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Section 302(a)(2)--Commission of a "Tortious Act"; Circulation of a Dangerous Instrumentality

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Rolls Royce of Canada, Ltd., which, in turn, owned all the stock of Rolls Royce, Inc., a Delaware corporation doing business in New York. The Delaware subsidiary owned no products of its own, and its sole business consisted of selling and servicing the products of the parent. The subsidiary bought from the parent at a price lower than that which the ultimate consumer paid. The parent, however, gave the warranty and paid the subsidiary a fixed annual fee for services rendered in connection with these warranties. The court, rejecting the contention that the subsidiary was an independent purchaser, held that it was, in effect, a sales agent of the parent, thereby subjecting the parent to in personam jurisdiction.[63]

Section 302 (a) (2) — Commission of a "Tortious Act"; circulation of a dangerous instrumentality.

Two very significant recent decisions in this area are *Singer v. Walker*[64] and *Feathers v. McLucas*.[65] In both cases, the courts sustained jurisdiction upon the theory that a tortious act was committed within New York.

There has been an increased sensitivity of recent for both acquisition-of-jurisdiction and choice-of-law purposes, as to whether a tortious act is committed at the place of manufacture or at the place of injury.[66] But it is worthy of note, indeed, when even for only jurisdictional purposes a tortious act is held to have occurred at the place where a product (which later, and elsewhere, produced the injury) was merely circulated for, or even after, sale.

The *Singer* case holds just that. There the defendant, an Illinois corporation, manufactured geologists' hammers, labeled them unbreakable, and shipped them f.o.b. Rockford, Illinois, to a New York dealer. The New York dealer bought them via mail order by use of a catalogue sent to him by defendant. In February 1960, the infant-plaintiff's aunt bought one such hammer in New York and thereafter presented it to him as a gift. In April 1960, while on a field trip in Connecticut, the hammer broke while being used by the plaintiff to break rocks. This resulted in plaintiff's loss

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[63] *Id.* at 75, 248 N.Y.S.2d at 275.

[64] 21 App. Div. 2d 285, 250 N.Y.S.2d 216 (1st Dep't 1964).

[65] 21 App. Div. 2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964).

[66] See Trippe Mfg. Co. v. Spencer Gifts, Inc., 270 F.2d 821 (7th Cir. 1959); Hellriegel v. Sears, Roebuck & Co., 157 F. Supp. 718 (N.D. Ill. 1957); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Lewin v. Bock Laundry Mach. Co., 42 Misc. 2d 599, 249 N.Y.S.2d 49 (Sup. Ct. 1964); Fornabaio v. Swissair Transp. Co., 42 Misc. 2d 182, 247 N.Y.S.2d 203 (Sup. Ct. 1964). As to the choice-of-law problem, see Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

of an eye. An action was brought for negligence and breach of warranty in New York. Special term dismissed the action on the ground that the cause of action did not arise from any tortious act or transaction of business in this state, *i.e.*, that neither (1) nor (2) of 302(a) applied. The appellate division reversed, holding that because "defendant was responsible for a continuous tortious act, namely, the circulation in New York of a defective hammer, always bearing its mislabeling, a tortious act occurred in this state from which the cause of action arose. . . ." [67] The fact that the injury occurred in Connecticut was deemed irrelevant *for jurisdictional purposes.* The result is that a single injury may be the product of many tortious acts for jurisdictional (as opposed to choice-of-law) purposes. Assuming each jurisdiction has a "tortious act" jurisdictional statute like CPLR 302(a)(2), the act would be held to have been committed in (1) the place of manufacture, (2) the place of circulation *and* (3) the place of injury. Clearly (1) and (3) are jurisdictional predicates. The *Singer* case adds (2).

In *Feathers,* the court reached the same result, but that case fell under (3) of the foregoing list, a more usual jurisdictional foundation. In *Feathers,* the defendant corporation was a Kansas manufacturer of pressure tanks. Defendant sold one of these tanks to a Missouri corporation which affixed the tank to a trailer chassis and wheels. The trailer, as completed, was sold to a Pennsylvania corporation engaged in interstate commerce. En-route from Pennsylvania to Vermont, the tank exploded in New York causing injury to plaintiff. The supreme court had held that there was no jurisdiction over defendant on the ground that only the injury and not the tortious act occurred in New York.[68] In reversing, the appellate division held that "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." [69]

In both *Singer* and *Feathers,* the courts placed great emphasis on the fact that there was an instrumentality involved which, if negligently manufactured, would be dangerous to life, and that it would be reasonable, therefore, to hold defendant responsible in New York for the consequences of his act.

While *Feathers* may itself be somewhat of an extension of *Gray v. American Radiator & Sanitary Corp.,*[70] since defendant's contacts with the forum state were more remote in

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[67] Singer v. Walker, 21 App. Div. 2d 285, 286, 250 N.Y.S.2d 216, 218 (1st Dep't 1964).

[68] Feathers v. McLucas, 41 Misc. 2d 498, 245 N.Y.S.2d 282 (Sup. Ct. 1963). This case was reported in 38 ST. JOHN'S L. REV. 412 (1964).

[69] Feathers v. McLucas, 21 App. Div. 2d 558, 559, 251 N.Y.S.2d 548, 550 (3d Dep't 1964). (The case is currently before the court of appeals.)

[70] *Supra* note 66.

Feathers than in *Gray*, the *Singer* case goes even further than *Feathers*. Although both cases involved a defective instrumentality which found its way into New York, the *Singer* case involved no injury in New York. What was important in *Singer* was that plaintiff came into possession of the hammer while it was still in circulation in New York. This, for the court, was an "essential nexus to sustain jurisdiction." [71] The tortious act was held to have continued so long as the defective hammer circulated in New York. Once the user came into possession of the product in New York, it was immaterial where he took it. However, the court further indicated that if plaintiff had been given the hammer in Connecticut rather than in New York, the cause of action would have had no relation to the tortious act committed in New York, namely, the circulation of the defective hammer. The court made note of the fact that defendant had made various transactions of business in New York, for example, sending salesmen and catalogues into the state, but this was not the deciding factor in the case. The court indicated that due process considerations would be more restrictive if the case involved a "transaction of business" question (CPLR 302(a)(1)), but that when a dangerous instrumentality is involved (producing a tortious act under CPLR 302(a)(2)) the responsibility should be greater.

In the *Feathers* case, defendant's sole contact with the state was the entry into the borders of New York of its cargo pressure tank. Defendant apparently had never engaged in any business activity in New York. Nevertheless, the court sustained jurisdiction, stating that "jurisdiction of a State may be extended over a foreign corporation where 'single or occasional acts . . . because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit' on causes of action arising therefrom." [72]

Tests for jurisdiction.

When a non-domiciliary knows or ought to know that his product will find its way into New York, he should be compelled to answer here for any damage caused by his negligent act in the manufacture of that product.[73] However, the nature of the product is an important factor. It is questionable whether the courts would, or could entertain jurisdiction if the product happens to be defective yarn,[74] which is not inherently dangerous, as

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[71] Singer v. Walker, *supra* note 67, at 290, 250 N.Y.S.2d at 221.

[72] Feathers v. McLucas, *supra* note 69, at 560, 251 N.Y.S.2d at 551; see International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

[73] Lewin v. Bock Laundry Mach. Co., *supra* note 66; Fornabaio v. Swissair Transp. Co., *supra* note 66.

[74] Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956).