St. John's Law Review

Volume 40
Number 1 *Volume 40, December 1965, Number 1*

Article 25

CPLR 302(a)(2): Tortious Act Distinguished from Resultant Injury

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

defendant and since the cause of action arose from the performance of these activities in furtherance of the employment contract. As was stressed in previous issues of the *Survey,* CPLR 302 offers no objection to the assertion of jurisdiction in such a situation.[48]

In its discussion of minimum contacts, however, the court stated that this question need only be answered when attempting to satisfy the test for "doing business" under CPLR 301.[49] Such language should not be strictly construed by the practitioner. The Supreme Court of the United States has not abrogated the "minimum contacts" test of *International Shoe Co. v. Washington,*[50] and it would seem obvious, therefore, that this requirement would subsist under CPLR 302(a)(1).

CPLR 302(a)(2): Tortious act distinguished from resultant injury.

The Court of Appeals, in two recent cases, has either settled permanently the application of CPLR 302(a)(2) or has paved the way for decisive legislative activity on a paragraph which is perhaps the most important section in the CPLR.

In *Feathers v. McLucas,*[51] the defendant was a Kansas corporation engaged in the manufacture of pressure tanks. A Missouri corporation purchased one of these tanks and mounted it on a wheel base. The completed assembly was thereafter sold to a Pennsylvania corporation engaged in interstate commerce. While passing through New York en route from Pennsylvania to Vermont, the tank exploded, causing injury to the plaintiffs. In sustaining jurisdiction, the appellate division stated that "the legislature did not intend to separate foreign wrongful acts from resulting forum consequences."[52] Thus, the negligent act of manufacture could be said to have been committed in this state. The Court of Appeals, emphasizing the distinction between tort and tortious act, reversed, holding that CPLR 302(a)(2) is directed only at "a tortious act committed [by a nondomiciliary] in this state."[53] On this basis, the Court concluded that the defendant's

---

[48] See *The Biannual Survey of New York Practice,* 39 ST. JOHN'S L. REV. 178, 191 (1964).

[49] Schneider v. J. & C. Carpet Co., 23 App. Div. 2d 103, 104-05, 258 N.Y.S.2d 717, 718 (1st Dep't 1965).

[50] 326 U.S. 310 (1945); see Angelilli Const. Co. v. Sullivan & Son, Inc., 45 Misc. 2d 171, 172-73, 256 N.Y.S.2d 189, 191 (Sup. Ct. 1964), wherein it was stated that CPLR 302 "defines a class of 'minimum contacts' upon which the courts of New York can obtain personal jurisdiction over non-resident parties within the expanded area permitted . . . in *International Shoe* . . . ."

[51] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

[52] 21 App. Div. 2d 558, 559, 251 N.Y.S.2d 548, 550 (3d Dep't 1964).

[53] Feathers v. McLucas, 15 N.Y.2d 443, 464, 209 N.E.2d 68, 80, 261 N.Y.S.2d 8, 24 (1965).

tortious act had been committed in Kansas and hence New York courts could not assert jurisdiction based on paragraph 2. In so holding, the Court found it unnecessary to discuss the question of minimum contacts.

In *Singer v. Walker*,[54] the defendant was an Illinois manufacturer of geologists' hammers. The hammers, labeled "unbreakable," were ordered by a New York dealer through defendant's mail order catalogue and shipped to New York where one was sold to the aunt of the infant plaintiff. While being used by plaintiff on a field trip in Connecticut, the hammer fragmented and caused him injury. The appellate division sustained New York's jurisdiction on the theory that the defendant "was responsible for a continuous tortious act, namely, the circulation in New York of a defective hammer. . . ." [55]

The Court of Appeals affirmed; however, it rejected paragraph 2 as a basis for asserting jurisdiction, stating that the "tortious acts attributed to the appellant . . . occurred at the place of manufacture in Illinois and . . . are wholly insufficient to satisfy the requirement of paragraph 2 that the 'tortious act' be one committed 'within' this state." [56] The Court, however, determined that jurisdiction could be sustained on the basis of CPLR 302(a)(1) since the "appellant's activities in this state are sufficient to satisfy the statutory criterion of transaction of business as well as the constitutional requirement of minimum contacts." [57]

Prior to CPLR 302, the liberal trend of Supreme Court cases, such as *International Shoe Co. v. Washington* [58] and *McGee v. International Life Ins. Co.*,[59] had a limited effect on the procedural law of New York.[60] Though several New York cases suggested that "doing business" requirements might be relaxed,[61] "presence" remained the sole basis upon which to subject a foreign corporation to in personam jurisdiction.[62]

It is evident that the Advisory Committee, in drafting the CPLR, desired to remedy this situation and relax jurisdictional requirements to the extent permitted by federal due process.[63]

---

[54] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).
[55] Singer v. Walker, 21 App. Div. 2d 285, 286, 250 N.Y.S.2d 216, 218 (1st Dep't 1964).
[56] 15 N.Y.2d 443, 465, 209 N.E.2d 68, 81, 261 N.Y.S.2d 8, 25 (1965).
[57] *Id.* at 467, 209 N.E.2d at 81, 261 N.Y.S.2d at 26.
[58] 326 U.S. 310 (1945).
[59] 355 U.S. 220 (1957).
[60] See Simonson v. International Bank, 14 N.Y.2d 281, 287, 200 N.E.2d 427, 430, 251 N.Y.S.2d 433, 437 (1964).
[61] *E.g.*, La Belle Creole Int'l, S.A. v. Attorney-General, 10 N.Y.2d 192, 197-98, 176 N.E.2d 705, 708, 219 N.Y.S.2d 1, 5 (1961); Elish v. St. Louis Southwestern Ry., 305 N.Y. 267, 269, 112 N.E.2d 842, 843 (1953).
[62] *Supra* note 60.
[63] SECOND REP. 39.

The Committee Reports expressly state that Article 3 was designed to take full advantage of the state's constitutional power over persons and things.[64] If, as was held by the Court in *Feathers* and *Singer,* there is a definite distinction between tort and tortious act and a clear legislative intent that only the original negligent act itself, exclusive of circulation and injury, is meant to be included under CPLR 302(a)(2), then the apparent liberalization of jurisdictional bases by means of this paragraph exists only in theory. The question necessarily posed is what was the reasonable intent of the legislature in enacting this paragraph.

It would seem reasonable to attribute to the legislature a liberal intent, *i.e.,* to afford New York citizens a local forum for seeking the redress of injuries occasioned by the act of a nonresident, done without the state but having its consequences in New York. When combined with the instruction that "the civil practice law and rules shall be liberally construed," [65] it would seem that this approach can be reasonably attributed to the legislature. The Court of Appeals, however, rejected this and attributed to the legislature an intent consistent in result with the former, more conservative approach.

When faced with the expanded power of a state to assert jurisdiction, as well as the clear intention of the Advisory Committee to utilize such power, it seems strange that so restrictive an interpretation was placed on a paragraph of the very section enacted to secure this end. The distinction made between tort and tortious act, though "semantically attractive," [66] is a distinction which ignores the fact that an act does not assume the quality of being tortious until a tort is committed. Since "the tort of negligence requires damage, and the tort does not arise unless damage has occurred, the tort clearly arises where the damage occurs." [67] Furthermore, as was stated in *Gray v. American Radiator & Standard Sanitary Corp.,*[68] an attempt to make such a distinction between tort and tortious act overlooks a vital point. Even though a product is manufactured entirely without New York, if the manufacturer knows "or because of the scope of his operations ought to know that the object will find its way into New York," [69] then such manufacturer should be subject to New York's jurisdiction in any action arising from an injury caused by the negligent manufacture.

---

[64] *Ibid.*
[65] CPLR 104.
[66] 7B McKINNEY'S CPLR art. 3, supp. commentary 58 (1965).
[67] *Ibid.*
[68] 22 Ill. 2d 432, 441, 176 N.E.2d 761, 766 (1961).
[69] 7B McKINNEY'S CPLR art. 3, supp. commentary 21 (1964).

It is reasonable to assume that the legislature was aware of *Gray* in enacting CPLR 302, since the report had but recently been submitted to the legislature when the *Gray* case was decided.[70] If the legislature knew of *Gray,* and was cognizant, as it obviously was, that CPLR 302(a)(2) was modeled on the statute construed in that case, then it is logical to conclude that some question would have been raised as to the meaning of paragraph 2 if any great opposition existed to a similar construction.

Let us consider the results of the tort-tortious act distinction. As was observed by the Supreme Court of Vermont: "To require a resident to commence his action in a foreign jurisdiction on a tort committed where he lives, and to transport his witnesses to such other state might well make the protection of his right prohibitive. . . ." [71] The United States Supreme Court, however, in *Hanson v. Denckla,*[72] stated that there must 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." [73] Though the statement from the Vermont court must be interwoven with the admonition given in *Hanson,* it is nevertheless submitted that due process can be served in each case without the necessity of any distinction between tort and tortious act.

Under the facts of *Feathers* and *Singer,* the Court of Appeals did achieve a result consistent with due process requirements. The minimum contacts requirements of *International Shoe* must be met not only in the application of CPLR 301, but must also be complied with in each application of CPLR 302(a)(1) and (2). From this it follows that if the distinction made by the Court between tort and tortious act is contrary to the intent of the legislature, and if there are certain tortious activities which would not amount to "minimum contacts," certain situations would arise wherein the application of CPLR 302(a)(2) would be violative of due process.

For example, were *X* to be injured in New York by eating poisonous home-made candy purchased by him in a foreign jurisdiction from *Y's* roadside stand, the application of this paragraph to assert jurisdiction would not appear to meet the "minimum contacts" standard and hence would be violative of due process. It is evident that *Y,* who made the candy, committed no act by which he "purposefully" availed himself "of the privilege of con-

---

[70] The final report of the Advisory Committee was submitted on January 4, 1961, and *Gray* was decided on June 14, 1961.

[71] Smyth v. Twin State Improvement Corp., 116 Vt. 569, 575, 80 A.2d 664, 668 (1951).

[72] 357 U.S. 235, 253 (1958).

[73] *Ibid.*

ducting activities within the forum State, thus invoking the benefits and protections of its laws." [74]

Hence, the position taken that there is a needless distinction drawn between tort and tortious act in the instant cases does open the door to the further problem of drawing the line between the situations where CPLR 302(a)(2) can be constitutionally applied and those wherein its application would be unconstitutional.

The fact that such a problem would face the courts, however, should not act as a deterrent to proper construction of the statute, but rather, should serve as a stimulus towards meeting the problem created when combining the due process requirements of "minimum contacts" with the expanded jurisdictional bases now being utilized.

CPLR 302(a)(3): Ownership, use or possession of real property.

Tebedo v. Nye,[75] one of the infrequent decisions construing CPLR 302(a)(3), involved a cause of action for failure to convey real property. Defendant Nye, after agreeing to sell the disputed land to the plaintiffs and accepting the consideration, conveyed the entire parcel to defendant McLaughlin. McLaughlin, allegedly with knowledge of a prior agreement to convey to the plaintiffs, conveyed the realty to a third party. Subsequently, McLaughlin established residence in Florida where he was served personally under CPLR 302(a)(3). The court held that irrespective of the fact that the defendant McLaughlin no longer had any interest in the land, nor owned any other real estate in New York, jurisdiction would nonetheless be sustained on the basis of "the relationship existing between the defendant and the realty out of which the cause of action arose at the time the cause of action arose."[76]

CPLR 305(b): Amendment.

CPLR 305(b), as originally enacted, provided that for purposes of a default judgment it would not be necessary to serve a complaint with the summons if (1) the claim was for a sum certain, and (2) a notice stating this sum was served with the summons. The CPLR 305(b) notice would take the place of the complaint for default purposes. In 1965, this was amended to provide for the expanded use of such notice, *i.e.*, a statement of the nature of the action and the relief demanded in monetary as well as non-monetary actions. There is some disagreement as

---

[74] *Ibid.*

[75] 45 Misc. 2d 222, 256 N.Y.S.2d 235 (Sup. Ct. Onondaga County 1965).

[76] *Id.* at 223, 256 N.Y.S.2d at 236.