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EXPANDING JURISDICTION OVER FOREIGN TORTS: THE 1966 AMENDMENT OF NEW YORK'S LONG-ARM STATUTE

Adolf Homburger and Joseph Lauffer*

New York greatly lengthened the arm of its courts when, on September 1, 1963, its modernized civil procedure took effect.¹ In adopting new patterns of jurisdiction, the Empire State followed, rather tardily, the example of quite a few sister states which, over the past decade, had enacted what became popularly known as "long-arm statutes."² Under the new law, a plaintiff has been able to secure personal jurisdiction in New York over a non-resident defendant on novel grounds, all related to specified connections which the defendant had established with the state. Three separate clauses of the original version of CPLR section 302³ enable a plaintiff to secure in personam jurisdiction over a non-resident defendant for a cause of action arising from any one of three distinct activities that the latter has carried on "within the state":

First, if he transacted any business, CPLR section 302(a)(1) (hereafter called "the business clause"), second, if he committed a tortious act, CPLR section 302(a)(2) (hereafter called "the local tort clause"), and third, if he owned, used or possessed real property, CPLR section 302(a)(3) (hereafter called "the real property clause").

Three years later to the day, an amendment of CPLR section 302(a) went into effect.⁴ It left the business, local tort and real property clauses just noted untouched⁵ but expanded jurisdiction over tortious acts beyond those com-

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3. CPLR § 302, as enacted in 1962, and before its amendment in 1966 read:

§ 302. Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

(1) transacts any business within the state; or

(2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

(3) owns, uses or possesses any real property situated within the state.

(b) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.


5. "It should be noted that the various changes . . . in the opening paragraph of
mitted within the state to those committed "without the state causing injury ... within the state"6 (hereafter called "the foreign tort clause"). Personal jurisdiction based on these "out-of-state" torts, however, is subject to limitations enumerated in the amendment. This brief article will serve two purposes: (1) to examine the background of the 1966 "foreign tort clause"; (2) to reflect on the significance and constitutionality of the new basis of personal jurisdiction, qualified as it is by important legislative limitations.

I. Background of the 1966 Tort Clause

The "foreign tort clause" of 1966 is a direct response to the Court of Appeals' holding in Feathers v. McLucas7 that the local tort clause as enacted in 1963 does not cover claims arising from foreign acts which produce local injury. Almost identical language in the Illinois long-arm statute8 had been construed, four years earlier, by that state's Supreme Court as affording jurisdiction over such claims.9 The Court of Appeals' narrow interpretation affected most seriously litigation of products liability, for it insulated many foreign manufacturers of defective products against jurisdiction under that clause of the long-arm statute. The limited scope allowed by the Court to the 1963 tort clause had curious side effects. Since jurisdiction over foreign tort cases could

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6. Italics added. The foreign tort clause was inserted as CPLR § 302(a)(3) while the real property clause re-appears as CPLR 302(a)(4). CPLR § 302(a) as amended by New York Session Laws, 1966, c. 590 reads:

§ 302. Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

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. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
   (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
   (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

7. 15 N.Y.2d 443, 458-64, 209 N.E.2d 68, 76-80, 261 N.Y.S.2d 8, 19-24 (1965); the case was decided together with two others which also involved interpretation of CPLR § 302, Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., and Singer v. Walker. For critiques of these decisions, compare Homburger, supra note 1, at 66-72, with Von Mehren & Trautman, supra note 2, at 1169-73.


no longer be sought under a liberal interpretation of the tort clause—that avenue had been closed by Feathers—the tort plaintiff would claim that defendant transacted claim-connected business within the state and thus resort to the business clause. Yet, even in invoking the business clause, a tort plaintiff ran into new obstacles. In Singer v. Walker,10 decided together with Feathers, the Court of Appeals had held that, for the purpose of the long-arm statute, a defendant “transacts . . . business” when he ships substantial quantities of merchandise f.o.b. into New York, and at the same time, through catalogs, advertisements, and a local manufacturer’s representative, solicits business within the state. That decision seemed on the verge of accepting the principle that activities without the state intended or reasonably expected to have forum consequences would sustain jurisdiction under the business clause. Hence, observers thought that in many instances the business clause could be used to patch up the wide crack that had appeared in the tort clause: New York courts would entertain jurisdiction over many tort cases in which the non-resident defendant had commercial ties with the state. However, this prospect seemingly held out by Singer did not materialize. For later decisions made it evident that the Court of Appeals preferred to construe the business clause pretty much like the tort clause.11 While these holdings displayed liberality toward the type of activities that would qualify,12 strictness prevailed regarding their location: business activities without the state intended or reasonably foreseeable to have consequences within were held in and of themselves insufficient to support jurisdiction either in contract or in tort actions. The thrust of the case law, in other words, was toward an unbending insistence on the defendant’s purposeful, claim-connected activities within the state either in person or through an agent. Thus, the business clause too fell considerably short of affording the wide jurisdictional berth to which plaintiffs’ counsel had looked as a substitute for the diminished local tort clause. Moreover, Feathers itself had made it clear that the business clause could not rescue plaintiffs from the jurisdictional limbo if their claims were directed against a defendant without commercial ties with the state. It is thus hardly surprising that soon after Feathers, pressures for legislative relief began to assert themselves. Indeed, the Court of Appeals opinion in Feathers referred to possible curative legislation.13

13. 15 N.Y.2d, at 464, 209 N.E.2d at 80, 261 N.Y.S.2d at 24. At the 1965 Crotonville Conference of Supreme Court Trial Justices it was suggested that the Judicial Conference of the State of New York undertake a study looking toward expansion of New York's
In the end, the Judicial Conference, after consulting its Advisory Committee, acted on the hint from the bench and recommended that the Legislature amend the tort clause. Its recommendation has now been enacted into law.

II. THE 1966 AMENDMENT

The policy of the 1966 amendment becomes clear, when it is seen against the background of profound changes in the substantive law of torts. The startling expansion of products liability in New York and elsewhere is the most significant contemporary development in that field. This expansion did much to stimulate the rapid growth of long-arm jurisdiction in the United States: widening products liability as a matter of substantive law would be of limited help to a victim who is denied access to a convenient forum. Hence, the 1966 change is designed to let these plaintiffs freely enter the "tort gate" of New York's jurisdiction instead of turning many of them away and forcing still others to squeeze awkwardly through the half-opened doors of the business clause.

In light of the foregoing, it is hardly necessary to stress the importance of this new departure to plaintiffs and defendants. Nor will its theoretical meaning be lost on the observer. What makes the amendment significant beyond its local impact is its novel approach to jurisdictional problems in tort cases with multi-state facets. The 1966 statute combines with the original version of 1963 to bring three classes of non-resident tortfeasors under New York's long-arm jurisdiction: (1) those who act tortiously within the state, subdivision 2 of section 302(a); (2) those who act tortiously without the state, with injurious results within, and have, in addition, local contacts that meet one of three alternate tests, sub-paragraph (i) of section 302(a)(3); and (3) those who act tortiously without the state, with injuries resulting within, if they expected or should reasonably have expected forum consequences and in addition, derive substantial revenue from interstate or international commerce, sub-paragraph (ii) of section 302(a)(3).
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Sub-paragraph (i) is taken verbatim from the Uniform Interstate and International Procedure Act.¹⁹ It applies when the non-resident who commits the out-of-state tortious act with injurious results within: (a) regularly does or solicits business in the state; or (b) engages in any other persistent course of conduct there; or (c) derives substantial revenue from goods used or consumed or services rendered in the state. While all these activities have elements of continuity,²⁰ it should be emphasized that they need not rise to the level of "doing business" in the traditional sense; for if they did, reliance on the foreign tort clause would be unnecessary. It should also be noted that the additional activities need not be related to plaintiff's claim.²¹ The rationale of the provision is that in the foreign act-local injury situation it is neither unreasonable nor unfair to impose upon a non-resident tortfeasor the burden of defending a lawsuit in New York if he maintains relations with the state that approach but do not quite reach the level of "doing business."²² The affiliating circumstances set forth in (i), added to a local injury, are designed to assure that the provision is constitutional even if the injury results locally from the purely fortuitous presence of a defective product in the state.

Sub-paragraph (i) will evidently reach many defendants who were beyond the scope of the original local tort clause. Even so, it still fails to bring within New York's reach tortfeasors who expect or should reasonably expect that their foreign acts will lead to consequences in New York, but who otherwise have no contact with the state.²³ As already noted, they are now brought within the reach of the long arm, but only if they derive substantial revenue from interstate or international commerce. Why this limitation? In fairness and reason, should not a defendant respond to a local action for a local injury whenever he expected or should have reasonably expected that his act done without the state could have local consequences? In all likelihood a provision based merely on foreseeability of forum consequences would withstand an attack on its constitutionality.²⁴ In fact, at least two jurisdictions now have provisions drafted along these lines.²⁵ However, the cautious draftsmen of the New York tort clauses. Nor did it accept his proposal to include § 1.03(a)(2) of the Uniform Act in New York's long-arm statute. That provision confers personal jurisdiction over a non-resident as to claims arising from his contracting to supply services or things in this state. On the other hand, the Judicial Conference went beyond his suggestions in recommending CPLR § 302(a)(ii). For the reasons, see the Conference Report on the CPLR to the 1966 Legislature, McKinney's Session Law News, A-66-72 (1966).


²⁰. See Commissioners' Notes to § 1.03(a)(4) of the Uniform Interstate & International Procedure Act, 9B U.L.A. 310, 312 (1966). See also Homburger, supra note 1, at 79.


²². See id. at A-71.

²³. See Homburger, supra note 1, at 78-79.


amendment thought that not all non-residents should be indiscriminately subjected to New York’s jurisdiction merely because they acted with reasonable expectation of forum consequences. Instead, jurisdiction was confined to defendants normally engaged in multi-state or international commerce who derive substantial revenue from non-local activities. Such defendants are in a position to plan for foreign litigation and to anticipate the expenses and inconvenience connected with it even though their commercial activities may not extend to New York. They can protect themselves against exposure to foreign litigation by establishing appropriate reserves or covering the risk of litigation by insurance. They will normally budget the cost of this protection as an item of their production and marketing expenses. In other words, they are or should be in a position to handle foreign litigation or to turn it over to insurance carriers whose litigation facilities are nation-wide. The same is not always true of defendants whose normal activities do not extend beyond state lines. Hence, the latter are exempted from the reach of the new provision.

Another question presents itself. Why did not sub-paragraph (ii) omit altogether the requirement of foreseeability of forum consequences as does sub-paragraph (i)? Why not simply reach all defendants equipped to handle foreign litigation if they cause local consequences whether anticipated or not? Perhaps a statute of this sort will eventually triumph. It would have the virtue of functional simplicity. However, at the present time its constitutional fate would be clouded in view of continuing objections that are nourished by lingering notions of territoriality and state sovereignty.

Finally, one may wonder why sub-paragraph (ii) differentiates so carefully between defendants engaged in interstate or international commerce and those not so engaged, but draws no similar distinction among plaintiffs. The latter are treated alike whatever their circumstances. It is evidently sensible to abandon the usual bias in favor of defendant’s domicile and to compel him to litigate at the forum where the injury occurred if, for example, plaintiff is a consumer of limited means who suffered injury through a defective product which reached the state without his intervention or participation. But what of a plaintiff who is well equipped to handle foreign litigation and for whom it


27. In practice, many retailers serving only local markets are now obtaining products liability insurance with extensive coverage at relatively moderate cost.

28. See von Mehren & Trautman, supra note 2, at 1164-79.

29. See infra pp. 76-80.
would be no hardship to seek out the defendant at his domicile? In other words, is it justifiable to prefer the plaintiff when both parties derive revenue from multi-state or international commerce? Here, everything else being equal, it should be decisive that it would be most convenient to try a tort case where the accident happened. Although defendant's tortious act occurred elsewhere the evidence available at the place of injury is critically important for many aspects of plaintiff's claim. These include the condition of the defective product at the time of the occurrence, the conduct of the victim, the extent of the damage and other circumstances which surrounded the event. Even though the law of the place of the injury is no longer automatically applied, that law in most cases will be chosen as the rule of decision; and the defendant expected or should have reasonably expected consequences to occur there. Moreover, the state where the injury occurred has an overriding interest in adjusting the rights of the parties. Lastly, when plaintiff is a non-resident, the doctrine of forum non conveniens should enable the court to deal with particular cases in which resort to New York courts seems undesirable. Regrettably, under present case law New York courts deem themselves powerless to decline jurisdiction when plaintiff is a resident. As a result, non-resident plaintiffs who fear the bite of the doctrine can easily avoid it by establishing after the event a residence in New York or assigning the claim, whenever possible, to a New York resident. In light of the recent unprecedented expansion of jurisdictional


34. Wagner v. Braunsberg, 5 A.D.2d 564, 173 N.Y.S.2d 525 (1st Dep't 1958). Cf. McCauley v. Georgia R.R. Bank, 122 Misc. 632, 203 N.Y. Supp. 350 (Sup. Ct.), aff'd 209 App. Div. 886, 205 N.Y. Supp. 935 (2d Dep't), aff'd 239 N.Y. 514, 147 N.E. 175 (1924). What is the relation of CPLR § 302(a) to § 1314 of the Business Corporation Law? The latter specifies the conditions under which a New York court is competent to entertain an action against a foreign corporation. If plaintiff is a resident or a domestic corporation an action is always maintainable (subd. (a)). However, if plaintiff is a non-resident or a foreign corporation the court is competent only if specified criteria are met (subd. (b)). These parallel the criteria used in two other contexts: those that determine the existence of a basis for personal jurisdiction and those that guide the exercise of the court's discretion in applying the doctrine of forum non conveniens. See Weinstein, Korn, Miller, New York Civil Practice § 3211.12 (1965). If the criteria specified in § 1314(b) have not been met the court lacks competence, i.e., in the circumstances, the state has not seen fit to give to its courts the power to entertain the action. See Restatement, Judgments § 7 (1942). This lack of power affects the court's subject-matter jurisdiction and, in contrast to the lack of a basis for the exercise of jurisdiction, is not waivable. On the other hand, if the criteria have been met the court has subject-matter jurisdiction and usually will also have jurisdiction over defendant's person. Indeed, under a recent amendment to § 1314(b) (N.Y. Sess. Laws 1965, ch. 803, § 49) the existence of the basis requirements under New York's long-arm statute also fulfills the requirements of competence under § 1314(b). Even so, the court, having jurisdiction over the subject matter and over defendant's person,
opportunities New York courts should seriously consider abandoning their narrow approach to the doctrine. Indeed, the word “may” in the opening clause of CPLR 302(a) provides a statutory basis, if that were needed, for applying the doctrine to New York’s long-arm jurisdiction. This could be done even if the courts were as yet unprepared to wield it freely elsewhere. Significantly, the Interstate and International Procedure Act expressly enables a court to decline jurisdiction whenever “in the interest of substantial justice the action should be heard in another forum.” Unfortunately, the 1966 amendment did not include that language. Should it not be incorporated into New York law?

The jurisdictional tests set forth in sub-paragraph (ii) depend upon the defendant’s state of mind, namely his reasonable expectation of forum consequences. This test may invite criticism because it uses what may be claimed to be a vague standard. However, a test that shuns narrow rubrics in an effort to implement a concept as vague and indefinite as “due process” must necessarily be broad and flexible. And clearly, the task of interpretation will remain inescapable. Seemingly more definite statutory tests such as “commission of a tortious act within the state” have not, as we have seen, forestalled serious disagreement about their meaning. Moreover, the courts are experienced in applying as determinants of negligence standards of comparable breadth such as those of the reasonable man or foreseeability of harm. If these standards have any relevance, they also indicate that the phrase “reasonably expects” will be given an objective rather than a subjective meaning. In any event, are the new tests likely to generate more controversies than the classic “doing business” test which, after thousands of judicial opinions seeking to apply it, has been referred to as still “an enigma?”

Similar observations may be made about the further requirement that defendant derive “substantial revenue” from his activities as set forth in subparagraphs (i) and (ii). The use of the adjective “substantial” as descriptive of quantity or quality or both is not uncommon in statutory and case law.

need not necessarily exercise that jurisdiction. It should always have the power to decline it on the ground of forum non conveniens if in the interest of justice the action should be heard in another forum.

For the text, see supra note 6.


In drafting long-arm jurisdiction it has been suggested that “perhaps the wisest course is to use broad language . . . .” Reese & Galston, supra note 2, at 267. See also Homburger, supra note 1, at 81-82.

See text at p. 68, supra.


Use of the term in jurisdictional contexts may be illustrated by Wisconsin’s 1959 long-arm statute which considers a non-resident as having “local presence or status” if he is engaged in “substantial and not isolated activities within the State”; Wis. Stat. Ann,
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In construing the term the statutory purpose of limiting the clause to defendants who are not principally engaged in local trade must be kept in mind. A defendant must either derive substantial revenue from specified activities within the state under sub-paragraph (i) or from interstate or international commerce under sub-paragraph (ii). To achieve that purpose, substantiality must be measured not merely in terms of the proportion of defendant's revenues that flow from activities outside his home state but in absolute terms as well: The defendant must have sufficient financial resources and contacts to be able without undue hardship to litigate or have his insurer do so, in a forum other than that of his locality.

Before we end our discussion of the 1966 amendment a word on problems of transition created by the new law. These involve retroactivity, res judicata, and the statute of limitations and parallel those presented when the 1963 version of the long-arm statute was enacted.

The facts establishing jurisdiction under the foreign torts clause may have occurred before the effective date of the amendment, September 1, 1966. In that situation, the new jurisdictional provisions apply retroactively if the defendant was served after September 1, 1966. On the other hand, the new jurisdictional provisions cannot validate, by relation back, service effected before that day if, under the 1963 version of the statute, that service was jurisdictionally defective. In such cases the action must be dismissed but plaintiff may now sue again under the new jurisdictional provisions. He need not fear the res judicata effect of the earlier dismissal since the question whether the new foreign tort clause applied was never adjudicated and the dismissal was not on the merits.

A more difficult question arises when, in the first action, the court made findings of disputed jurisdictional facts which are relevant under the present law. If these facts were necessary to the earlier determination and were unfavorable to the plaintiff they should have estoppel effect in the second action. On the other hand, if they were favorable to the plaintiff they should have no estoppel effect against the defendant since he was the winning party in the first action and the findings were not necessary to the result reached.

§ 262.05(1)(d) (Supp. 1966); compare Chief Justice Stone's example of a defendant corporation whose "continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities," in International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945), with Mr. Justice Black's remark in upholding California's jurisdiction based on an isolated transaction in the insurance field: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with . . . [California]," McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).


42. See cases cited supra note 41.

43. Restatement, Judgments Introductory Note to ch. 3, at 160; § 45, Comment(d); § 69(2) and Comment on Subsection (2) (1942). Cf. Karameros v. Luther, 279 N.Y. 87, 17
case which came to a contrary conclusion did not consider this aspect of the problem.\textsuperscript{44}

The retroactive nature of the new jurisdictional provisions may turn them into a trap for an unwary plaintiff who, under the 1963 version, could not obtain jurisdiction over a non-resident tortfeasor in New York, but who under the new law can do so now. As long as the non-resident defendant was beyond the reach of New York's tort clause, the statute of limitations was tolled. However, if he is now subject to personal jurisdiction by service without the state, the tolling provision no longer applies.\textsuperscript{46} Thus, after the end of the statutory period which began to run on September 1, 1966, an unsuspecting plaintiff may find his claim barred in New York as well as under the applicable local statute in defendant's home state.

\textbf{CONSTITUTIONALITY}

We turn to what is perhaps the most critical question arising under the tort clause as expanded in 1966: Is it constitutional? The Supreme Court has not yet had occasion to consider a statute of this type. In the meantime reflection on this problem must be guided by the widely discussed trilogy of modern decisions in which the Court has struggled with the legacy of Pennoyer.\textsuperscript{46} These are \textit{International Shoe Co. v. Washington},\textsuperscript{47} \textit{McGee v. International Life Insurance Co.},\textsuperscript{48} and lastly the troublesome decision of \textit{Hanson v. Denckla}.\textsuperscript{49} Since they deal with various facets of the pervasive problem of jurisdiction, inevitably opinions about their meaning and impact on traditional doctrine differ.\textsuperscript{60} Still, it is fair to say that most observers are ready to predict that the Supreme Court will sanction in principle, though perhaps not in all its applications, the assertion of long-arm jurisdiction which has found its most recent expression in New York’s 1966 amendment.\textsuperscript{51}

The three decisions reflect, as a group, a new phase in the Court’s jurisdictional thinking. Originally the Court considered basis of jurisdiction and notice to the defendant of the proceedings as one inseparable problem for constitutional purposes. This view was a direct outcome of the accepted common law notions about jurisdiction. Presence, save for consent, was the only recognized basis for securing personal jurisdiction over non-residents.\textsuperscript{52} Hence,
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the requirements for jurisdiction and notice were fulfilled simultaneously through service of process within the state. However, as time went on, the requirements for notice on the one hand, and for securing a basis for jurisdiction on the other, parted company, each evolving in a different direction. As far as notice is concerned, the Supreme Court has abandoned the Pennoyer notion that extra-territorial service violates basic principles of state sovereignty and due process. It approved any state-ordained method of notification as long as it was reasonably calculated to apprise the defendant of the suit and give him a reasonable opportunity to be heard. This constitutional sanction was given even though, in the process of notification, state lines were crossed. In this context, at least, a functional approach prevailed at a relatively early time over the traditional notions of territorialism and state sovereignty.

Judicial thinking about new bases of jurisdiction developed more hesitantly. Evolution was evidently slowed by an awareness that no new guiding principle of jurisdiction had as yet emerged to take the place of the old territorial order enshrined in the requisites of defendant's local "presence" or "consent." Yet, the pressures for expanding jurisdiction proved irresistible. As a result the old doctrine, in accordance with common law tradition, was restated on an ad hoc basis to meet the pressing needs which could not be satisfied by the inherited dogma. Following a lengthy development the Supreme Court felt finally impelled, in the International Shoe case, to introduce the "minimum contacts doctrine." Characteristically, it presented the novel doctrine not as a radical departure but as a modernized version of the traditional doctrine of presence. It justified its new approach on the ground that, after the demise of the ancient capias ad respondendum, in personam jurisdiction no longer rested on any real power over the defendant, but on his contact with the forum. And it re-interpreted the concept of "presence," as applied to corporations, as merely a symbol of "those activities of the corporation's agent within the state which courts will deem sufficient to satisfy the demands of due process." While this cautious rationalization of the minimum contacts doctrine may have made innovations more palatable to those who still clung to the territorial dogma, the benefit was bought at a price. The new departures from the confines of Pennoyer emphasized defendant's activities within the state, but in so doing tended to slight other equally significant aspects of the complex problem summarized by the term "basis of jurisdiction." These include forum interests, foreseeability of forum consequences, choice of law considerations and litigational convenience. Yet it would be wrong to read the cases narrowly. True, the non-resident's activities within the state are the recurrent theme both in

55. See Developments in the Law—State Court Jurisdiction, supra note 52, at 919-23, 935-48.
56. 326 U.S. at 316.
57. 326 U.S. at 317.
International Shoe and even more so in Hanson v. Denckla. The Court plainly did not, however, as some would have it, conceive the minimum contacts doctrine simply as another way of phrasing a requirement that defendant be physically present within the state at least when the cause of action arose—a sort of latter-day substitute for physical presence at the time of service. Instead, the Court has in fact, if not in language, chosen a functional approach to the problem of jurisdiction, broadly rooted in reasonableness, fair play and substantial justice. Nothing else can explain the Court's sweeping statement in the International Shoe case that "those demands [of due process] may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." And in the same vein: "[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.'" In McGee, jurisdiction was sustained although the defendant insurance company and its agents were never "present." It would be ignoring the evolution of the Court's jurisdictional thought to explain this case away as a special instance of state interest in the area of insurance. There is not the slightest indication in the court's opinion that it viewed it as such. True, in Denckla the majority opinion insisted that "it is essential in each case that there be some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws." Reading these words as requiring defendant's physical presence in the state when he acts would again be an interpretation that does not adequately reflect the preceding developments in the Court's thinking. Moreover, the Court's opaque language does not compel such confining interpretation. As Professor D. Currie observed, the Denckla test simply requires "that the defendant must have taken voluntary action calculated to have an effect in the forum state." Justice Arthur Goldberg apparently approved this interpretation. His dictum may have expressed the view of the

58. See infra note 62.
59. 326 U.S. at 317.
60. 326 U.S. at 316.
61. Defendant's only contacts with the forum state were the mailing of an insurance contract to that state and the acceptance of premiums which the insured mailed to defendant's out-of-state office, "[R]espondent has never solicited or done any insurance business in . . . [the forum state] apart from the policy involved here." 355 U.S. at 222.
65. See his opinion in chambers, passing on an application for a stay in a case where the Second Circuit had sustained jurisdiction under New York's long-arm statute; Rosen-
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Court's majority. In any event, it is not likely that Denckla will hamper the evolution along functional lines of the judicial power to adjudicate. Conceptually, that evolution must continue to be responsive to the reality of our federal system. It remains a system in which geographical limitations on the power of the states inescapably play an important part in the allocation of the judicial business. We believe that the doctrine of minimum contacts continues to hold out hope for developing a new functional concept of jurisdiction. This concept will accommodate a federal society's conflicting interests without losing sight of contemporary technological and economic changes and the immense growth of multi-state relations. The prospects for such a development would be seriously dimmed, however, if the doctrine were reduced to a mere variation on the old theme of "presence," whether geared to the moment of service or of causing consequences within the state. Since such narrow reading by the Supreme Court under present-day conditions is unlikely, the 1966 amendment should not encounter serious constitutional obstacles based on the due process clause.

Will the new tort clause encounter other constitutional objections? Only one requires notice here. Since engaging in interstate or international commerce under the new law may be a determinant for jurisdiction, defendants may be expected to contend that the new provision burdens that commerce. Indeed, a careful study of the question cites a few recent federal decisions that invoke the commerce clause against attempts to assert long-arm jurisdiction. The most widely cited of these is Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc. Yet it is not likely that the argument will prevail save in exceptional situations. As the early cases on this constitutional limitation on jurisdiction emphasize, it is only the oppressive and unreasonable burden on interstate and international commerce that is proscribed. Thus all the arguments that tend to sustain the new jurisdiction against attacks based on the due process clause are also relevant here. It has been suggested that, in contrast to the due

67. Neither the equal protection clause nor the privileges and immunities clause (the latter, in any event, unavailable to corporations) limits the exercise of jurisdiction more strictly than is done by the due process and commerce clauses. In weighing the restraints imposed by the former clauses the critical theme is the reasonableness of the classification made by the statute. That theme, in substance, also runs through much of the due process discussion; cf. Henry B. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).
68. Developments in the Law—State Court Jurisdiction, supra note 52, at 983-87.
69. 239 F.2d 502 (4th Cir. 1956).
71. "The end result of the . . . cases seems . . . to have been along lines similar to those which ultimately developed in the due process decisions, where fairness and con-
process clause, the commerce clause limitation is concerned not merely with this
defendant but with all others who may be deterred from engaging in interstate
or international commerce if the threatened litigation were sanctioned. 72 If this
were true, the answer would seem to be: the nation's public interest, as pres-
ently conceived, calls for an open economy in a federal society, but it san-
tions state action that imposes correlative duties on those who enjoy the priv-
ileges of unhampered access to nationwide or worldwide markets. Thus the
states have authority to insist that those operating in these markets on a sub-
stantial scale appear, in carefully defined situations, at a tort victim's forum
to litigate his claim against them.

IV. COMPARISONS

It is instructive to test the reach of the foreign tort clause of 1966 by
applying it hypothetically to some of the cases decided under the local tort
clause of 1963. In at least two, the results are clear; two others are in doubt.

In Feathers v. McLucas, 73 plaintiff was seriously injured when a tractor-
drawn gas tank exploded near plaintiff's home in Berlin, New York. The for-
gien corporation which had manufactured the tank for a foreign assembler
acted "presumably with knowledge that the latter would mount the tank on
a wheel base and then sell it to . . . a Pennsylvania corporation, which oper-
ated as a licensed interstate carrier in Pennsylvania and several other states,
including New York." 74 It was not shown that defendant transacted any busi-
ness within the state. As already noted, the Court read the local tort clause
as denying jurisdiction over the foreign manufacturer; there was local injury,
but no local tortious act. It is clear that under the new foreign tort clause
there would be jurisdiction. Defendant manufactured steel products on a na-
tional scale, with annual sales of millions of dollars. Undoubtedly it derived
"substantial revenue" from interstate commerce and under the Court's express
findings it expected the tank to be used in New York. Thus the jurisdictional
prerequisites of new CPLR section 302(a)(3)(ii) are fulfilled. Indeed, as we
have seen, the very purpose of the amendment was to overcome the holding
in the Feathers case.

In Platt Corp. v. Platt 75 plaintiff sued its director, a non-resident, in tort
for his failure to attend directors' meetings in New York and to perform in
New York his duties as a director, with resulting loss to the corporation. The
Court's first problem was to locate the place where defendant had committed
the alleged tortious act, a problem not unfamiliar in the choice of law. 76 Was

72. Developments in the Law—State Court Jurisdiction, supra note 52, at 987.
74. Id. at 458, 209 N.E.2d at 76, 261 N.Y.S.2d at 19-20.
Restatement, Conflict of Laws § 17 (1934) with Restatement (Second), Conflict of Laws,
EXPANDING JURISDICTION

it where plaintiff was when he failed to act? Was it where defendant should have acted when he remained inactive, thus causing damage to plaintiff? The Court of Appeals, overruling the Appellate Division and Special Term, held that “to treat ‘omission’ as an ‘act’ in a particular place, one must be there to do or to omit to do the act.”77 We find it difficult to accept the Court’s position. Under its rule a non-resident who is under a legal duty to act in New York and who by his inaction creates a risk in that state may escape the reach of its courts by the simple expedient of staying away from New York. However that may be, once the Court had concluded that defendant’s tortious act was committed without the state, a dismissal was inevitable. How would it have decided under the present law? We need not speculate because the Court went out of its way to give us the answer. It stated that “obviously the broader language of the amended statute would not pick up jurisdiction under the facts of the present case.” We agree. Nothing in the amended statute would cause the Court to alter its view of the location of a tortious omission. Plaintiff therefore would have to claim jurisdiction under the foreign tort clause; yet, that clause does not help him either, because the defendant had no other qualifying contacts with the state nor did he derive substantial revenue from interstate or international commerce.

More problematical is Kramer v. Vogl.78 In that case, plaintiff, an importer, sued Austrian leather manufacturers for fraud and deceit, charging that they had induced him to enter into an agreement whereby they made him their exclusive United States distributor when in fact they intended to sell, and did sell their product to plaintiff’s competitors. The Court declined to hold the defendant under the local tort clause because the alleged fraudulent representation had been made in Austria even though plaintiff may have suffered damage in New York. Nor would the Court sustain jurisdiction under the business clause since the mere shipment of goods into the state f.o.b. Austria, pursuant to orders received from within the state, did not satisfy the jurisdictional requirements of the business clause. What would the answer be today? Defendant carried on no sales, promotions, or advertising activities in the state. Vogl’s sales to Kramer amounted to only one to two per cent of Vogl’s total volume of business. Under the circumstances it probably would be difficult for the plaintiff to meet the jurisdictional test under sub-paragraph (i) of the foreign tort clause. On the other hand, plaintiff’s chances under its sub-paragraph (ii) would be better. Defendants expected or should have reasonably expected that their misrepresentations would have consequences in the state and they probably have derived substantial revenue from international trade.

An example of a case which probably is beyond the reach of the foreign

§ 43f(e) and comment (h) (Tent. Draft No. 3, 1956); see also Louis-Dreyfus v. Paterson S.S., Ltd., 43 F.2d 824 (2d Cir. 1930) (failure to perform contractual duty governed by law of place of promised performance).

tort clause is *Harvey v. Chemie Gruenenthal, G.m.b.H.* Plaintiffs, husband and wife, sued a West German pharmaceutical firm in a federal court in New York for damages resulting from a sedative which contained thalidomide. Before her marriage in New York, plaintiff's wife had been a German resident and citizen. She had bought the poisonous drug in Germany on a German doctor's prescription, brought it with her to New York and used it during her pregnancy, later giving birth to deformed twins. The federal court dismissed the action on the authority of the *Feathers* case. The tortious act had been committed in West Germany and not in New York. Again we ask what would the result have been under the present law? Defendant had engaged only in sporadic and irregular activities in New York. It had retained a New York attorney, concluded a product license agreement with a company having offices in New York City and shipped samples through a New York port. It is very doubtful whether these activities reached the level of the affiliating circumstances prescribed in sub-paragraph (i), all of which contain an element of continuity. It is also very doubtful whether under the circumstances defendant, though engaged in international trade, could have reasonably foreseen that the manufacture of the drug would have consequences in this country where the tablets, because of their thalidomide ingredient, had never been approved for distribution. From defendant's point of view, the presence and use of the drug in New York seems to have been fortuitous rather than expected or reasonably foreseeable.

V. Conclusion

This issue of the Buffalo Law Review, dedicated to the memory of Arthur Lenhoff, has for its theme the comparative and international aspects of law which were so close to the distinguished scholar's heart. One may ask why this article, concerned as it is primarily with a local statute, has been included in this issue. May we suggest that long-arm statutes have stirred the interest of practitioners and scholars both here and abroad and that they are by their very nature "border-crossers." They have enabled our courts to extend their own jurisdiction but have also encouraged them to grant recognition to foreign judgments resting on similar bases. More importantly, as another author in this issue observes long-arm statutes eventually may persuade foreign countries to recognize judgments based on the novel jurisdiction when they emanate from our courts. For we should be aware that to sanction jurisdiction by affiliations of the long-arm type is more congenial to Europe's jurisdictional philosophy than to do so on the basis of physical presence. Furthermore, broadening these bases under long-arm statutes along functional lines may eventually lead to the decline and un lamented demise of the "transient doctrine" of jurisdic-

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79. 354 F.2d 428 (2d Cir. 1965).
tion—a serious roadblock to recognition of judgments of American courts abroad. Thus, quite apart from the practical need for broadening New York's long-arm statute, the amendment appears to be a step toward the lofty goals of international cooperation and uniformity in a rapidly shrinking world. To the achievement of these goals Arthur Lenhoff gave much of his life.