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The Evolving Rationale of Personal Jurisdiction

By George Kenny

Modern personal jurisdiction law dates from the landmark 1945 *International Shoe Co. v. Washington* case. There, the Supreme Court held that an out-of-state party may be subject to the jurisdiction of a state court only if it has "minimum contacts" with that state. Plaintiff must demonstrate that the out-of-state defendant has been fairly treated under traditional concepts of fair play and substantial justice.

The 1980 *World Wide Volkswagen Corp. v. Woodson* case, a 6-3 majority opinion written by Justice Byron White, was the next major case to discuss the rationale for use in deciding the personal jurisdiction issue. *World Wide* arose out of an automobile accident in Oklahoma. A Ford Torino rear ended plaintiffs' Audi and, although the impact of the collision caused no injuries, occupants of the Audi were severely burned when their doors jammed and a puncture of the Audi gas tank caused a fire. Plaintiffs brought a product liability action in the state court of Oklahoma against New York distributors and sellers of the Audi. Those defendants, on motion for dismissal, claimed that if Oklahoma exercised in persona jurisdiction over them, on the basis of the minimum contacts rule, it would offend accepted concepts of fair play and

substantial justice under the Due Process Clause of the United States Constitution.

The court held that since these defendants had no contacts with Oklahoma, but for the Audi being driven through the state, plaintiffs could not establish "minimum contacts" of the New York defendants as needed to secure jurisdiction of defendants in Oklahoma. The acid test being whether a defendant's conduct and connection with the forum state was such that the defendant might reasonably anticipate being haled into court there. Defendant in this case simply did not purposely direct any activities at or into Oklahoma.

In Justice Brennan's dissenting opinion, however, he offered another rationale for jurisdiction, one based on reasonable foreseeability rather than any other traditional minimum contacts test. The hook for this rationale was as follows. An automobile, wherever sold, is mobile and, therefore, it is reasonably foreseeable that a New York car would subsequently journey through Oklahoma and become involved in an accident and might cause injury, leading to a state court suit there against out-of-state defendants. Especially in a product defect accident, because in product liability, liability is assessed against all persons within the chain of distribution, from manufacturer through seller. The majority rejected this rationale, not accepting that foreseeability alone could provide the basis for jurisdiction over an out-of-state defendant.

Justice Brennan argued in his dissent that an automobile is intended by its very nature to

move around the country and the automobile dealer obviously intends its purchasers to use their automobiles to travel to distant states where the dealer does not do any direct business. So the sale of the automobile, in fact, injects the vehicle into the stream of interstate commerce and "this stream of commerce is just as natural a force as a stream of water" and equally, as predictable, once released into this metaphorical stream, the automobile will reach Oklahoma. Thus, was born the "stream of commerce" rationale, but not a rationale accepted by the majority of the *World Wide* court in 1980.

Then, in 1986, the New Jersey Supreme Court decided the product liability case of *Gendler v. Telecom Equipment*, which arose from the sale of allegedly defective telephone equipment manufactured in Japan by Nippon Electric Company and sold to Gendler in New Jersey. The court adopted the stream of commerce theory to analyze the personal jurisdiction issue against Nippon who passed its equipment through a subsidiary, warranted as free from defects, to Gendler. The court noted a trend toward expanding the reach of state jurisdiction over out-of-state corporations and held that when products of "foreign" manufacture are deliberately marketed through the "stream of commerce," an out-of-state defendant may subject itself to the jurisdiction of the state in which a defect in the product caused damage. The court held that such a theory comported with due process under the Fourteenth Amendment as a common sense recognition of the fluidity of modern commerce and did not offend present day notions of fair play and substantial justice. However, a unanimous court determined that

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additional facts were needed to determine whether Nippon was aware, or should have been aware, of a system of distribution that purposefully directed the telephone equipment to New Jersey, and remanded for additional factual development to that purpose.

In 1987 came the United States Supreme court case of *Asahi Metal Industry v. Superior Court*. Dueling opinions in that product liability case raised legal turmoil as to acceptable rationales to be relied on in deciding personal jurisdiction cases. An opinion by Justice Brennan (4 Justices) applied the stream of commerce theory to affirm California's grant of jurisdiction, whereas Justice O'Connor (4 Justices) took the position that stream of commerce must also have facts showing that, in this case, Asahi had reached into the forum state in order to support personal jurisdiction in that state. Justice Stevens wrote a separate opinion, however, which did not weigh in on the personal jurisdiction issue but rather resolved the case on other bases. Without five justices, the court did not have a majority opinion and, not having a majority opinion, was not precedential.

On one issue, however, all Justices agreed. Because of the severity of the burden on Asahi, by reason of geographic distance and legal dissimilarities, the case should be resolved in either Japan or Taiwan.

Only two years after *Gendler* and one year after *Asahi*, *Lebel v. Everglades Marina*, a product liability action, came before the New Jersey Supreme Court. Faced with the split of opinions by Brennan and O'Connor, on the proper rationale to decide personal jurisdiction contests, Justice O'Hern, for a unanimous court, wrote:

It seems that little profit can be gained from an extended analysis of Supreme Court doctrine until the Court itself draws the lines as the umpire of federalism. [so]

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Rather than embark on a prediction of the future course of this stream of jurisprudence, we shall hew closely to the limited fundamentals about which there is little or no dispute or debate.

Foresaking *Gendler*, the court in *Lebel* rested more easily on the traditional criteria New Jersey used for personal jurisdiction guidance.

In *Lebel*, over a two-year period the seller continued phoning to sell a high-speed luxury boat to plaintiff. After completing the sale, a sales agreement was drawn and signed by plaintiff in New Jersey. Plaintiff took delivery and registered the Florida boat. He also hired a shipper to transport the boat to New Jersey. The boat never made it. After an accident en route, the boat was returned to Florida, at which time the buyer allegedly learned that in the telephone calls to New Jersey, he had been misled as to the condition of the boat. The insertion of this sales pitch, with its fraudulent misrepresentations, was held to constitute sufficient minimum contact under traditional notions of substantial justice and fair play. Defendant should have been aware that on reaching into New Jersey, with what was the heart of the conduct resulting in the New Jersey suit, the seller should have been aware he might be haled into the courts of this state as the result of his alleged misrepresentations.

Next, in 2010, came *Nicastro v. McIntyre Machinery*, which involved an alleged product defect in a metal shearing machine manufactured by McIntyre in England and sold in the United States, through a separate distributor to a New Jersey customer. McIntyre, itself, never had activities or connection with New Jersey, except for this one machine. The case produced two well written but divergent opinions. The majority opinion by Justice Albin (5 Justices) adopted the *Asahi* rationale espoused by Justice Brennan and the dissent by Justice Hoens (2 Justices) adopted Justice O'Connor's point of view. Once again New Jersey had opted for the "stream of commerce" approach. But not so fast.

Certiorari was granted and in the 2011 United States Supreme Court case of *J. McIntyre Machinery v. Nicastro*, Justice Kennedy (4 Justices) wrote an "O'Connor" opinion and Justice Ginsberg (3 Justices) wrote a "Brennan" opinion. Each was a plurality opinion since a majority of the court did not join in either the opinion of Kennedy or Ginsberg. Therefore, once again, the case was not precedential. Justice Alito had concurred, rather than joined in either opinion, because, he thought it "unwise to

announce a rule of broad applicability without full consideration of the modern-day consequences."

The latest personal jurisdiction case was decided in 2017. In the United States Supreme Court case of *Bristol-Myers Squibb Co. v. Superior Court*, the majority opinion, written by Justice Alito with a dissent by Justice Sotomayor, made clear, in this California pharmaceutical liability suit against Bristol-Myers, that California did not have personal jurisdiction over this non-resident manufacturer, because (1) it lacked requisite in-state activities, and (2) the drug was not manufactured in California. The court noted that plaintiffs still retained a remedy by bringing suit against Bristol-Myers in Delaware or New York where it was, respectively, incorporated and maintained its principal place of business.

It appears that, for our time, and under the present United States Supreme Court makeup, the stream of commerce theory must await a future judicial day or be tucked into that well-known dustbin of history. But since any of these tests are born of an artificial intellectual construct, one never knows what the future will bring. ■