

LONG ARM STATUTE JURISDICTION WHEN THE TORTIOUS ACT OCCURS IN ONE STATE, THE INJURIOUS CONSEQUENCES IN ANOTHER

The states have greatly expanded their jurisdiction over non-residents by the enactment of long-arm statutes. The extent to which jurisdiction can be acquired over a nonresident is subject only to satisfying the requirements of federal due process. This test is generally thought to consist of three steps: (1) Some minimum contact must exist between the state and the nonresident. (2) The cause of action must arise out of that contact. (3) Assuming the first two requirements are met, due process must be satisfied if the nonresident is forced to defend in the forum state.¹ When the nonresident or his agent has conducted activities within the state, jurisdiction is generally extended to include him. But jurisdiction becomes more difficult to extend to a nonresident when he commits an act outside the forum state which causes injury to person or property within the state, this act being his only contact.

I. THE SUPREME COURT GUIDELINES

The Supreme Court in 1958 asserted in *Hanson v. Denckla*² that there are limitations to the expansion of state jurisdiction over nonresidents. This note will explore the limitations referred to in *Hanson* in the context in which the lower courts have applied them to the difficult cases.

The modern test of the constitutional limitations on state court jurisdiction over nonresident is contained in *International Shoe Co. v. Washington*.³ The test permits the assertion of jurisdiction over non-residents when the nonresident has certain minimal contacts with the forum state, but the contacts must be substantial enough to satisfy due process. A court must decide whether it is fair and reasonable to require the nonresident to defend an action in the forum state.⁴ The due process requirements are met when the assertion of jurisdiction would not offend "traditional notions of fair play and substantial justice."⁵

¹ This summarization of the due process requirements was adopted from Note, 47 GEO. L.J. 342, 351-52 (1958).

² 357 U.S. 235, 251 (1958).

³ 326 U.S. 310 (1945).

⁴ *Id.* at 320.

⁵ *Id.* at 316.

In *McGee v. International Life Ins.*,⁶ the Supreme Court of the United States made it clear that one transaction in the forum state may be enough to satisfy due process. A Texas insurance company had assumed the obligations of an Arizona corporation, and mailed a re-insurance offer to a California plaintiff. The plaintiff accepted the offer by mail from California and mailed premium payments to Texas. There was no evidence the nonresident defendant had ever transacted other business in California. The Court upheld jurisdiction because the suit "was based on a contract which had substantial connection with that state."⁷ The Court noted that California had an interest in providing effective redress for its residents when nonresident insurers refused to pay claims solicited in that state.⁸ The reasonableness of asserting jurisdiction depended upon factors establishing the interest of the forum state in the subject matter of the lawsuit, as opposed to successive business activity. In appraising the interest of the forum state, Justice Black noted that in the trial of insurance cases the essential evidence is to be found in the state of the insured's residence.⁹ After balancing the interests of the forum state and the plaintiff against the inconvenience of defending in a foreign forum, jurisdiction was upheld.¹⁰

One year later, the Supreme Court refused to uphold jurisdiction in *Hanson v. Denckla*.¹¹ Florida attempted to gain jurisdiction over a Delaware trustee, the trust corpus being located in Delaware. The trust was created by a Delaware resident, who later became domiciled in Florida. The Delaware trustee corresponded with her by mail, and income payments were mailed to her in Florida. The Court held Florida had no jurisdiction over the trustee because "it 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 protection of its laws."¹² But the trustee had done nothing more than to continue a pre-existing relationship with the settlor after her

⁶ 355 U.S. 220 (1957).

⁷ *Id.* at 223.

⁸ *Id.* This decision may have been influenced by the fact that California had enacted a statute which specifically subjected foreign corporations to jurisdiction on insurance contracts, thus clearly evidencing the state's desire to protect its citizens in insurance transactions.

⁹ *Id.*

¹⁰ *Id.* at 224.

¹¹ 357 U.S. 235 (1958).

¹² *Id.* at 253.

change of domicile. The *Hanson* Court denied jurisdiction distinguishing *McGee* on two grounds. First, in *McGee* the nonresident insurance company went into California by mail and solicited business.¹³ The *Hanson* trustee had performed no act in Florida that could be considered exercising a Florida privilege. Second, the Court stated:

The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum state. In that respect, it differs from *McGee*¹⁴

There are at least two plausible readings of the *Hanson* opinion. One results from a literal reading of the minimum contact due process requirement. This interpretation would mean that in each case, to obtain jurisdiction over the nonresident, a court would have to find some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum. The alternative reading would be to confine *Hanson* to its facts. The purposefully availing test would be used only in a case in which the nonresident's contact with the state is his transaction of business.

Many states have included in their long arm statute the commission of a tortious act as a basis of jurisdiction.¹⁵ These provisions have been construed as extending jurisdiction to the nonresident who commits an act outside the state which results in consequences within the state.¹⁶ Therefore, under the *International Shoe* test, a court must decide whether it is fair and reasonable to require the nonresident to defend an action based on the injurious effect of the outside act.¹⁷ When one commits a tortious act he obviously does not consider the benefit of the laws of the state in which such act is committed. Thus, a rule limiting jurisdiction

¹³ *Id.* at 251.

¹⁴ *Id.*

¹⁵ *E.g.*, OHIO REV. CODE ANN. § 2307.382 (Page Supp. 1966); ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1967); ORE. REV. STAT., § 14.035 (1965); *See also* Comment, *Ohio's Long Arm Statute*, 15 CLEV.-MAR. L. REV. 363 (1966); Comment, *Jurisdiction Under New Ohio "Long Arm" Statute-Problems of Interpretation and Application*, 35 U. CIN. L. REV. 157 (1966); Note, *Conflict of Laws-Jurisdiction-Long-Arm Statute-Commission of a Tort*, 44 ORE. L. REV. 131 (1965).

¹⁶ *See* *United Medical Laboratories v. Columbia Broadcasting System, Inc.*, 256 F. Supp. 570 (D. Ore. 1966); *Gray v. American Radiator*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).

¹⁷ *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

Whether due process is satisfied must depend rather 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.

to defendants who purposefully conduct activities within the forum state is very difficult to apply in the tort situation. The contact with the forum state is the injurious effect of the act committed outside the state. *Hanson* denied jurisdiction because (1) the cause of action did not arise out of the nonresident's connection with the forum state, and (2) the nonresident did nothing by which he purposefully availed himself of that state's laws.¹⁸ If the cause of action arises out of a contact that amounts to the commission of a tortious act within the state, and not out of the transaction of business within the state, can a court still uphold jurisdiction over the nonresident without first finding that he purposefully availed himself of the benefits of the forum state's laws?

II. LOWER COURT APPLICATIONS OF THE *Hanson* DOCTRINES

The lower courts have employed several different approaches in attempting to reconcile their upholding of jurisdiction with the *Hanson* decision. There has been little difficulty in upholding jurisdiction over a nonresident when he or his agent commits an act within the state. The difficulty occurs when the defendant's acts are committed outside the forum jurisdiction and cause injury to persons or property within the forum.

The Supreme Court of Illinois, in *Gray v. American Radiator*,¹⁹ upheld jurisdiction over an Ohio corporation under the tortious act provision of the Illinois long arm statute.²⁰ The nonresident's only contact with Illinois was the presence of its product there. Titan Valve manufactured in Ohio a safety valve which it sold to American Radiator, a Pennsylvania corporation. This corporation used the valve in manufacturing water heaters, one of which was sold to the Illinois plaintiff. Plaintiff was injured when the water heater exploded in his Illinois residence. There was no evidence the nonresident manufacturer of the safety valve, Titan, did any business in Illinois, other than the fact that the valves were used in water heaters which American Radiator sent into that state. The Illinois Supreme Court, in straining to comply with the language of *Hanson*, held that one could reasonably infer that the nonresident defendant foresaw that the valves were being manufactured for ultimate use in many states, one of which might well have been Illinois.²¹ The Ohio manufacturer undoubtedly bene-

¹⁸ 357 U.S. 235, 251, 253 (1958).

¹⁹ *Gray v. American Radiator*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

²⁰ ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1967).

²¹ *Gray v. American Radiator*, 22 Ill. 2d 432, 442, 176 N.E.2d 761, 766 (1961).

fited from the protection of Illinois law in the marketing of water heaters containing its valves.²² The court appeared to conclude that foreseeability was the equivalent of purposefully availing the benefit of state law.

Other more recent product liability cases have added authority to the *Gray* doctrines. *Ehlers v. U.S. Heating & Cooling Mfg. Corp.*²³ involved essentially the same fact pattern. The Minnesota Supreme Court reached the same conclusion through similar reasoning. The court decided that the appellant corporation, although never sending its agents into the state, or shipping products directly to the distributors there, nevertheless manufactured its product for use by the general public. There was no proof that this area of foreseeable use excluded Minnesota. Thus the nonresident manufacturer was purposefully availing himself of the benefit of Minnesota law.²⁴

The Supreme Court of Iowa also found the *Hanson* test to have been met by the presence of only a single product of the nonresident manufacturer. In *Andersen v. National Presto Industries, Inc.*,²⁵ the court asserted that it would be unrealistic to deny the knowledge that commercial products of an interstate corporation are designed for whatever markets may be found for them. The court stated, "They are placed in the stream of commerce; and when they reach a foreign state they have the protection of its laws."²⁶

The preceding cases, all dealing with product liability in which the nonresident's only contact with the forum state was the product itself, had little difficulty in disposing of the *Hanson* requirements. They considered the entry of the defendant's product, though sent in by an independent third party, to have been the contact with the forum state. These cases also held the cause of action arose out of that contact. Each of the three courts predicated jurisdiction under the commission of a tortious act provision of their long arm statute. They did not hold that the nonresident was transacting business within the state.²⁷

²² *Id.*

²³ 267 Minn. 56, 124 N.W.2d 824 (1963).

²⁴ *Id.* at 61, 124 N.W.2d at 827.

²⁵ 257 Iowa 911, 135 N.W.2d 639 (1965).

²⁶ *Id.* at 919, 135 N.W.2d at 643.

²⁷ For excellent analyses of the products liabilities cases, see Comment, *Tortious Act As a Basis For Jurisdiction in Product Liability Cases*, 33 *FORD. L. REV.* 671 (1965); Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 *MICH. L. REV.* 1028 (1965).

Another court disposed of the *Hanson* language with a different rationale. In *Phillips v. Anchor Hocking Glass, Corp.*,²⁸ the nonresident defendant's only contact with Arizona was the presence of an allegedly defective glass dish. The dish was manufactured and sold to plaintiff outside the state, and plaintiff was injured by the dish when it exploded in his Arizona residence. The court held it not necessary under the *Hanson* language to find the defendant manufacturer had purposefully availed itself of the forum state's laws,²⁹ or that he had foreseen the use of his product in Arizona.³⁰ Referring to the purposeful activity language of *Hanson*, the court said:

We do not think the quoted language can be construed literally. . . . A rule limiting jurisdiction to defendants who purposefully conduct activities within the state cannot properly be applied in product liability cases in view of the fortuitous route by which products enter any particular state.³¹

But the court upheld jurisdiction because it felt the defendant could have foreseen the product's ultimate use in Arizona, but not because *Hanson* required this result. The court stated:

Upon reflection, we think it would be a rare situation where a manufacturer could not foresee the presence of his product anywhere within the continental United States. That possibility should motivate him to seek appropriate insurance.³²

The Arizona Supreme Court placed emphasis on foreseeability in this case, not because it was necessary to comply with the *Hanson* doctrine, but because it felt it would be fair and reasonable to require the nonresident to defend the action. He could have foreseen that his product would be used in Arizona, and therefore could have protected himself.

A recent case outside the products liability area also relied on foreseeability. *Bibie v. T. D. Publishing Corp.*³³ involved an alleged invasion of privacy. The United States District Court for the Northern District of California upheld jurisdiction over a nonresident publisher although its only contact with California was that it sold magazines to an independent distributor who distributed

²⁸ 100 Ariz. 251, 413 P.2d 732 (1966).

²⁹ *Id.* at 256, 413 P.2d at 735.

³⁰ *Id.* at 259, 413 P.2d at 737.

³¹ *Id.* at 256, 413 P.2d at 735.

³² *Id.* at 259, 413 P.2d at 737.

³³ 252 F. Supp. 185 (N.D. Cal. 1966).

them in California. The court decided the defendant was well aware a substantial number of its magazines were destined for sale in California. Therefore, it was not unreasonable to conclude that by its own affirmative act the defendant had chosen to exploit the California market for the sale of its products.³⁴

Hanson v. Denckla clearly established that there were some limits to expanding in personam jurisdiction over nonresidents.³⁵ However, the doctrines used in that case have not significantly impeded the lower courts from asserting jurisdiction over nonresidents. In cases where the contact consisted of only a single product, sent into the state by a third party, the courts have attempted to comply with the *Hanson* language through the ultimate use and the foreseeability theories.³⁶ The Phillips court found it unnecessary to reconcile its case with *Hanson*. That court decided that *Hanson* did not apply to the fact situation before them. The contact in the *Phillips* case was the tortious injury, not the transaction of business which *Hanson* was considering.³⁷ By limiting *Hanson* to its facts, the *Phillips* court effectively extended the limits of due process.

III. A POSSIBLE POINT OF JURISDICTIONAL LIMITATION

When will long arm jurisdiction violate due process? One could conclude that a court following the *Phillips* rationale would only deny jurisdiction when the nonresident could not reasonably foresee that his act would have an injurious effect in the forum state. The other product liability cases, like *Gray*, continued to pay lip service to the purposeful activity requirement of *Hanson*. But it does not follow that one who foresees the use of his product in the forum state necessarily invokes the benefit of that state's laws.

A recent case decided by the Ninth Circuit Court of Appeals may give some indication of jurisdictional limitation. *Taylor v. Portland Paramount Corp.*³⁸ denied a Portland, Oregon theater's attempt to gain jurisdiction over Elizabeth Taylor. Twentieth Century Fox and Taylor had produced the film "Cleopatra" which

³⁴ *Id.* at 189.

³⁵ 357 U.S. 235, 251 (1958).

It is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.

³⁶ Most of the products liability cases have followed the language of *Gray*, *supra* note 22, in an attempt to comply with the doctrines of *Hanson*.

³⁷ *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 256, 413 P.2d 732, 735 (1966).

³⁸ 383 F.2d 634 (9th Cir. 1967).

Taylor starred in. Fox contracted with appellee, Portland Paramount, to exhibit the film in Oregon. Taylor had no control over the distribution of the film and had nothing to do with the negotiations between Fox and Portland Paramount. But she was to receive in excess of 10,000 dollars from this exhibition contract as her share of the gross receipts. Portland Paramount charged that Taylor had committed a tortious act within Oregon in that she had negligently conducted herself with Richard Burton in such a manner as to arouse indignation and adverse opinion in the minds of the Oregon theater-going populace, causing them to refuse to view the movie. The courts' basis for denying jurisdiction was summed up in the following statement:

If it be said that, through the mechanism of the distribution agreement, she sent the picture "Cleopatra" into Oregon, a position we accept only *Arguendo*, it is not that act which is the basis of the tort cause of action. Rather, it is her conduct elsewhere with Burton, and her disparagement of the picture, not in Oregon, that are claimed to be the tort.³⁹

The court asserted that Taylor had a minimum contact with Oregon, the distribution mechanism, but that the cause of action arose out of her conduct in Europe, rather than her contact with Oregon. Apparently the court did not consider the possibility that because the *injurious effect* of the act committed outside the state occurred within the state, it could be argued that the "tortious act" referred to in the long arm statute was committed in Oregon.

There are at least two troublesome points in the line the *Taylor* court appears to have drawn. When there is a long arm statute that contemplates jurisdiction by the commission of a tortious act that causes injury within the state, is not the injury itself the minimum contact? For example, in the *Taylor* case, was not Taylor's contact with Oregon the impact she caused in the minds of theatergoers? If the minimum contact was the tort, and not the distribution, the cause of action did arise out of the contact. Also, a factor that may have affected the *Taylor* decision is the apparent frivolous nature of the plaintiff's cause of action.⁴⁰ Was a basic reason for

³⁹ *Id.* at 642.

⁴⁰ *Id.* at 642 n.8, 643. The court referred to the *Gray* case in which the Illinois Supreme Court stated:

It must be remembered that lawsuits can be brought on frivolous demands or groundless claims as well as on legitimate ones, and that procedural rules must be designed and appraised in the light of what is fair and just to both sides in the dispute.

Gray v. American Radiator, 22 Ill. 2d 432, 441, 176 N.E.2d 761, 766 (1961).

the court's reluctance to extend jurisdiction a feeling that it would be unfair to require Taylor to defend in Oregon on such a tenuous cause of action?

With regard to the first of the preceding points, the Washington Supreme Court has not had the difficulty the Ninth Circuit indicated. The case of *Golden Gate Hop Ranch v. Velsicol Chemical Corp.*⁴¹ was very similar to the *Taylor* case with respect to the nature of the minimum contact. The plaintiff claimed an agent of the defendant wrote a letter from Chicago to plaintiff's business in Washington, advising him to use a certain chemical on his hops. The chemical caused damage to the crop. The alleged tortious act was the agent's negligence in preparing and sending such advice. The injury occurred in Washington, as a result of the letter coming from Chicago. The court held:

[W]here damages result from negligence of a defendant, the injury occurring in this state is an inseparable part of the "tortious act" as that term is used in the statute (The statute referred to being the long arm statute).⁴²

How different factually is this case from the *Taylor* situation? Here, the act occurred in Chicago. A letter crossed the state line, resulting in injury within the forum state. In *Taylor*, the court declared that it was Taylor's conduct with Burton in Europe that was the tortious act. Yet the alleged injury was the alienation in the minds of potential theater goers in Oregon. Would it not be too fine a distinction to place the emphasis upon the medium by which the injurious consequences are carried into the state? Perhaps the frivolity of the plaintiff's claim in *Taylor* swayed the court more than the opinion indicated.

Since at the time of the *Taylor* case there was judicial precedent holding that the tortious act is committed in the state where the injury occurs, regardless of the state where the act was committed, several possibilities with respect to the *Taylor* opinion are raised. Perhaps the Ninth Circuit did not wish to apply the theory enunciated by the Washington Supreme Court, in the absence of any tangible article such as a letter, or a consumer product, coming into the state. Perhaps the nature of plaintiff's claim was so frivolous that the court thought *some* theory was necessary to disallow jurisdiction, and chose to ignore the possibility that the injury was the minimum contact. Perhaps the Ninth Circuit was not aware

⁴¹ 66 Wash. 2d 469, 403 P.2d 351 (1965).

⁴² *Id.* at 471, 403 P.2d at 352.

of the Washington holdings, and thus their decision reflected no indication of their opinion of this theory. But their express reference to the fact that the tort was committed in Europe would seem to indicate they did not adhere to the injury-contact theory of the Washington decisions.

Thus, the question remains. At what point will jurisdictional limitation of the reach of the long arm statute occur? The decisions are so numerous as to apparently settle this issue when a defendant manufacturer's product comes into a state by the process of commercial distribution and causes injury. Even though the defendant transacts no business in that state, he probably will be required to defend there. The majority of these cases seem to agree that the manufacturer could "foresee" the use of the product in the forum state, and thus availed himself of the benefit of that state's law. They consider the entry of the defendant's product, though sent in by an independent third party, to be the contact with the forum state. Even the decisions involving libel as the injury have contained the foreseeability element. Generally, the courts have held that the defendant publisher could foresee the sale and use of his printed material in the forum state. Another theory is that formulated by the Washington Supreme Court. Where damages result in the forum state, the injury occurring there is an inseparable part of the "tortious act" as that term is used in the statute.

It would seem we are left with little limitation to the state's power to require a non-resident to defend an action in that state. The *Taylor* opinion is one of few checks on the rapid expansion of state jurisdiction. The nature of plaintiff's claim in that case may explain its uniqueness. But the specific answers to the question have not been forthcoming.

IV. CONCLUSION

The lower court cases have shown that the restrictive language of *Hanson* is not necessarily a significant barrier to expanding in personam jurisdiction. They have either manipulated the *Hanson* test to suit their own factual situations, or limited it to the facts of *Hanson*. The better approach would be to consider the purposeful activity language of *Hanson* to be only one factor in the balancing of interests process. The courts should take into account various factors such as the extent the nonresident has received the benefit of state law, the quantity of the contacts, the nature and quality of the contacts, the source and connection of the cause of action to those contacts, the interest of the forum state, the relative availability of

evidence, the burden of defense or prosecution in one place rather than another, and the accessibility to an alternative forum. To the extent the courts now implement this balancing process, their opinions should more clearly reflect the decisive factors. Only through elucidating what they feel are the vital elements necessary to uphold or deny jurisdiction will the courts be able to reasonably define the limits of this unwieldy due process requirement. The Supreme Court seems to be willing to leave the problem to the lower courts. These courts, given this opportunity, should be more definitive.

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