ Weinstein, Korn & Miller, New York Civil Practice, ¶ 302.01, at 3-29 (1963).

²⁷ CPLR 302(a)1. See Thornton, First Judicial Interpretations of the New York Single Act Statute, 30 Brooklyn L. Rev. 285, 288-90 (1964).

²⁸ 41 Misc. 2d 186, 245 N.Y.S.2d 545 (Sup. Ct. 1963).

²⁹ *Id.* at 188, 245 N.Y.S.2d at 547. The court cited with approval McLaughlin's Practice Commentary, supra note 25.

³⁰ "While it may be argued that the breach of the contract occurred . . . outside the state of New York, the Court considers the making of the contract in New York and the arising of a cause of action out of such a contract as sufficient to validate the service of process effected herein." *Patrick Ellam, Inc. v. Nieves*, supra note 28, at 188.

³¹ 42 Misc. 2d 70, 247 N.Y.S.2d 743 (Sup. Ct. 1964). See also *Grobark v. Addo Machine Co.*, 16 Ill. 2d 426, 158 N.E.2d 73 (1959). But see *National Gas Appliance Corp. v. A B Electrolux*, 270 F.2d 472 (7th Cir. 1959), cert. denied, 361 U.S. 959 (1960).

³² Thus the signing of a contract to buy stock and the transfer of stock in New York was sufficient contact to constitute a transaction of business within the state in *Steele v. De Leeuw*, 40 Misc. 2d 807, 244 N.Y.S.2d 97 (Sup. Ct. 1963), and indeed, in *Elkan v. Hindman Agency, Inc.*, 46 Misc. 2d 403, 259 N.Y.S.2d 563 (Dist. Ct. 1965), it was determined

In line with the limitation of *Hanson v. Denckla*,³³ the cases indicated that the requirement of transaction of any business within the state was not met unless the defendant (and not the plaintiff) performed an act while present in the state.³⁴ There are, however, recurrent in the opinions, statements and intimations that the courts were merely trying to interpret CPLR 302(a)1, and not to define the due process limit of the statute. The court in *Irgang v. Pelton & Crane Co.*, speaks to this effect: "[W]e must distinguish between what the United States Supreme Court says a State may legislate and what a State does do in legislating its jurisdiction over nondomiciliary defendants."³⁵

b. "*Commits a Tortious Act within the State.*"³⁶—The problem of interpreting the "tortious act" section of the statute is a great deal more complicated, and the results of the lower New York courts in doing so were correspondingly less satisfactory in establishing a workable standard.

The problem of jurisdiction over the non-resident tortfeasor is twofold. There is really little difficulty in sustaining jurisdiction over a non-resident tortfeasor under the usual single-act statute where the commission of the tort in one state results in the occurrence of damage in that same state.³⁷ The more difficult problem occurs, however, when an out-of-state tortious act or failure to act results in damage in the forum state.

CPLR 302(a)2, as previously stated, was patterned after the Illinois provision. At the time the New York statute was enacted, and after no little uncertainty, the Illinois courts had decided and the federal courts reluctantly conceded³⁸ that the Illinois statute³⁹ would sustain jurisdiction in the case of an out-of-state act or omission producing an injury within the forum state. In *Gray v. American Radiator & Standard Sanitary Corp.*,⁴⁰ the non-resident defendant, an Ohio manufacturer, made the valve in question, which was incorporated into a heater by a Pennsylvania manufacturer; the heater was later sold to the plaintiff, a resident of Illinois, where the allegedly defective

that delivery in the state of an insurance contract to be performed in New York by a California corporation not licensed to do business in New York was, when added to the fact that the defendant had solicited the plaintiff's business in New York, sufficient "transaction of business" to justify the exercise of jurisdiction of New York courts over a cause of action arising from that contract. See also *Iroquois Gas Corp. v. Collins*, 42 Misc. 2d 632, 248 N.Y.S.2d 494 (Sup. Ct. 1964).

³³ *Hanson v. Denckla*, supra note 11. ". . . [I]t is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253.

³⁴ Thornton, supra note 27, at 288. See *Schreder v. Loomis*, 46 Misc. 2d 184, 259 N.Y.S.2d 42 (Sup. Ct. 1965); see also *Old Westbury Golf & Country Club, Inc. v. Mitchell*, 44 Misc. 2d 687, 254 N.Y.S.2d 679 (Sup. Ct. 1964).

³⁵ Supra note 31, at 74, 247 N.Y.S.2d at 748.

³⁶ CPLR 302(a)2. See Thornton, supra note 27, at 291-94.

³⁷ See *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951).

³⁸ See *McMahon v. Boeing Airplane Co.*, 199 F. Supp. 908-09 (N.D. Ill. 1961).

³⁹ The corresponding section of the Illinois Code provides for jurisdiction over non-resident defendants in any cause of action arising from "the commission of a tortious act within this state." Ill. Rev. Stat. ch. 110, § 17(1)(b) (1961). The history of the judicial struggle for a statutory interpretation can be found in Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533.

⁴⁰ 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

valve caused the heater to explode, injuring the plaintiff. The Illinois Supreme Court determined that, in accordance with the traditional choice of law test, a "tortious act" had been committed "in the State" because the injury had occurred there.⁴¹ The court found a legislative intent that the scope of the statute be "... the extent permitted by the due process clause."⁴² Assuming that the Ohio manufacturer enjoyed an Illinois market for his product, despite the fact that the record failed to show whether the defendant had done any other business in Illinois either directly or indirectly,⁴³ the court concluded: "As a general proposition, if a corporation elects to sell its product for ultimate use in another state, it is not unjust to hold it answerable there for any damage caused by defects in those products."⁴⁴ It was irrelevant that the Ohio manufacturer had not sold the valve in question directly in Illinois.⁴⁵

In *Feathers v. McLucas*,⁴⁶ the supreme court refused to find that *Gray* set the scope of CPLR 302(a)2, arguing that the statutory language "commits a tortious act" was not synonymous with the language "commits a tortious injury."⁴⁷ The special term took the opposite approach in *Fornabaio v. Swissair Transp. Co.*,⁴⁸ sustaining jurisdiction over a Delaware corporation which had sold equipment it had manufactured to Westinghouse who incorporated it into its product which was then shipped to Swissair, the plaintiff's employer, in New York where the plaintiff was injured. The court cited with approval the statement in *Gray* that negligence in manufacturing cannot be separated from the resulting injury,⁴⁹ but was also quick to point out that the defendant (S. & C. Electric Co.) was engaging in other contacts in New York.⁵⁰

The *Fornabaio* approach was typical of the New York cases that followed the *Gray* case, as the lower New York courts continued to seek some other contact in the state in addition to the out-of-state negligence.

The courts devised various approaches in finding this additional contact. In one instance, a lower court found more than one section of 302 which would support jurisdiction.⁵¹ In other cases the courts assumed, as in *Gray*,

⁴¹ *Id.* at 435, 176 N.E.2d at 762-63 (citing Restatement (Second); Conflict of Laws § 377 (1958)).

⁴² *Id.* at 436, 176 N.E.2d at 763. See *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

⁴³ *Id.* at 438, 176 N.E.2d at 764.

⁴⁴ *Id.* at 442, 176 N.E.2d at 766.

⁴⁵ "It should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State." *Ibid.*

The Illinois federal courts had previously decided that Ill. Rev. Stat. ch. 110, § 17(1)(b) (1961) did not grant jurisdiction to the Illinois courts in such a situation. *Hellriegel v. Sears Roebuck & Co.*, 157 F. Supp. 718 (N.D. Ill. 1957). They later reversed themselves, however, and followed the *Gray* decision. *McMahon v. Boeing Airplane Co.*, supra note 38; *Anderson v. Penncraft Tool Co.*, 200 F. Supp. 145 (N.D. Ill. 1961).

⁴⁶ 41 Misc. 2d 498, 245 N.Y.S.2d 282 (Sup. Ct. 1963).

⁴⁷ *Id.* at 504, 245 N.Y.S.2d at 287.

⁴⁸ 42 Misc. 2d 182, 247 N.Y.S.2d 203 (Sup. Ct. 1964).

⁴⁹ *Id.* at 183, 247 N.Y.S.2d at 204-05.

⁵⁰ "Here, defendant's products are used and consumed in this state in sufficient quantity and this defendant knew that its product was being shipped to New York for use therein." *Id.* at 183, 247 N.Y.S.2d at 205.

⁵¹ See *Moss v. Frost Hempstead Corp.*, 43 Misc. 2d 357, 251 N.Y.S.2d 194 (Sup. Ct.

that the non-resident defendant knew or should have known that his product would be used in New York, or that there was a substantial New York market for his product. In *Johnson v. Equitable Life Assur. Soc'y*,⁵² the defendant, a Michigan manufacturer, produced a component which was incorporated into a window washing scaffold by a New Jersey manufacturer. The scaffold was installed at Equitable's building in New York City, where, due to an alleged defect in the component, the scaffold malfunctioned, causing the death of the plaintiffs' decedents. The court made the same assumption that had been made in *Gray*, that there was a large New York market for the defendant's product, and that the defendant should have assumed the likelihood that New York would be the ultimate market.⁵³ In affirming per curiam, the appellate division relied on the "other contacts" within the state as the basis of jurisdiction. Noting the substantial price of the component manufactured by the Michigan defendant and the fact that a number of identical components had been purchased by the New Jersey manufacturer for use in scaffolds installed in New York City, the court concluded:

This was known to Michigan Tool, which, in connection with the sale and installation of the completed products had occasion to inspect at least one of the installations in New York City, albeit not the one involved in this case. These sales and services, even if indirect because of the intervention of the New Jersey assembler, amount to substantial contacts satisfying constitutional standards.⁵⁴

The same result was reached in *Newman v. Nathen*⁵⁵ where, on facts similar to those of *Gray*, the court itself raised the relevancy of inquiring whether the scope of the New York statute was intended to be as broad as the application of the Illinois statute as interpreted by *Gray*, ". . . especially in the case of manufacturer's liability."⁵⁶ Acknowledging the holding of *Gray*, the court distinguished the cases in which the manufacturer shipped or sold the product in New York from those in which the product, without the knowledge or intent of the manufacturer, eventually came to rest in the state,⁵⁷ and ultimately held that the non-domiciliary manufacturer would be amenable to New York personal jurisdiction if there were a reasonably anticipated sale in New York of the specific product which caused the injury.⁵⁸ Therefore, again reluctant to base jurisdiction under CPLR 302(a)2 on an out-of-state negligence—local injury theory, the court stressed, and immediately found compliance with, the additional factor of an anticipated contact.

1964) where the court determined that the "case would seem to come well within CPLR § 302(a)1, and 2 in that the cause of action arises from both the transaction of business within the State and the commission of a tortious act therein." *Id.* at 358, 251 N.Y.S.2d at 195.

⁵² 43 Misc. 2d 850, 252 N.Y.S.2d 477 (Sup. Ct. 1964).

⁵³ *Id.* at 851, 252 N.Y.S.2d at 478.

⁵⁴ *Johnson v. Equitable Life Assur. Soc'y*, 22 App. Div. 2d 138, 140, 254 N.Y.S.2d 258, 260 (1964).

⁵⁵ 46 Misc. 2d 407, 259 N.Y.S.2d 637 (Sup. Ct. 1965).

⁵⁶ *Id.* at 409, 259 N.Y.S.2d at 639.

⁵⁷ *Id.* at 410, 259 N.Y.S.2d at 640-41.

⁵⁸ *Ibid.*

In *Platt Corp. v. Platt*,⁵⁹ the supreme court was again reluctant to base jurisdiction solely on the out-of-state negligence—local injury theory. The court sustained jurisdiction under CPLR 302 over non-resident directors in an action based on their failure to attend directors' meetings in New York. First holding that this failure to act was a tort within the purview of the statute, the court reasoned that since the defendants' duty was to go to New York and participate in the corporate affairs, their failure to do so (an out-of-state non-feasance) was a breach of duty in New York (a local injury), and therefore, citing *Gray*, since the injury was local, the "... defendants' 'tortious acts' were committed in New York, where the alleged injuries caused by their 'omissions' were suffered."⁶⁰ By concluding that the neglect of duty was at the place where the duty arose, the court established that the "tortious acts" were local; thus it was spared the problem of having to face the issue of *Gray*—whether jurisdiction can be sustained under the single-act statute when an out-of-state tortious activity results in a local injury.

Clearly the interpretations of the lower New York courts had failed to define workable standards, and the actual scope of the statute's grant of jurisdiction remained unsettled until the recent decisions of the New York Court of Appeals.

III

*Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*⁶¹ represents the first interpretation by the New York Court of Appeals of CPLR 302(a)1, 2. The single decision disposes of three cases, all of which arose under the statute.

a. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*—Plaintiff, a New York corporation, sought to recover some \$476,000 in damages from the defendant, a Delaware corporation doing business in Chicago, for an alleged breach of warranty of the defendant's contract to manufacture and install certain machines in the plaintiff's plant at Lynbrook, Long Island. During the negotiation period, the defendant mailed its contract proposals to the plaintiff in New York and sent its officers there. Although the purchase order was executed in Illinois, the order recited that it was a contract made in New York and governed by the laws thereof.⁶² After further negotiations both in New York and Illinois a supplementary agreement was signed in March 1963 by plaintiff in New York after it had been signed by the defendant in Illinois. This agreement provided, among other things, that delivery of the machines did not constitute acceptance, and that the machines would be accepted only after they had met certain tests. The machines were shipped f.o.b. Chicago in April 1963, and from April until June, two of the defendant's engineers were at the plaintiff's plant supervising installation. After acceptance, the alleged defects were discovered and this action was commenced. The defendant's motion to dismiss was denied by the special term; the appellate division affirmed unanimously.⁶³

⁵⁹ 42 Misc. 2d 640, 249 N.Y.S.2d 1 (Sup. Ct. 1964).

⁶⁰ Id. at 646, 249 N.Y.S.2d at 8.

⁶¹ 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

⁶² Id. at 455, 261 N.Y.S.2d at 17.

⁶³ 21 App. Div. 2d 474, 251 N.Y.S.2d 740 (1964).

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HELD: Defendant's activities in the state prior to and subsequent to the actual execution of the contract are sufficient to meet the statutory requirement of transaction of any business even if the contract was made elsewhere.

In *Daveny v. Rheem Mfg. Co.*, a recent Second Circuit decision concerned with the Vermont single-act statute, Judge Clark (in dictum) concisely stated the problem: "It is impossible to imagine a case arising from a contract made by a foreign corporation 'with a resident of Vermont . . . ' where contacts with Vermont would not suffice to sustain jurisdiction."⁶⁴ The difficulty with *Longines-Wittnauer* and that which distinguishes it from *Daveny* and the other cases decided under CPLR 302(a)1 is that the court had to determine whether contacts other than actual execution of the contract in the state would be sufficient to sustain jurisdiction under the statute, and, if so, whether the defendant's contacts were sufficient.

The court, noting that the legislature did not choose the most precise language available, refused to read "transacts any business within the state" to require that the contract be made in the state, or performed in the state.⁶⁵ Therefore, even if the last act of execution of the contract were elsewhere, jurisdiction could still be obtained under CPLR 302(a)1.⁶⁶

The court then considered whether the defendant's contacts with New York in the case were sufficient to be called a "transaction of business" under the statute. The court considered the defendant's contacts with the state regarding the contract as a totality.

We need not determine whether any one of the foregoing activities would in and of itself, suffice to meet the statutory standard; in combination they more than meet that standard. And merely to list the activities in which the appellant engaged in this State answers any constitutional objection which might be raised against requiring the appellant to make its defense in our courts.⁶⁷

In a leading case, *Compania De Astral, S. A. v. Boston Metals Co.*,⁶⁸ the Court of Appeals of Maryland, faced with a similar fact situation, considered the defendant's activities within the state in their totality, rather than individually, in determining the defendant's contact as sufficient to sustain the constitutionality of Maryland jurisdiction over a non-resident defendant under the Maryland statute.⁶⁹ Indeed, where the non-resident defendant's

⁶⁴ *Daveny v. Rheem Mfg. Co.*, 319 F.2d 124, 128 (2d Cir. 1963).

⁶⁵ See statutes cited in *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, supra note 61, at 456, 209 N.E.2d at 75, 261 N.Y.S.2d at 18.

⁶⁶ The court then concluded that the defendant's activities within the state clearly showed a purposeful attempt to avail itself of the New York market. *Id.* at 458, 209 N.E.2d at 75, 261 N.Y.S.2d at 19.

⁶⁷ *Ibid.*

⁶⁸ 205 Md. 237, 107 A.2d 357, 108 A.2d 372 (1954) (dissent), cert. denied, 348 U.S. 943 (1955).

⁶⁹ The Maryland statute granted jurisdiction over foreign corporations in ". . . any cause of action arising out of a contract made within this State or liability incurred for acts done within this State, whether or not such foreign corporation is doing business in this State." Md. Ann. Code art. 23, § 88(d) (1951).

actions within the state in their totality are sufficient to meet the "minimum contacts" standard, there would seem to be no reason for determining whether any one transaction would be adequate to satisfy the standard. That standard would in fact contemplate a pattern of activity rather than individual acts.⁷⁰

In summary, the court in *Longines-Wittnauer*, in interpreting the legislative intent, concluded that "... the statutory test may be satisfied by a showing of other purposeful acts performed by the appellant in this State in relation to the contract, albeit preliminary or subsequent to its execution."⁷¹ This interpretation, based as it is on the facts of *Longines-Wittnauer*, would seem to be well within the due process limitations as established by *International Shoe*, *McGee*, and *Hanson v. Denckla*.⁷²

b. *Feathers v. McLucas*.—Traveling through upstate New York while en route from Pennsylvania to Vermont, a tractor-drawn tank containing liquified propane gas exploded, causing serious personal injuries and property damage to the plaintiffs, who sued to recover for this damage. The tank was manufactured in Kansas by the defendant Darby, a Kansas corporation, under a contract with Butler Manufacturing Company, a Missouri corporation, allegedly with the knowledge that the latter would mount it on a wheel-base and sell it to E. Brooke Matlock, a Pennsylvania corporation and interstate carrier licensed to operate in several states including New York.

HELD: Jurisdiction over the defendant Darby Corporation is improper because CPLR 302(a)2 extends jurisdiction only to cases where a tortious act is committed within the state by a nondomiciliary; the commission of a tortious act outside the state which results in an injury within the state is not equivalent to the commission of a tortious act within the state.

The appellate division, in reversing the special term's dismissal of the complaint for lack of jurisdiction,⁷³ had stated that "... in expanding the State's *in personam* jurisdiction over nondomiciliaries the Legislature did not intend to separate foreign wrongful acts from resulting forum consequences and that the acts complained of here can be said to have been committed in this State."⁷⁴ The record, according to the appellate division, showed that Darby knew the tank had been constructed for the ultimate Pennsylvania

⁷⁰ See also *S. Howes Co. v. W. P. Milling Co.*, 277 P.2d 655 (Okla. 1954), appeal dismissed, 348 U.S. 983 (1955).

⁷¹ *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, supra note 61, at 457, 209 N.E.2d at 75, 261 N.Y.S.2d at 18. See the cases cited, id. at 457 n.5, 209 N.E.2d at 75 n.5, 261 N.Y.S.2d at 18 n.5. It should also be noted that the Advisory Committee report avoids language that would require an execution of the contract in the state. The language of the report is in terms of commission of "acts within the state" or "defendant's transaction of business within the state." N.Y. Advisory Comm. Rep., N.Y. Legislative Doc. No. 13, at 39 (1958).

⁷² The constitutionality of a statute granting jurisdiction over a non-resident who "transacts any business within the state" regardless of where the contract may be executed is established. The Illinois law upon which CPLR 302 is based was judged not violative of the due process clause. *National Gas Appliance Corp. v. A B Electrolux*, supra note 31. See also *Bluff Creek Oil Co. v. Green*, 257 F.2d 83 (5th Cir. 1958).

⁷³ *Feathers v. McLucas*, 21 App. Div. 2d 558, 251 N.Y.S.2d 548 (1964).

⁷⁴ Id. at 559, 251 N.Y.S.2d at 550, citing Restatement (Second), Conflict of Laws §§ 84, 91a (Tent. Draft No. 3, 1956) and *Conklin v. Canadian-Colonial Airways*, 226 N.Y. 244, 194 N.E. 692 (1935).

user, and was intended for use in interstate commerce; the court concluded that Darby could reasonably have foreseen that its negligence might well have consequences in New York.⁷⁵

The court of appeals, however, concerned itself strictly with the statute's scope. "The language of [CPLR 302(a)2]—conferring personal jurisdiction over the non-domiciliary 'if . . . he . . . commits a tortious act *within* the state'—is too plain and precise to permit it to be read, as has the appellate division, as if it were synonymous with 'commits a tortious act *without* the state which causes injury within the state.'"⁷⁶ The express design of the statute and the draftsmen, reasoned the court, was to supply "jurisdiction over a non-domiciliary whose act in the state gives rise to a cause of action" and "to subject non-residents to personal jurisdiction when they commit acts within the state."⁷⁷ Discussing *Gray*, the court found that decision to exceed the bounds of sound statutory construction,⁷⁸ and that the reliance of the appellate division on that case had been misplaced. The court concluded that the New York legislature had no intention of granting as complete jurisdiction in CPLR 302(a)2 as the *Gray* decision had attributed to the Illinois act.

In a concurring opinion, Judge Van Voorhis agreed that CPLR 302(a)2 will not confer jurisdiction in this case. However, he stated his belief that the interpretation of the statute made by the majority approached the permissible limit under the due process clause, thus disagreeing with the majority's conclusion that the statute was not intended to expand the New York courts' jurisdiction to the limit permitted by the due process clause.⁷⁹

Chief Judge Desmond, dissenting, would affirm *Feathers v. McLucas*. The construction of the majority "restrict[s] the statutory language . . . so narrowly as to defeat the apparent legislative purpose and deprive our citizens of the intended benefits of the statutory plan."⁸⁰

c. *Singer v. Walker*.—Plaintiff, Michael Singer, a minor, sued for damages sustained by him when a geologist's hammer he was using broke and a chip penetrated his eye while he was on a field trip in Connecticut. The hammer was manufactured by the defendant, Estwing Manufacturing Company of Illinois, and bore the label, "Unbreakable Tools. Estwing Mfg. Co." It was shipped by Estwing f.o.b. Illinois to the defendant Walker, a New York dealer in geological supplies, in response to the latter's order, and was purchased from Walker by Michael's aunt, who presented it to the boy.

HELD: CPLR 302(a)1 is not limited to actions in contract, but applies also to actions in tort based on the defendant's transaction of business within the state; defendant's substantial shipment of its product into New York due to solicitation of a local manufacturer's representative is sufficient contact to warrant jurisdiction based on CPLR 302(a)1.

⁷⁵ *Feathers v. McLucas*, supra note 73, at 560, 251 N.Y.S.2d at 551.

⁷⁶ *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, supra note 61, at 460, 209 N.E.2d at 77, 261 N.Y.S.2d at 21.

⁷⁷ N.Y. Advisory Comm. Rep., supra note 71, at 37, 39.

⁷⁸ *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, supra note 61, at 463, 209 N.E.2d at 79, 261 N.Y.S.2d at 23.

⁷⁹ *Id.* at 467-68, 209 N.E.2d at 82, 261 N.Y.S.2d at 27.

⁸⁰ *Id.* at 472, 209 N.E.2d at 85, 261 N.Y.S.2d at 31.

The special term had dismissed the complaint for lack of personal jurisdiction over the defendant. The appellate division, in reversing the special term's dismissal of the action, decided that a tortious act had been committed within the meaning of CPLR 302(a)2, and since "the statute is not defined in terms of requiring that the cause of action arise in the State, but only that it arise from the commission of a tortious act in the State,"⁸¹ that such jurisdiction was proper under CPLR 302(a)2.

On appeal, the argument of the appellate division was rejected. The court of appeals also rejected, as it had in *Longines-Wittnauer*, the argument that CPLR 302(a)1 did not apply because the contract had been executed in Illinois, and further discounted, as not controlling, the consideration that the injury occurred in Connecticut. The court does, then, expand the application of CPLR 302(a)1 by holding, in effect, that this section will sustain jurisdiction over a non-resident who transacts any business in the state, not only in a cause of action arising from his transaction of that business, but also in a cause of action that is ancillary to that business—once the necessary nexus of contact has been shown.

Feathers v. McLucas and *Singer v. Walker* both presented the court with a greater opportunity to delineate the scope of the statute than did *Longines-Wittnauer*. In rejecting *Gray*, the court of appeals made it clear, however, that it was determining the scope of jurisdiction granted by the statute, and not the limitations on the statute imposed by the due process clause. The decisions establish that the court of appeals will interpret CPLR 302(a)2 to require some contact with the state, in addition to the tortious injury, in order to comprise the jurisdictional tortious act. In a case of manufacturer's product liability this other contact is somewhere in the limbo between no activity at all, and that "doing business" activity which would be sufficient to bring a case within CPLR 302(a)1, as in *Singer v. Walker*.

IV

Although New York, in requiring some "other contact" in addition to the tortious injury in order to sustain jurisdiction, thereby aligns itself with the majority of states having "tortious act" statutes, the New York court is more demanding than other courts in what it will accept as a "contact." This unnecessarily robs the statute of its breadth of application, so that New York does not get as much mileage out of its statute as it could.

The Vermont statute is of the "tort in whole or in part" variety,⁸² and

⁸¹ *Singer v. Walker*, 21 App. Div. 2d 285, 286, 250 N.Y.S.2d 216, 218 (1964). The appellate division argued that the circulation of a dangerously defective article in New York was a tortious act occurring in the state, thus leading the way for jurisdiction on the basis of CPLR 302(a)2—that the defendant had committed a tortious act within the state.

⁸² Vt. Stat. Ann. tit. 12, § 855 (1958):

If a foreign corporation makes a contract with a resident of Vermont to be performed in whole or in part by either party in Vermont, or if such foreign corporation commits a tort in whole or in part in Vermont against a resident of Vermont, such acts shall be deemed to be doing business in Vermont by such foreign corporation.

was held constitutional in *Smyth v. Twin State Improvement Corp.*,⁸³ a landmark case cited with approval by the Supreme Court in *McGee*.⁸⁴ In *Smyth*, however, it was clear that the tortious injury resulted from the defendant's transaction of business within the state.

Subsequently the Vermont court refused to sustain jurisdiction under the same statute in *O'Brien v. Comstock Foods*.⁸⁵ There, the plaintiff had sought damages for injury suffered from a piece of glass discovered in canned food packed by the defendant in New York. The court reasoned:

The vital factor in the statute is the intentional and affirmative action on the part of the non-resident defendant in pursuit of its corporate purposes within this jurisdiction. A single act, purposefully performed here, will put the actor within the reach of the sovereignty of this state, as in the *Smyth* case. . . . [I]t is incumbent upon the claimant to plead sufficient facts to demonstrate that the defendant is causally responsible for the presence of the injuring agency within the state of Vermont.⁸⁶

It is interesting that *O'Brien* and *Feathers* reach the same result, although the language of the pertinent statutes is different. There is some question, as will be pointed out below,⁸⁷ whether the difference in statutory language should necessarily result in different interpretations of the extent of jurisdiction granted by the statute.

On the other hand, as already noted, the Supreme Court of Illinois has sustained jurisdiction in a strikingly similar fact situation involving a "tortious act" statute identical to CPLR 302(a)2.⁸⁸ Reasoning that the injury of the plaintiff within the state as a result of the defendant's out-of-state negligence is equivalent to a tortious act committed within the state,⁸⁹ and coupling this with the determination that the defendant should have known that there was a large Illinois market for its product,⁹⁰ the Illinois court sustained jurisdiction.

The Supreme Court of Minnesota had less trouble than that of Vermont in finding jurisdiction over a non-resident manufacturer where the injury was local under its "tort in whole or in part" statute.⁹¹ In finding that an Ohio boiler manufacturer, whose product had found its way into Minnesota where it proved to be defective and exploded, had sufficient contact, the court stated: ". . . The negligent manufacture of a product in a foreign state be-

⁸³ Supra note 37.

⁸⁴ *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 n.2 (1957).

⁸⁵ 123 Vt. 461, 194 A.2d 568 (1963).

⁸⁶ Id. at 464-65, 194 A.2d at 570-71.

⁸⁷ *Infra*, p. 150.

⁸⁸ *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

⁸⁹ Id. at 435-36, 176 N.E.2d at 762-63, citing Restatement (Second), Conflict of Laws § 377 (1958).

⁹⁰ *Ibid.*

⁹¹ It should be noted that the provisions of the Minnesota statute and the Vermont statute are identically worded. Compare Minn. Stat. § 303.13(3) (1961), with Vt. Stat. Ann. tit. 12, § 855 (1958).

comes a tort committed 'in whole or in part in Minnesota.' ⁹² However, in upholding jurisdiction under the statute, the court assumed that it was foreseeable by the defendant that his product would be used in Minnesota.⁹³

The commission of a tort should probably be sufficient to meet the "minimum contact" requirement of *International Shoe*. Nevertheless, many courts obviously continue to require some contact in addition to the tortious act itself. The Vermont court probably carried this to the extreme in *O'Brien* in requiring some sort of "purposeful activity" on the part of the defendant. The "purposeful activity" test, spawned in *Hanson v. Denckla*, although no doubt necessary in cases wherein the jurisdictional basis is the transaction of business, is undoubtedly too stringent a requirement in cases where the jurisdictional basis is a tort. Indeed, on the basis of *Hess v. Pawloski* and other cases dealing with the non-resident motorist statutes, and particularly in tort cases involving dangerous instrumentalities, there should be no need to find any other contact. "[I]t can be noted that the continued recognition of the nonresident motorist statutes is persuasive authority in support of the proposition that the commission of a single tort within the state is sufficient to satisfy the 'minimum contact' requirement of the *International Shoe* decision."⁹⁴

While the Vermont court in *O'Brien* went to the extreme of requiring that the defendant purposefully engage in availing himself of the Vermont market, the Illinois court in *Gray* and the Minnesota court in *Ehlers* gave only passing mention to this additional requirement inasmuch as these courts found that this additional contact was satisfied with the assumption that the local market was reasonably foreseen or contemplated by the non-resident manufacturer.

The Minnesota court has on one occasion based jurisdiction solely on the occurrence of the tortious injury in the state—with no reliance on an additional contact. In *Atkins v. Jones & Laughlin Steel Corp.*⁹⁵ the plaintiff, a truckdriver, was injured when a steel drum containing acid broke while he was hauling and unloading it. Although the acid was distributed by the defendant, the Montanin Company, a New York corporation, on orders from independent brokers who were not under contract, and to whom the defendant paid a commission, none of the defendant's employees ever handled the acid. Upon receipt of customer orders from the independent brokers, the defendant had ordered the acid from a Maryland company who in turn arranged for the manufacturer, a Delaware corporation, to ship it in tank cars

⁹² *Ehlers v. United States Heating & Cooling Mfg. Co.*, 267 Minn. 56, 60, 124 N.W.2d 824, 826 (1963).

⁹³ *Id.* at 61, 124 N.W.2d at 827:

We feel justified, in view of the record, in concluding that the product here involved was manufactured by appellant corporation for use by the general public. It is not contended that the area of foreseeable use of the product was so limited as to exclude the state of Minnesota. The affidavit filed . . . did not negate the reasonable inference that the "Fireball" boiler is a mass-production unit intended for nationwide use.

⁹⁴ Jenner & Tone, Historical & Practice Notes to the Illinois Statutes (Smith-Hurd Ill. Ann. Stat. ch. 110, § 17 (1956)) 165, 169, included by the New York Advisory Committee in its report, *supra* note 71, at 471, 475.

⁹⁵ 258 Minn. 571, 104 N.W.2d 888 (1960).

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to Robinson Brothers Chemicals in New York. Robinson Brothers then repacked the acid in five gallon drums which they had purchased from Jones & Laughlin, the manufacturer, which had tested the drums at its plant in Pennsylvania. Robinson Brothers then arranged for the shipment of the acid filled drums to the defendant's customers by independent trucker, by whom the plaintiff was employed.

Jurisdiction over the defendant was held to be proper under the Minnesota statute. The Minnesota court quoted with approval the memorandum of the lower court:

"Without doubt the principal act of negligence occurred in the making and sealing of the container; that occurred in an eastern state. However, a mere failure to exercise reasonable care is not a tort. It only becomes a tort actionable as such when someone is injured as a proximate result. . . . Damage is an essential element of the cause of action. . . . In this case the leakage of the dangerous substance occurred in Minnesota, and the plaintiff was injured thereby in this state. It is the opinion of the Court that the tort occurred therefore in part in Minnesota."⁹⁶

In affirming jurisdiction, the Minnesota Supreme Court, using the ordinary product liability theory, held that the defendant was liable to anyone that his product injures despite the lack of privity of contract. The court found the exercise of jurisdiction proper without a finding of or even an allusion to any other contact.

[I]f the allegations of the complaint herein are established, it would follow that defendant was subject to the jurisdiction of our courts, since the last event essential to its tort liability—the injury of plaintiff—occurred here. Under § 303.13, subd. 1(3), such contact with a Minnesota resident constituted doing business here so as to make defendant subject to service of process as provided therein.⁹⁷

The New York Court of Appeals' test for determining the applicability of CPLR 302(a)2 lies somewhere in the middle of the spectrum of these various state approaches. The court of appeals' opinion makes it clear that the New York courts require more "contact" occurrence of a tortious injury, thus clearly looking for a broader base of jurisdiction than did the Minnesota court in *Atkins*. Although it seems that New York will not require as stringent a standard as did Vermont in *O'Brien*—that is, that the defendant "purposefully act" so as to avail himself of the local market for his product—it is also clear that New York will not be satisfied, as were the *Gray* and *Ehlers* courts, with a mere assumption that the local market was known, or foreseeable to the defendant. Indeed, the court of appeals refused to make this assumption when invited to do so by the plaintiff in *Feathers v. McLucas*.⁹⁸ Into the small area left, the court engrafts its interpretation of the basis of jurisdiction under

⁹⁶ Id. at 575-76, 104 N.W.2d at 891.

⁹⁷ Id. at 579, 104 N.W.2d at 893.

⁹⁸ *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, supra note 61, at 464, 209 N.E.2d at 79, 261 N.Y.S.2d at 24.

CPLR 302(a)2. If the defendant is purposefully engaging in the New York market, he is clearly "transacting business" in the state and jurisdiction can be based, even in a cause of action arising out of a tort, on CPLR 302(a)1—as was done in *Singer v. Walker*. Yet the court is unwilling to base jurisdiction under section 2 of CPLR 302(a) on a tortious injury alone! By its unwillingness to assume that the New York market was reasonably foreseeable to the defendant, the court limits jurisdiction under CPLR 302(a)2 to the very few cases in which there is a tortious act within the state and the plaintiff can also show some additional contact—not necessarily so much as to constitute a "transaction of business" but enough so that the court will not have to assume that "other contact."

Chief Judge Desmond, in his dissent, hinted that he might be willing to adopt a more liberal view. The Chief Judge concurred with the result of *Singer v. Walker*, but argued that jurisdiction could have been sustained under section 2 as well as section 1 of CPLR 302(a); for that reason also, he would have affirmed *Feathers v. McLucas*. All the single-tort-act statutes, he says, "reflect the idea that the various separate acts or omissions may together make out a tort. For instance, the totality of an actionable tort such as charged here (involving manufacturer's products liability) consists of three elements: defective manufacture, distribution to purchaser, and a resulting injury."⁹⁹ The suggestion then, is that any one of these tortious acts (which together comprise a tort) should be sufficient, if it occurs in New York, to meet the statutory requirement of the commission of a "tortious act within the state."

Desmond strengthens this intimation with the suggestion that the semantic differences among the various state statutes are of no consequence, and that these should not be interpreted as indicating different legislative intents concerning the scope of conferred jurisdiction. The New York statute, he suggests,¹⁰⁰ which calls for the commission of a "tortious act," is no different in content or intent from the Minnesota or Vermont statutes which call for the commission of a "tort in whole or in part" or from the Connecticut or North Carolina statutes which call for "tortious conduct."¹⁰¹ Since, as he points out, an actionable tort is composed of several "tortious acts," all these statutes through their various wordings are in actuality demanding the same conduct as a basis for the exercise of jurisdiction.

However, after appearing to advocate the position that the tortious injury alone should be sufficient under the statute, Desmond retreats, and urges upon the court the rationale of *Gray*: that the tortious injury within the state plus the contemplated or reasonably anticipated market within the state for the non-resident manufacturer's product is equivalent to a tortious act within the purview of any of the statutes.¹⁰²

⁹⁹ Id. at 470-71, 209 N.E.2d at 84, 261 N.Y.S.2d at 30.

¹⁰⁰ Id. at 470, 209 N.E.2d at 84, 261 N.Y.S.2d at 29-30.

¹⁰¹ Conn. Gen. Stat. Ann. § 33-411(c) (1960); N.C. Gen. Stat. § 55-145(a)(4) (1965).

¹⁰² Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., supra note 61, at 471, 209 N.E.2d at 84, 261 N.Y.S.2d at 30: "... [W]hen a manufacturer purposefully sends its product into the forum state or when his conduct of his business is such that he contem-

It would seem that the assumption that the defendant could reasonably have foreseen that his product would find use in New York could have comfortably been made by the court of appeals in these cases, particularly since all the defendants sent their products into a widespread market. And it also appears that New York case law would amply support the view that the distribution of a dangerous instrumentality, made dangerous by negligent manufacture, or an injury due to such distribution is a tortious act—as suggested by Desmond. Such a step would have been expected from the court that has been such a forerunner in the field of manufacturer's warranty.¹⁰³

V

Whenever a statute, or any other basis of state jurisdiction is at issue, the consideration must ever be present that in a mobile economy such as ours, it is necessary to provide a forum that will be convenient for the plaintiff as well as for the defendant.¹⁰⁴ Not only is there the question of how many witnesses each party would have to bring a long distance in order to testify at the trial, but, in the interests of fairness, the courts must also consider the type of business that the nonresident defendant has engaged in. If the defendant is engaged in a local business, catering to the needs of his local community, and doing nothing to garner a more widespread trade, then it would seem undue to force him to come a long distance to defend an action arising from a defect in his product when he never contemplated or even planned or desired that his product would ever find its way into the forum state. But the defendants in both *Feathers v. McLucas* and *Singer v. Walker* were engaged in a widespread business. Estwing solicited business in other states; Darby sold its product to a customer in another state, and could not help but be aware of the fact that its product would ultimately be used in many states. Thus, by engaging in a more widely ranged business activity it does not seem undue that these manufacturers be compelled to go to wherever the market

plates the delivery of his product in a forum state he is guilty of a tortious act in the forum state if the product is defective in such manner that the manufacturer is liable in tort."

¹⁰³ See cases cited by Judge Van Voorhis, id. at 468-69, 209 N.E.2d 82-83, 261 N.Y.S.2d at 28.

¹⁰⁴ Mr. Justice Black recognized the importance of this factor in *McGee v. International Life Ins. Co.*, supra note 84, at 223-24:

It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgement proof. Often the crucial witnesses—as here on the company's defense of suicide—will be found in the insured's locality. Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process.

On the other hand, it was noted in *Hanson v. Denckla*, 238 U.S. 235, 254 (1958), that relative convenience to the parties should never become a substitute for personal jurisdiction.

into which they willingly entered may carry their product in order to defend suits resulting from the defects in the products which they placed in that market. The engagement in such a widespread market may by itself go a long way toward meeting the foreseeability test. Indeed, it could be argued that when courts like those in *Gray* and *Ehlers* are so ready to make the assumption that the defendant had contemplated or could have foreseen that its product would enter the forum market, they are in fact simply balancing the equities between plaintiff and defendant in the light of the market for the latter's product.

CPLR 302(a) represents the interest of the state in providing a convenient forum for its citizens who are injured at the hands of those who enter the state, or use its facilities. No stronger case can be pointed out to demonstrate this interest and the need for this protection than *Feathers v. McLucas*. The state has no effective means of controlling the worthiness of the carriers of interstate commerce, and cannot restrict the use of the state roads in cases of interstate shipment of dangerous cargos in defective containers. Therefore, the state should be able to provide a convenient forum for its citizens injured through the out-of-state negligence of a manufacturer who allows a defective (and dangerous) product to go into or through New York.

But the decision of the court of appeals restricts the scope of interpretation of the statute so narrowly that for all practical purposes CPLR 302(a)2, standing alone, in cases of manufacturer's tort liability, cannot provide a basis of jurisdiction. By failing to read into the statute a more desirable range of jurisdiction, the court of appeals likely misconstrued the intent of the legislature, and failed to meet the needs of the people of New York. Chief Judge Desmond recognized this inadequacy in the court of appeals' interpretation:

The damage being done by this decision is not to the plaintiff and his cause but to the second part of section 302 (subd. a, par. 2: "commits a tortious act within the state") which is being given a restrictive meaning not required or justified, contrary to the plain language of the statute itself and its evident purpose and to the relevant decisions in this court and in courts of other states.¹⁰⁵

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¹⁰⁵ *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, supra note 61, at 470, 209 N.E.2d at 84, 261 N.Y.S.2d at 29.