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Alan R. Taradosh

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MULTI-STATE DEFAMATION AND THE LONG-ARM

INTRODUCTION

Under the present Illinois "long-arm" statute,¹ jurisdiction in a multi-state defamation case over a non-resident defendant who is not doing business within the state is based upon the commission of a tortious act within the state.² When the assertion of such in personam jurisdiction is challenged the court faces an extremely complex question: Whether the defendant has had sufficient contact with the state of Illinois for submission jurisdiction to be invoked consonant with the due process requirements of *International Shoe Co. v. Washington*.³ The purpose of this comment is to examine the theories and considerations relevant in deciding this jurisdictional question. Although fundamentally concerned with defamation and the "long-arm," the analysis herein is equally applicable to the tort of invasion of privacy.

IN PERSONAM JURISDICTION

The origin of in personam jurisdiction is coincident with the development of the organized body politic. Implicit in the idea of an organized society was the theory that the citizens and residents of such a body were subject to the power and authority of the society's machinery for adjudicating controversies which arose between its citizens. In an age when the organized state was relatively simple and the people rather stationary, this simple concept of jurisdiction over persons owing allegiance to the sovereign and those within the sovereign's physical boundaries worked reasonably well. The rationale of the "allegiance" theory of jurisdiction was that the citizens owed certain obligations to the sovereign for benefits they received.

The United States' federal system of dual sovereignty presented conflict of laws problems which necessitated an alteration of the "allegiance" theory.⁵ The change took the form of a doc-

¹ ILL. REV. STAT. ch. 110, §§16-17 (1967).

² ILL. REV. STAT. ch. 110, §17(1)(b) (1967).

³ 326 U.S. 310 (1945).

⁴ The historical development of in personam jurisdiction has been thoroughly discussed by numerous authors. The sole purpose of reviewing here the sequential development of in personam jurisdiction is to examine the theories upon which the various foundations of such jurisdiction were based; and, the extent to which those theories are, or are not, suited to the special jurisdictional problems of interstate, or multi-state, defamation. For a thorough discussion of the history of personal jurisdiction see generally T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956); S. KIMBALL, *HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM* (1966).

⁵ It should be noted, however, that an analogous problem existed in England in the area of venue as it related to the counties and the diverse allegiances of the subjects to the various lesser lords of the kingdom. See Johnston, *The Fallacy of Physical Power*, 1 JOHN MAR. J. PRAC. & PROC. 37, 44-49 (1967).

trine often referred to as the "physical power" doctrine. This doctrine became an established concept of jurisdiction following the decision in *Pennoyer v. Neff*.⁶ Actually, the "physical power" doctrine was a consequence of a strict interpretation of the concept of state sovereignty and required that the state actually have physical control over the person of the defendant,⁷ i.e., one had to be physically within the state's boundaries to be validly served with process.⁸

A corollary to the "physical power" doctrine was the "physical presence" theory.⁹ The test employed to determine whether one was physically present in a state varied with the type of defendant, whether a corporation¹⁰ or an individual, and the nature of the act committed by the defendant.¹¹ Corporations which engaged in business within a state other than their state of incorporation were frequently required to register and expressly consent to be sued there.¹² This "express consent" theory permitted the court to have jurisdiction over a defendant as to any cause of action¹³ regardless of where the operative facts arose, and, as a condition precedent to doing business within a state, the corporation was required to appoint an agent within the state upon whom process could be served. The idea of consenting to be sued was subsequently expanded to include implied consent as well as express consent.¹⁴

The "implied consent" theory rested on the state's right to regulate certain other kinds of activity¹⁵ occurring within its boundaries or which affected its citizens.¹⁶ Such activities were usually those whereby the rights of citizens and residents of a state were affected on a large scale.¹⁷ States have legitimately maintained a special regulatory interest in such activities upon the basis that such an interest is implicit in the right and duty of a sovereign state to protect the lives and property of those within its boundaries.¹⁸

⁶ 95 U.S. 714 (1877).

⁷ J. STORY, CONFLICT OF LAWS 21-23 (8th ed. 1883).

⁸ *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877).

⁹ *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1897).

¹⁰ *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139 (2d Cir. 1930).

¹¹ See generally Ehrenzweig, *The Transient Rule of Personal Jurisdiction; The "Power" Myth and Forum Conveniens*, 65 YALE L. J. 289 (1956).

¹² *Lafayette Ins. Co. v. French*, 59 U.S. 404 (1855).

¹³ *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F. 148 (S.D. N.Y. 1915).

¹⁴ Johnston, *The Fallacy of Physical Power*, 1 JOHN MAR. J. PRAC. & PROC. 37, 49-51 (1967).

¹⁵ See note 19 *infra*.

¹⁶ *Hanson v. Denckla*, 357 U.S. 235 (1958).

¹⁷ *Id.* at 252-53.

¹⁸ Generally, the right of a sovereign to make laws, both substantive and procedural, is directly related to its self interest. This is an old and well recognized principle. Story, citing Boulenois, stated:

The need of a state to protect its residents from another potential source of injury came with the advent of the automobile and the attendant hazards associated with its use. As a result, states enacted non-resident motorist statutes¹⁹ which generally provided for service by mail and substitute service upon a designated state official.²⁰ The intended protection was primarily from potential tortious injury; whereas, the reason for requiring corporations to register was to protect residents from contractual as well as tortious injury.²¹ Corporations that failed to register could still be physically present in a state if they were conducting a sufficient amount of business in that state. The test employed to determine whether or not a corporation was physically present was that of "doing business." This test was generally quantitative notwithstanding the fact that the volume of business that one needed to be doing in a state to be considered physically present varied from state to state.²²

The landmark case of *International Shoe Co. v. Washington*²³ was in many ways the final step in carrying the concept of in personam jurisdiction to its present definition.²⁴ The pre-

[E]very nation possesses an exclusive sovereignty and jurisdiction within its own territory.

(1) He, or those who have the sovereign authority, have the sole right to make laws; and these laws ought to be executed in all places within the sovereignty where they are known, in the prescribed manner.

(2) The sovereign has power and authority over his subjects, and over the property which they possess within his dominions. (3) The sovereign has also authority to regulate the forms and solemnities of contracts which his subjects make within the territories under his dominions, and to prescribe the rules for the administration of justice.

(4) The sovereign has also a right to make laws to govern foreigners in many cases; for example, in relation to property which they possess within the reach of his sovereignty; in relation to the formalities of contracts which they make within his territories, and in relation to judiciary proceedings, if they institute suits before his tribunals. (5) The sovereign may in like manner make laws for foreigners who even pass through his territories; but these laws are either permanent, or they are made only for certain occurrences.

J. STORY, CONFLICT OF LAWS 21-22 (8th ed. 1883).

¹⁹ Kane v. New Jersey, 242 U.S. 160 (1916).

²⁰ Hess v. Pawloski, 275 U.S. 352 (1927).

²¹ See note 18 *supra*.

²² Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

²³ 326 U.S. 310 (1945).

²⁴ In *International Shoe*, a Delaware corporation, which only employed salesmen to solicit orders in the state of Washington and was not otherwise doing business in that state, was held to be subject to substitute service of process in Washington because the obligation sued upon arose out of the corporation's Washington activities. The Court stated, "[i]t is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just . . . to permit the state to enforce the obligations . . . incurred there." *Id.* at 320. On the basis of such contacts with Washington the Court found that the non-resident defendant company was conducting continuous and systematic business within the forum state. That finding was sufficient under the prevailing "doing business" theory to establish in personam jurisdiction over the defendant. The Court, however, took the occasion to enunciate the theory of "minimum contacts." And, while the utterance was merely judicial dictum, its pervasive effect was, nonetheless, undiminished.

vious theories of "allegiance," "physical power" and "consent" were inadequate in light of the vast changes that had occurred in transportation and communications. The doctrine of "minimum contacts" declared in *International Shoe* enlarged the base of state jurisdiction and provided a reasonably workable foundation for jurisdiction over non-residents. The only limitations on the assertion of jurisdiction based upon "minimum contacts" were the vague concepts of "due process," "fair play" and "substantial justice."²⁵

The primary issue in *International Shoe* was ". . . whether, within the limitations of the due process clause of the fourteenth amendment . . . a Delaware corporation, [had] by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that State" ²⁶ The Court responded affirmatively to that issue on the basis of the theory of "minimum contacts."²⁷ The rationale behind the holding was that single acts may be sufficient to give the state in personam jurisdiction "because of their nature and quality and the circumstances of their commission."²⁸ "[T]he quality and nature of the activity" in relation to orderly judicial administration was the basic consideration in determining whether or not due process requirements were met.²⁹ The extension of *International Shoe* was, to a large degree, prompted by the need of the state to protect its residents from injury inflicted by one outside of the physical boundaries of the state.³⁰ There is no question concerning the authority of a state to do so. The United States Constitution recognizes many areas of state interest and implicitly leaves such areas to the states to regulate.³¹ The right of a state to protect its legitimate and proper interests is not doubted. It is the appropriateness of the exercise of that right which is determinative of whether the state has violated the constitutional rights of the individual defendant. This is why Mr. Justice Black

²⁵ See note 31 *infra*.

²⁶ 326 U.S. 310, 311 (1945).

²⁷ The court said:

[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."

Id. at 316.

²⁸ *Id.* at 318.

²⁹ *Id.* at 319.

³⁰ See note 18 *supra*.

³¹ Mr. Justice Black, in a dissenting opinion in *International Shoe*, made this clear when he expressed concern for first amendment rights:

[W]e should . . . decline the invitation to formulate broad rules as to the meaning of due process, which here would amount to deciding a constitutional question "in advance of the necessity for its decision." . . . The Court . . . has engaged in an *unnecessary* discussion in the course of which it has announced vague Constitutional criteria applied for the

so strongly argued that to base a state's jurisdictional foundation upon vague notions of natural justice (such as "fair play" or "substantial justice"), without regard to the nature of the act or conduct involved, is to permit the potential abridgement of the first amendment rights of freedom of speech and of the press. The possibility of this danger becoming a reality is by no means remote.³²

Illinois responded to the invitation of *International Shoe* in 1955 when it enacted a "long-arm" statute³³ with the intention of extending, to the limits of due process³⁴ as defined in *International Shoe*, the state's jurisdictional authority over non-resident defendants who had had certain prescribed minimum contacts with the state.³⁵ The constitutionality of the Illinois "long-arm" was first raised in *Nelson v. Miller*³⁶ where jurisdiction over the defendant was based upon section 17(1)(b). The defendant contended that such a jurisdictional base denied him due process

first time to the issue before us. *It has thus introduced uncertain elements confusing the simple pattern and tending to curtail the exercise not justified by the Constitution.*

326 U.S. 310, 322-25 (1945) (emphasis added).

³² See Comment, *Long-Arm Jurisdiction Over Publishers: To Chill A Mocking Word*, 67 COLUM. L. REV. 342 (1967).

³³ ILL. REV. STAT. ch. 110, §17 (1967):

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

(a) The transaction of any business within this State;

(b) The commission of a tortious act with this State;

(c) The ownership, use, or possession of any real estate situated in this State;

(d) Contracting to insure any person, property or risk located within this State at the time of contracting.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.

(4) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

³⁴ ILL. ANN. STAT. ch. 110, §17 (Smith-Hurd 1969), Historical & Practice

Notes.

³⁵ Section 16 of the Illinois Civil Practice Act permits extra-territorial service of process upon a defendant who has submitted to the state's jurisdiction by engaging in one of the types of conduct enumerated in section 17. Section 16 provides, in part:

(1) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the effect of service by publication.

ILL. REV. STAT. ch. 110, §16 (1967).

³⁶ 11 Ill. 2d 378, 143 N.E.2d 673 (1957). In *Nelson* the non-resident defendant's employee negligently injured the plaintiff while unloading an appliance in Illinois. Both the tortious act and the injury occurred within Illinois and the injured plaintiff was an Illinois resident.

of law which was a violation of the Illinois constitution³⁷ and of the fourteenth amendment of the United States Constitution.³⁸ The court, however, upheld the constitutionality of sections 16 and 17 and cited *International Shoe* to support the acknowledged change in the foundation of jurisdiction over the non-resident defendant, stating:

The foundations of jurisdiction include the interest that a State has in providing redress in its own courts against persons who inflict injuries upon, or otherwise incur obligations to, those within the ambit of the State's legitimate protective policy.³⁹

The question necessarily arises as to who is to be included within the limits or scope of the "State's legitimate protective policy." The residents of the state would seem to be included as is indicated by the analogy drawn in *Nelson* between a foundation of jurisdiction in the form of a "long-arm" statute and in the form of a non-resident motorist statute.⁴⁰ The rationale of the *Nelson* court upon which such jurisdiction could be sustained ". . . is to be found in the legitimate interest of the State in providing redress in its courts against persons who, having substantial contacts with the State, incur obligations to those entitled to the State's protection."⁴¹ It would, therefore, seem reasonable to conclude that the state's primary interest is in protecting its residents from injury by a non-resident who is either not within, or is no longer within, the state's physical boundaries.⁴² This is not to suggest that the state has no other le-

³⁷ ILL. CONST. art. 2, §2.

³⁸ 11 Ill. 2d 378, 383, 143 N.E.2d 673, 676 (1957).

³⁹ *Id.* at 384, 143 N.E.2d at 676.

⁴⁰ The *Nelson* court, quoting Mr. Justice Frankfurter in *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338 (1953), stated: "[A non-resident motorist statute] is a fair rule of law as between a *resident* injured party (for whose protection these statutes are primarily intended) and a non-resident motorist, and . . . the requirements of due process are . . . met." *Nelson v. Miller*, 11 Ill. 2d 378, 387, 143 N.E.2d 673 (1957) (emphasis added). In *Olberding* an action was brought under the Kentucky non-resident motorist statute, which provided that non-resident motorists operating vehicles on Kentucky highways thereby make the Secretary of State their agent for service of process in actions resulting from the vehicle's operation in Kentucky. The Court held that the defendant did not impliedly consent to be sued in Kentucky merely because he drove his truck on Kentucky highways. But jurisdiction over the defendant did not require consent, express or implied:

The liability rests on the inroad which the automobile has made on the decision of *Pennoyer v. Neff*, as it has on so many aspects of our social scene. The potentialities of damage by a motorist . . . are such that those whom he injures must have opportunities of redress against him provided only that he is afforded an opportunity to defend himself. *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 341 (1953).

⁴¹ *Nelson v. Miller*, 11 Ill. 2d 378, 389, 143 N.E.2d 673, 679 (1957).

⁴² This conclusion has substantial weight added to it in view of the *Nelson* court's use of a Vermont statute for support. The court stated: A Vermont statute provides for jurisdiction over any foreign corporation which "makes a contract with a resident of Vermont to be performed in whole or in part by either party in Vermont, or . . . commits a tort in whole or in part in Vermont against a *resident* of Vermont." *Id.* at 390, 143 N.E.2d at 679 (emphasis added).

gitimate interests to protect; but the fact is inescapable that the primary purpose of protecting specified areas of state interest is to secure from harm those who are within the state's sovereign authority or control and to provide them with a reasonable forum to redress their legal wrongs.⁴³

Nevertheless, the protection of a non-resident from injury within the state is also a recognized function and interest of the state. "[C]ertainly . . . the hardship on the defendant [is] no greater, than if the plaintiff resided in Illinois. *But the nature of the cause of action may be important when the plaintiff is a non-resident.*"⁴⁴

The limits of due process have certainly been approached in cases where the "long-arm" has been stretched to reach non-residents acting outside the state but causing injury within the state. In *Hellriegel v. Sears Roebuck & Co.*⁴⁵ the United States District Court for the Northern District of Illinois, applying the Illinois "long-arm" statute, refused to assert jurisdiction over an Ohio manufacturer whose defectively manufactured product caused injury within the state of Illinois. The United States Supreme Court, however, gave impetus to the expansive and imaginative use of "long-arm" statutes with its decision in *McGee v. International Life Insurance Co.*⁴⁶ For the purposes of due process, it was held to be sufficient "that the suit was based on a contract which had substantial connection with that State."⁴⁷

Notwithstanding the pronouncement of *McGee*, the mere mailing of materials into the state was generally held to be insufficient to satisfy the qualitative test of minimum contacts.⁴⁸

⁴³ Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L. F. 533.

⁴⁴ *Id.* at 543 (emphasis added).

⁴⁵ 157 F. Supp. 718 (N.D. Ill. 1957).

⁴⁶ 355 U.S. 220 (1957). The plaintiff in *McGee*, a California resident, had obtained and made premium payments on an insurance policy through the mails with an out of state insurance company which had neither an agent nor an officer in California. Suit was brought under a California statute which subjected foreign corporations to suit in California notwithstanding the fact that service of process was not within California but was only by mail to the corporation's principal place of business. The Court held that California had a definite interest in providing a forum and the due process clause was not thereby violated because "[t]he contract was delivered in California, the premiums . . . mailed from there and the insured was a resident of that State when he died." *Id.* at 223 (emphasis added).

⁴⁷ *Id.* at 223.

⁴⁸ *Mueller v. Steelcase, Inc.*, 172 F. Supp. 416 (D. Minn. 1959). In *Mueller* suit was brought in Minnesota against a Michigan corporation for negligent construction of a chair which plaintiff purchased from another in Minnesota. Service of process was made pursuant to a Minnesota statute which provided, *inter alia*, that foreign corporations who commit a tort in whole or in part in Minnesota against a resident are deemed to be doing business in Minnesota and to have appointed the secretary of state as the corporation's agent upon whom process could be served. The effect of such

Similarly, in *Trippe Manufacturing Co. v. Spencer*,⁴⁹ the United States Court of Appeals for the Seventh Circuit held that the fraudulent use of pictures in a catalog mailed into the state was not sufficient to constitute an act within the state for the purposes of "long-arm" jurisdiction.

In *Insull v. New York World-Telegram Corp.*,⁵⁰ the same court that decided *Trippe* also refused to extend the "long-arm" in a libel action where the resident plaintiff claimed to have been injured by defamatory matter published in a newspaper which was mailed into Illinois subsequent to being circulated elsewhere. The court said that:

[T]he 17(1)(b) jurisdictional requirements are met (1) "when the defendant, personally or through an agent, is the author of acts or omissions within the State," and (2) "when the complaint states a cause of action in tort arising from such conduct."⁵¹

In the *Insull* court's view "[t]he *Nelson* analysis sets forth the two requirements in conjunctive form. Both must be met for 17(1)(b) jurisdiction to exist. Failure to meet one is sufficient to dispose of the issue."⁵² In applying the *Nelson* analysis to the facts in *Insull*, the court held that the "long-arm" was insufficient to subject the defendants to the jurisdiction of Illinois courts because of Illinois' interpretation of the "multiple com-

service was to render the foreign corporation subject to the in personam jurisdiction of the court as to causes of action arising from the tort. The court held that the "... statute assumes to obliterate all conditions precedent heretofore considered essential to the State's jurisdiction over a foreign corporation in a tort action." *Id.* at 420. Consequently, the defendant's motion to quash service of summons was granted.

⁴⁹ 270 F.2d 821 (7th Cir. 1959). In *Trippe* an Illinois corporation brought suit against a New Jersey corporation charging unfair competition arising from the mailing of catalogues into the state. The court held that the service of summons in New Jersey was invalid and, consequently, jurisdiction over the defendant was lacking. The Court of Appeals for the Seventh Circuit followed *Grobark v. Addo Mach. Co.*, 16 Ill. 2d 426, 158 N.E.2d 73 (1959), in holding that the defendant did not have the requisite minimal contacts with Illinois nor did it commit any act, tortious or otherwise, in Illinois.

⁵⁰ 172 F. Supp. 615 (N.D. Ill. 1959).

⁵¹ *Id.* at 631. In *Insull* an Illinois resident obtained out-of-state service under the Illinois "long-arm" statute on the non-resident defendants. The corporate defendants were all incorporated elsewhere than Illinois and their principal places of business were similarly situated outside of Illinois. The sole contact of the defendants with the state of Illinois was the distribution of a small number of their daily newspapers into the state. The printing and first distribution of all the newspapers occurred in other states. Upon these facts the court held that the defendants were not transacting any business, nor did they commit any tortious acts, within Illinois. Consequently, jurisdiction under the Illinois "long-arm" could not attach.

⁵² *Id.* The district court's opinion was affirmed by the Court of Appeals for the Seventh Circuit which held that the defendants' acts of mailing libelous matter into the state of Illinois did not constitute the necessary tortious act committed within Illinois for submission jurisdiction under section 17(1)(b). *Insull v. New York World-Telegram Corp.*, 273 F.2d 166 (7th Cir. 1959). However, it should be noted that whether the act of publication occurred in Illinois hinged upon the court's interpretation of the "single publication rule;" see text at note 92 *infra*.

munications-single publication" rule.⁵³ This rule necessitated the finding that the defendants committed no tortious act within the state of Illinois because the last event necessary to render the actor liable for the alleged defamation occurred elsewhere than in Illinois.⁵⁴

Two years after *Insull* was decided the Supreme Court of Illinois applied the "last event"⁵⁵ approach in *Gray v. American Radiator & Standard Sanitary Corp.*⁵⁶ Two issues were decided in *Gray*:⁵⁷ (1) Whether a tortious act was committed within the meaning of 17(1)(b); and (2) whether a statutory construction which answered the first issue affirmatively would be in derogation of due process as interpreted in *International Shoe*. In answer to the first issue the court applied the "last event" theory.⁵⁸ The court buttressed the use of the "last event-place of wrong" approach by looking to the application of the rules of the statute of limitations, reasoning that since the statute begins to run from the time the injury is inflicted, the alleged tort must have occurred in Illinois where the injury resulted because "the

⁵³ *Insull v. New York World-Telegram Corp.*, 172 F. Supp. 615, 632 (N.D. Ill. 1959).

⁵⁴ As Judge Miner stated in *Insull*:

Unless the . . . defendants, personally or through their agents, authored the Illinois acts or omissions alleged to have damaged the plaintiff, the terms of Section 17(1)(b) have not been met. The alleged wrongful Illinois acts were the respective Illinois distributions of . . . newspapers. Neither personally nor through agents did these defendants distribute those newspapers within Illinois. It must, therefore, be concluded that they committed no tortious act in Illinois within the meaning of 17(1)(b).

Id. at 631.

⁵⁵ RESTATEMENT OF CONFLICT OF LAWS §377 (1934): "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

⁵⁶ 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

⁵⁷ *Id.* at 435, 176 N.E.2d at 762-63. The defendant in *Gray* sought to avoid the result reached by the court by contending that the statutory language "tortious" is different from the word "tort" "and that . . . ['tortious act'] refers only to the act or conduct, separate and apart from any consequences thereof." *Id.* at 436, 176 N.E.2d at 763. The court, however, rejected the defendant's contention and held that "[t]o be tortious an act must cause injury." *Id.* Whether or not an act must cause injury to be considered "tortious" is a matter of philosophical interpretation. See, e.g., Reese & Galston, *Doing An Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959). It is, therefore, not surprising that there is widespread disagreement among various jurisdictions. For the application of "single act" statutes by the forum state when the actual damage occurred in a sister state, see 14 DEPAUL L. REV. 202 (1964).

The *Gray* court found that the defendant had committed a tortious act and thereby had satisfied the "minimum contacts" test even though ". . . the defendant's only contact with . . . [Illinois] is found in the fact that a product manufactured in Ohio was incorporated, in Pennsylvania, into a hot water heater which in the course of commerce was sold to an Illinois consumer." *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 438, 176 N.E.2d 761, 764 (1961) (emphasis added).

⁵⁸ RESTATEMENT OF CONFLICT OF LAWS §377 (1934).

alleged negligence . . . cannot be separated from the resulting injury."⁵⁹

This conclusion presumes that the place of injury can be definitely determined. Obviously, in *Gray* the presumption was valid.⁶⁰ However, tortious injury is not confined to such overt physical occurrences. Defamation and invasion of privacy, for example, result in injuries which cannot be as neatly ascribed to either a particular place or an exact time.⁶¹ The mechanical application of the "last event" theory to cases where the injury is to an intangible quantum is likely to produce undesirable results.⁶² It is precisely because the "last event" theory is an impractical and inflexible standard that severe scholarly criticism has been levelled at it.⁶³

Moreover, the *Gray* analysis should not be extended to cases with complaints alleging amorphous injury, especially in view of the fact that the second issue in *Gray*⁶⁴ was decided by applying the very liberal approach of "minimum contacts."⁶⁵ It should also be noted that the reasoning in *Gray*⁶⁶ has been rejected and criticized by courts in other jurisdictions. In *Beaty v. M.S. Steel Co.*⁶⁷ Judge Harvey of the United States District Court for the

⁵⁹ *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 435, 176 N.E.2d 761, 763 (1961).

⁶⁰ The injuries suffered by the plaintiff in *Gray* resulted from the explosion of a water heater which contained a defectively manufactured valve. Injuries of this nature are, for obvious reasons, susceptible to reasonably precise determination as to the time and place of occurrence.

⁶¹ See text at note 85 *infra*.

⁶² Such application not only produces confusion in the law, but also predicates the satisfaction of due process upon the fiction that the defendant's tortious conduct occurred within the state. See text at note 27 *supra*.

⁶³ Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L. F. 533, 552-54.

⁶⁴ See text at note 57 *supra*.

⁶⁵ State interest, adequate notice to the defendant and convenience to both parties are ostensibly the primary considerations for determining the validity of the assertion of jurisdiction under the "long-arm." As the court stated in *Gray*:

[T]he trend in defining due process of law is away from the emphasis on territorial limitations and toward emphasis on providing adequate notice and opportunity to be heard: from the court with immediate power over the defendant, toward the court in which both parties can most conveniently settle their dispute.

Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 440, 176 N.E.2d 761, 765 (1961).

⁶⁶ In determining whether due process requirements have been met where jurisdiction is based on "minimum contacts," the Illinois Supreme Court held that:

[T]he question cannot be answered by applying a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable in the circumstances. In the application of this flexible test the relevant inquiry is whether defendant engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum.

Id.

⁶⁷ 276 F. Supp. 259 (D. Md. 1967). In *Beaty* an action was brought against an Alabama corporation by two iron workers who were injured in Maryland. The complaint alleged that the injury was caused by the col-

District of Maryland, indicated that in his view *Gray* violated due process requirements.⁶⁸ It is interesting to note that both *Beaty* and *Gray* relied on the interpretation of due process as promulgated in *International Shoe* and arrived at incompatible conclusions. If *Beaty* were merely an isolated view, perhaps *Gray* would be more acceptable; but other jurisdictions have similarly found *Gray* a just cause for criticism.⁶⁹

In *Chunky Corporation v. Blumenthal Bros. Chocolate Co.*,⁷⁰

lapse of negligently manufactured bar joists which were produced by the defendant in Alabama and were shipped into Maryland. Jurisdiction over the defendant was asserted under the Maryland "long-arm" statute which was based substantially on article 1, section 1.03a of the UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, 9B U.L.A. §1.03a. The relevant portion of the Maryland statute reads as follows:

§96(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's . . .

(3) Causing tortious injury in this State by an act or omission in this State;

(4) Causing tortious injury in this State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in this State or derives substantial revenue from food or services used or consumed in this State . . .

MD. ANN. CODE art. 75, §96(a) (Cum. Supp. 1969). For a perceptive analysis of the Maryland "long-arm" statute, see Auerbach, *The "Long Arm" Comes to Maryland*, 26 Md. L. REV. 13 (1966).

⁶⁸ *Beaty v. M.S. Steel Co.*, 276 F. Supp. 259 (D. Md. 1967). He said:

[A]lthough the precise question has not as yet been presented to the state or Federal courts in Maryland, this Court concludes that the *Gray* case would not be followed by the Maryland Court of Appeals. It would offend traditional notions of fair play and substantial justice to hold that a non-resident corporation could be sued in Maryland merely because on one occasion its product manufactured in another state was shipped into and used within this state.

Id. at 263.

⁶⁹ In *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502 (4th Cir. 1956), a case which involved facts substantially similar to *Beaty* and *Gray*, the Court of Appeals for the Fourth Circuit found that the defendant's contacts with the state of North Carolina were insufficient to satisfy the requirements of due process. The court held:

The orderly and fair administration of the laws throughout the nation is a highly important factor to consider . . . [D]isorder and unfairness [are] likely to follow from sustaining jurisdiction in a case like this . . . To permit this could seriously impair the guarantees which due process seeks to secure.

Id. at 507.

⁷⁰ 299 F. Supp. 110 (S.D.N.Y. 1969). Plaintiff, a New York candy manufacturer, sued a Pennsylvania chocolate company for damages resulting from an impure shipment of chocolate. The defendant brought a third party complaint against a Wisconsin corporation doing business in Illinois which supplied them with contaminated milk produced by a Pennsylvania dairy. The basis of the third party action was that if the defendant's shipment of chocolate was impure it was solely because of contaminated milk supplied to them by the third party defendants. On a motion to dismiss the third party action for lack of in personam jurisdiction under the New York "long-arm" statute, the court held that:

If [the third party defendants] could be brought into this action, then any supplier of raw material to a manufacturer which engages in interstate commerce could be compelled to defend an action in foreign jurisdictions with which the supplier has never had any contact. Such a result does not follow from the holdings or reasoning of the Supreme Court in *Internat'l Shoe* and *Hanson*, and would exceed the bounds of "fair play and substantial justice."

Id. at 117.

Judge Mansfield concluded that the standard of "minimum contacts," as handed down in *International Shoe*, and as interpreted in *Hanson v. Denckla*,⁷¹ was not met by a corporation merely introducing goods into the flow of interstate commerce where such corporation was not otherwise engaged in activities within the forum state. In addition, the basis of the *Gray* decision, the "last event" theory of the *Restatement*,⁷² has been abandoned by the American Law Institute.⁷³ The reason given for this change is that the "last event" approach did not always produce just results because it was indiscriminately applied to all torts regardless of their nature. "No distinction was drawn between tortious injuries to persons and to tangible things on the one hand and to other kinds of tortious injuries on the other."⁷⁴

Furthermore, while the *Gray* approach may still be defended on the basis that it is a feasible means of providing a state with a method of protecting its legitimate interests insofar as the majority of torts are concerned, the *Gray* rationale breaks down completely in the area of multi-state defamation. One reason for this lies in the fact that publication is the "last event" necessary for liability in a defamation action. The importance of this concept of publication becomes readily apparent upon a brief examination of the theory behind publication and the single publication rule.

PUBLICATION AND THE SINGLE PUBLICATION RULE

The concept of defamation is rooted in the necessary element of the communication of defamatory matter to a third person,⁷⁵ who either reads or hears and understands that the words are defamatory in nature.⁷⁶ The logical extension of this concept was reached in *Duke of Brunswick v. Harmer*.⁷⁷ The sale of a back copy of a libel-containing newspaper was held to be a new

⁷¹ 357 U.S. 235 (1958).

⁷² RESTATEMENT OF CONFLICT OF LAWS §377 (1934).

⁷³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS (Proposed Official Draft, Part II, 1968).

⁷⁴ *Id.*, Introductory Note §145.

⁷⁵ Prosser, *Interstate Publication*, 51 MICH. L. REV. 959 (1953):

Publication means communication to a third person; and until the words have reached such a person there is no publication, and no tort. It is not enough that slander is spoken to the plaintiff himself, or in a public place; it must be overheard. It is not enough that a libel is written, unless it is read. More than that, publication goes beyond communication of the words and includes comprehension of their meaning; and if they reach only those who do not understand the language in which they are spoken, or are too young to comprehend their significance, there is still no tort. It follows logically that each communication to a different person may be a new and separate basis for a cause of action, and that each repetition of the same words to the same person may create a new liability.

Id. at 961.

⁷⁶ W. PROSSER, LAW OF TORTS 788 (3d ed. 1964).

⁷⁷ 117 Eng. Rep. 75 (Q.B. 1849).

publication which gave rise to a cause of action despite the fact that the initial publication had occurred nearly seventeen years before.

Except for the expanded area of privilege,⁷⁸ the tort of libel has changed little since the end of the seventeenth century.⁷⁹ Methods of communication, publication and distribution have changed considerably. Reproduction and dissemination of the printed and spoken word is vastly different from past methods of communication. Complex problems have arisen in defamation actions when courts have attempted to apply simple judicial concepts to complex situations which were never anticipated.⁸⁰ One could reasonably contend, therefore, that the once simple concept of publication can no longer be used as a determining factor in asserting jurisdiction. The courts recognized this long ago when they dealt with the problem of venue.

In 1908 the court in *Julian v. Kansas City Star Co.*⁸¹ made the distinction between printing and publication and held that regardless of the number of copies of the same issue which the defendant distributes, they constitute but one publication.⁸² This

⁷⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁷⁹ The history of the law of defamation is beyond the scope of this comment. Excellent discussions may be found in the following: Carr, *The English Law of Defamation*, 18 L. Q. REV. 255, 388 (1902); Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903), 4 COLUM. L. REV. 33 (1904); Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 L. Q. REV. 302, 397 (1924), 41 L. Q. REV. 13 (1925).

⁸⁰ The Supreme Court of Illinois expressly recognized the problems involved in applying judicial principles of yesterday to the society of today. In *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), the court stated:

Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted. Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in the light of the facts of economic life as it is lived today. Otherwise the need for adaptation may become so great that basic rights are sacrificed in the name of reform, and the principles themselves become impaired.

Id. at 443, 176 N.E.2d at 766.

⁸¹ 209 Mo. 35, 107 S.W. 496 (1908). *Accord*, *United States v. Smith*, 173 F. 227 (D. Ind. 1909), where the court applied the rule that the publication of a defamatory article in a newspaper constitutes only one publication and the place of publication was where the newspaper was published.

⁸² *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S.W. 496 (1908):

[O]ne issue of the newspaper, though it may have been of many thousand copies distributed in many different counties, gave but one cause of action, but to reach that conclusion we must say that there was but one publication. If we should say that the publication in Jackson county was a publication distinct from that in Platte county, then we would have to say that there were more than one publication and more than one cause of action. But there was but one publication — one utterance — and though some of the papers did not reach their destination as soon as others, yet they all emanated from the one act and all

concept of publication has been referred to as the single publication rule. In its original form the single publication rule limited the plaintiff to one cause of action per jurisdiction. A new cause of action was said to exist in every state in which the libel was circulated.⁸³ This pragmatic approach, however, was not accepted by all jurisdictions. Thirty years after *Julian* there were still judges who clung to the security of the orthodox rule of *Duke of Brunswick*.⁸⁴

Whether a redistribution of an original publication was any different for the purposes of the statute of limitations from a reprinting was also a point of disagreement.⁸⁵ Adding to the confusion was the problem which arose because of the use of

constituted but one libel, if libel at all. It is the publication of the libel, not the printing of it, that gives the right of action.

Id. at 71-72, 107 S.W. at 500.

⁸³ *O'Reilly v. Curtis Publishing Co.*, 31 F. Supp. 364 (D. Mass. 1940).

⁸⁴ In *Wolfson v. Syracuse Newspapers*, 254 App. Div. 211, 4 N.Y.S.2d 640 (1938), Judge Taylor stated in his dissent:

The custom of publishers of newspapers is wholly immaterial to the question of publication, and permission to read its files which contained the libels was an affirmative act by which the defamatory matter was communicated to the reader. That defendant, the composer of the defamatory matter, did not intend or expect that it would be read on the particular occasion is also immaterial in the question of publication. The law is well settled:

That a libel is published when it is read by anyone but the one defamed;

That, unless occasioned by the wrongful act of a third person, an accidental or inadvertent communication is a publication if the communication resulted from any act or default on the part of the writer; and

That each publication of the libel is a wrong which gives rise to a separate cause of action.

Id. at 214, 4 N.Y.S.2d at 643.

⁸⁵ In *Winrod v. McFadden Publications, Inc.*, 62 F. Supp. 249 (N.D. Ill. 1945), the court noted that:

Several courts, especially the New York State courts and the Federal District courts in the New York City District, have held that the later mailing out of copies of a magazine to replace copies lost or damaged in distribution or in response to requests for the purchase of single copies does not constitute a republication.

The decisions in . . . cases [like *Wolfson v. Syracuse Newspapers, Inc.*, 254 App. Div. 211, 4 N.Y.S.2d 640 (1938)] are based upon two premises, first, that the mailing out of single copies of the magazine after the original distribution is a part of the original publication, and second, that to hold otherwise would nullify the statute of limitations. But this court does not agree with the reasoning of those cases.

[T]his court cannot, on principle, distinguish between the act of a publisher in mailing out a copy of the original issue from the act of a publisher in sending out a magazine which is identical in composition but which has merely been run through the printing presses a second time. Assuredly, the mere act of reprinting and mailing the same magazine out to the public upon request has the same effect as if one of the unsold copies of the original issue were mailed out.

Id. at 251-52. The New York court in *Wolfson v. Syracuse Newspapers, Inc.*, 254 App. Div. 211, 4 N.Y.S.2d 640 (1938), was faced with nearly the same problem as the court in *Duke of Brunswick*; *supra* note 77. The *Wolfson* court rejected the strict English interpretation of publication because in their view "such a rule would nullify the clear purpose of the Statute of Limitations." *Id.* at 213, 4 N.Y.S.2d at 643.

the single publication rule in determining which was the final event of publication.⁸⁶ The placing of the libelous material with a common carrier,⁸⁷ the moment the edition first went on public sale,⁸⁸ "when the issue goes into circulation generally,"⁸⁹ were all held to be the moment — the single point in time — when publication occurred so as to toll the statute of limitations. The single publication rule obviously does not enjoy uniform interpretation throughout the country.⁹⁰ The Illinois view of the single publication rule, as explained by Judge Miner in *Insull v. New York World-Telegram Corp.*,⁹¹ is the "multiple communications-single publication" theory.⁹² The effect of this rule is to give a plaintiff a single cause of action for a widespread distribution of a single allegedly defamatory writing and to toll the statute of limitations upon the first publication of such a writing.

Shortly after *Insull* was decided Illinois adopted the *Uniform Single Publication Act*⁹³ which codified the existing rule.⁹⁴ However, the adoption of this act by Illinois did not eliminate the complex⁹⁵ conflict of laws problems which exist in the area of multi-state defamation.⁹⁶

⁸⁶ Note, *The Single Publication Rule in Libel: A Fiction Misapplied*, 62 HARV. L. REV. 1041 (1949).

⁸⁷ *Backus v. Look, Inc.*, 39 F. Supp. 662 (S.D.N.Y. 1941).

⁸⁸ *Means v. MacFadden Publications, Inc.*, 25 F. Supp. 993 (S.D.N.Y. 1939).

⁸⁹ *Hartmann v. Time, Inc.*, 64 F. Supp. 671, 679 (E.D. Pa. 1946).

⁹⁰ While jurisdictions might be in agreement where the statute of limitations is at issue, they might very well be in disagreement where venue is at issue. Compare *Hartmann v. American News Co.*, 69 F. Supp. 736 (W.D. Wis. 1947) with *Hartmann v. Time, Inc.*, 166 F.2d 127 (3d Cir. 1947), cert. denied, 334 U.S. 838 (1948).

⁹¹ 172 F. Supp. 615 (N.D. Ill. 1959).

⁹² *Id.* at 632.

⁹³ ILL. REV. STAT. ch. 126, §§11-12 (1967):

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication or exhibition or utterance . . . shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance.

⁹⁴ *Wheeler v. Dell Publishing Co.*, 300 F.2d 372 (7th Cir. 1962).

⁹⁵ Professor Prosser suggests the complexity of the problem:

The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it. In connection with inter-state publication, it offers peculiar and baffling difficulties.

Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

⁹⁶ The discussion of the conflict of laws and choice-of-laws problems here is only for the purpose of summarily presenting some of the difficulties and intricacies, and, to indicate how they affect the jurisdictional aspects with which this Comment is primarily concerned. The magnitude of the

CONFLICT OF LAWS

The conflict of laws⁹⁷ problem in multi-state defamation has spawned numerous theories as to what law should govern in a given case. A few of the more prominent theories which have been suggested are: (1) the law of the place of first publication where the "seal of privacy was first broken;"⁹⁸ (2) the law of each place of publication;⁹⁹ (3) the law of the place where the greatest harm occurs;¹⁰⁰ (4) the law of the state where the publisher is incorporated;¹⁰¹ (5) the law of the state where the publisher has his principal place of business;¹⁰² (6) the law of the state where the plaintiff is domiciled;¹⁰³ (7) the law of the state where the plaintiff has his principal place of business;¹⁰⁴ (8) the law of the state of defendant's act;¹⁰⁵ and, (9) the law of the forum.¹⁰⁶ The fact that other rules have also been advocated further emphasizes the disagreement and confusion which exist in this area. Not surprisingly it has been suggested that federal legislation be enacted in order to achieve some degree of uniformity.¹⁰⁷ There is a great deal of merit in this suggestion if for no other reason than to establish certainty and uniformity in an area where confusion and disharmony reign. But there are other more compelling reasons for exploring the possibilities and practicalities of a unifying federal procedural law for multi-state defamation actions.

complexities alluded to can be more fully appreciated by an examination of some of these sources: Note, *The Choice of Law in Multistate Defamation — A Functional Approach*, 77 HARV. L. REV. 1463 (1964); Note, *An Examination of Publication and Choice of Law Problems in Multi-State Libel*, 56 NW. U.L. REV. 823 (1962); Prosser, *Interstate Publication*, 51 MICH. L. REV. 959 (1953); Note, *Conflict of Laws Problems in Multi-State Libel*, 16 U. CHI. L. REV. 164 (1949); Note, *The Single Publication Doctrine and Conflicts of Law Problems in Multi-State Libel*, 43 ILL. L. REV. 556 (1948); Note, *Characterization of Multi-State Libel in Conflict of Laws*, 48 COLUM. L. REV. 932 (1948); Note, *The Choice of Law in Multistate Defamation and Invasion of Privacy: An Unsolved Problem*, 60 HARV. L. REV. 941 (1947); W. COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942).

⁹⁷ See Currie, *Married Women's Contracts: A Study in Conflicts-of-Laws Methods*, 25 U. CHI. L. REV. 227, 251-54 (1958).

⁹⁸ *Banks v. King Features, Inc.*, 30 F. Supp. 352 (S.D.N.Y. 1939).

⁹⁹ See RESTATEMENT OF CONFLICT OF LAWS, Explanatory Notes §377, rule 5 at 457 (1934). "Where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated." *Id.*

¹⁰⁰ *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2d Cir. 1949).

¹⁰¹ Note, *Multi-State Libel and Conflict of Laws*, 35 VA. L. REV. 627 (1949).

¹⁰² *United States v. Smith*, 173 F. 227 (D. Ind. 1909).

¹⁰³ *Estill v. Hearst Publishing Co.*, 186 F.2d 1017 (7th Cir. 1951).

¹⁰⁴ *Leflar, The Single Publication Rule*, 25 ROCKY MT. L. REV. 263, 270 (1953); 10 LA. L. REV. 339, 345 (1950).

¹⁰⁵ Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 974-75 (1953); Ehrenzweig, *The Place of Acting in Intentional Multi-State Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1 (1951).

¹⁰⁶ *Spanel v. Pegler*, 160 F.2d 619 (7th Cir. 1947).

¹⁰⁷ Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 995-99 (1953); Note, *The Choice of Law in Multi-State Defamation and Invasion of Privacy: An Unsolved Problem*, 60 HARV. L. REV. 941, 951 (1947).

The possibility that the constitutional right of free speech will be impaired by the uncertainty of the present state laws has long been recognized as a real and serious threat to a fundamental right in a free society.¹⁰⁸ These first amendment considerations have been frequently raised by the non-resident defendant contesting "long-arm" jurisdiction.¹⁰⁹ In *Novel v. Garrison*¹¹⁰ an Ohio resident sued a Louisiana domiciliary and a Delaware corporation which had its principal place of business in Illinois for an alleged libel which appeared in *Playboy* magazine.¹¹¹ This diversity action was brought in the United States District Court for the Northern District of Illinois.¹¹² In an opinion by Chief Judge Campbell the court denied defendant Garrison's motions to dismiss for lack of in personam jurisdiction and on the basis of improper venue. *Buckley v. New York Post Corp.*¹¹³ was considered "exceptionally persuasive"¹¹⁴ by the court to support its conclusion that the single publication rule of *Insull v. New York World-Telegram Corp.*¹¹⁵ would not govern the facts of *Novel*. The court indicated that it was employing the former single publication approach of New York¹¹⁶ and the Second Circuit¹¹⁷ even though the latter has more recently applied the *Insull* approach.¹¹⁸

¹⁰⁸ *International Shoe Co. v. Washington*, 326 U.S. 310, 322-25 (1945) (dissent); Note, *Long Arm Jurisdiction Over Publishers: To Chill A Mocking Word*, 67 COLUM. L. REV. 342 (1967); Note, *Can The "Long-Arm" Reach Out-of-State Publishers?*, 43 N.D. LAWYER 83, 93-97 (1967); Note, *Constitutional Limitations to Long Arm Jurisdiction in Newspaper Libel Cases*, 34 U. CHI. L. REV. 436 (1967).

¹⁰⁹ *New York Times v. Connor*, 365 F.2d 567 (5th Cir. 1966); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964). Cf. *Novel v. Garrison*, 294 F. Supp. 825 (N.D. Ill. 1969); *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967).

¹¹⁰ 294 F. Supp. 825 (N.D. Ill. 1969).

¹¹¹ *PLAYBOY*, Oct., 1969, at 59.

¹¹² The absence of many reported cases in the Illinois courts indicates that multi-state defamation cases are frequently heard in the federal courts. Thus, the Illinois law in this area has been developed almost exclusively by the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit. See, e.g., *Novel v. Garrison*, 294 F. Supp. 825 (N.D. Ill. 1969); *Wheeler v. Dell Publishing Co.*, 300 F.2d 372 (7th Cir. 1962); *Insull v. New York World-Telegram Corp.*, 172 F. Supp. 615 (N.D. Ill. 1959), *aff'd mem.*, 273 F.2d 166 (7th Cir. 1959).

¹¹³ 373 F.2d 175 (2d Cir. 1967).

¹¹⁴ *Novel v. Garrison*, 294 F. Supp. 825, 830-31 (N.D. Ill. 1969).

¹¹⁵ See text at note 90 *supra*.

¹¹⁶ *Gregoire v. G. P. Putnam's Sons*, 298 N.Y. 119, 81 N.E.2d 45 (1948).

¹¹⁷ *Backus v. Look, Inc.*, 39 F. Supp. 662 (S.D.N.Y. 1941).

¹¹⁸ *Zuck v. Interstate Publishing Co.*, 317 F.2d 727 (2d Cir. 1963). Compare *Zuck* with *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967). The court was interpreting New York law in the former and Connecticut law in the latter. The *Novel* court noted this distinction and said:

Assuming that the intent of the *Insull* holding was to limit the cause of action to the state of first sale, the decision has been severely criticized and recently expressly rejected by the Court of Appeals for

The crux of the problem involved the reconciliation of the "single publication" rule of *Insull* with the expansive "minimum contacts" concept of *Gray*. The *Buckley* court acknowledged that such reconciliation is dubious indeed.¹¹⁹ In *Novel* the court ostensibly rejected the "single publication" of *Insull* while at the same time accepted the "most substantial relationship" test of *Insull*.¹²⁰ The explanation for this lies in the fact that faced with the two irreconcilable rules the court ultimately relied upon the doctrine of *forum non conveniens*.¹²¹ The "vortex"¹²² of activity occurred in Illinois and, notwithstanding the rules which would dictate a different result, other factors having been considered, the most logical place for trial was held to be Illinois.¹²³ Consequently, the court concluded that publication occurred in Illinois

the Second Circuit. I find the reasoning of that court exceptionally persuasive

The Court of Appeals for the Second Circuit, in *Buckley*, appears to accept *Gray* and reject *Insull*, indicating that it must view the decisions in those cases as contradictory in policy if not literally.

Novel v. Garrison, 294 F. Supp. 825, 830-31 (N.D. Ill. 1969).

¹¹⁹ *Buckley v. New York Post Corp.*, 373 F.2d 175, 180 (2d Cir. 1967). The American Law Institute reached the same conclusion as indicated by the abandonment of the "last event" approach (upon which *Gray* was predicated) in cases of defamation, fraud, invasion of privacy, unfair competition and interference with a marital relationship. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introductory Note §145 (Proposed Official Draft, Part II, 1968). The *Restatement* now proposes that the "vested rights" doctrine of the old *Restatement* be replaced and that the ". . . law of the state which . . . has the most significant relationship to the occurrence and the parties" should govern as to a particular issue or case. *Id.* The factors to be considered in ascertaining the state with the most "significant relationship" are determined by the nature of the tort involved. An examination of these factors reveals that they are the same factors the courts have been struggling with for years; e.g., *Insull v. New York World-Telegram Corp.*, 172 F. Supp. 615, 633 (N.D. Ill. 1959), *aff'd mem.*, 273 F.2d 116 (7th Cir. 1959) ("state which bears the most substantial relationship to all communications to third parties in all states in which communication occurs"); *Palmisano v. News Syndicate Co.*, 130 F. Supp. 17, 20 (S.D.N.Y. 1955) (state of principal reputation); *Dale System v. General Teleradio, Inc.*, 105 F. Supp. 745, 749 (S.D.N.Y. 1952) ("grouping of dominant contacts"). See also Note, *The Choice of Law in Multistate Defamation — A Functional Approach*, 77 HARV. L. REV. 1463 (1964).

¹²⁰ *Novel v. Garrison*, 294 F. Supp. 825, 832 (N.D. Ill. 1969).

¹²¹ Such ultimate reliance upon the doctrine of *forum non conveniens* was predicted years ago by Professor Ehrenzweig:

It may well be that in the law of jurisdiction over individuals . . . a substantial "minimum contact" will ultimately be the touchstone of permissible jurisdiction. The question will then arise whether this formula, whose extreme flexibility is hardly preferable to the extreme rigidity of the classical rule of physical personal service, will not need to be supplemented by criteria developed within the civilian laws of competency, or, more likely, within the common law of *forum non conveniens*.

Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L. J. 289, 311-12 (1956).

¹²² *Novel v. Garrison*, 294 F. Supp. 825, 833 (N.D. Ill. 1969).

¹²³ *Id.* See generally Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73 (1969); Forde, *The Emergence of Metropolitan Centers as Litigation Centers for the "Big Case": New Concepts in Federal and State Court Jurisdiction*, 2 JOHN MAR. J. PRAC. & PROC. 1 (1968).

and the defendant was, therefore, subject to the court's jurisdiction.

CONCLUSION

Although both are standards for measuring the defendant's contact with the state, the "most substantial relationship" test differs from the "vortex" of activity test; the former is a qualitative test while the latter is quantitative. The minimum contacts required for submission jurisdiction under the Illinois "long-arm" concerns the quality and nature of the defendant's act; not the geographic center of all acts giving rise to operative facts. The minimum contacts alone should have been sufficient to decide the jurisdictional question in *Novel*. The court, however, was fettered with the basically incompatible theories of *Gray* and *Insull*. But by introducing the "vortex" concept as a basis for the decision a new and unnecessary factor has been added to an already confused area of the law. The applicability of the "long-arm" based upon a single tortious act in multi-state defamation actions is indeed questionable. New York specifically excludes such actions under the similar provision of their "long-arm."¹²⁴

Submission jurisdiction under the Illinois "long-arm" has been effective in reaching the non-resident defendant acting outside, but causing injury within, Illinois. The interest and dignity of the state has been upheld and the plaintiff, injured in Illinois, has been provided with a convenient forum. However, the effectiveness of the "long-arm" does have its limitations. A failure to recognize those limits will inevitably result in a strained interpretation of the meaning of "the commission of a tortious act within this state." Uniform legislation designed to provide a more practical jurisdictional foundation is an attractive alternative that could greatly simplify the current law.

Alan R. Taradash

¹²⁴ N.Y. CIV. PRAC. §302(a) (McKinney Supp. 1967).