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"STREAM-OF-COMMERCE" INADEQUATE TO FOUND JURISDICTION; ASAHI RESOLVED

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1 Of Counsel to Nixon Peabody LLP, San Francisco and, together with Richard D. Hoffman of that firm, attorneys for Asahi in the Supreme Court. This essay was started years ago as a running account of doctrine following Asahi in the lower courts, especially in the Ninth Circuit and California. A recent decision brings it logically to an end and by its national scope has made much of its lower-court jurisprudence irrelevant. Some of that material is preserved in Part V. I am grateful for a Note by Matthew R. Huppert, Commercial Purpose as Constitutional Purpose: Reevaluating Asahi through the Lens of International Patent Litigation, 111 Columbia L. Rev. No. 8 (2011) in alerting me to a number of corrections and other amendments needed in regard to circuit decisions related to stream-of-commerce doctrine.
I. Introduction

The growth of free trade results in a higher likelihood that lawyers will engage in products liability litigation with international twists or implications. We increasingly face questions whether the courts can exercise jurisdiction over the alien and out-of-state defendants whose products are involved, under present recognition of sovereign jurisdiction and of the restraints of the Due Process Clause upon it. The *Asahi* case\(^2\) 24 years ago was a major step into this issue and produced important guidance but left in doubt the frequent question whether placing in the stream of commerce a product that injures someone in America is sufficient alone to found jurisdiction here of a suit against the foreign manufacturer of it. Two recent decisions have resolved the uncertainty of *Asahi* with a negative answer to the question.\(^3\) At the same time two of the opinions in the first of them pointedly contemplate possible developments in the present standards in response to technological and social changes in the patterns of international commerce which, if they were realized, would no doubt further increase the incidence of the issue, and perhaps the complexity of the standard.

II. The Doctrinal Background and Controlling Precedents

The doctrinal background involves principally four or five cases, only one of which concerns product liability. The *International Shoe* case,\(^4\) in 1945, re-defined the constitutional jurisdiction of courts across State lines,\(^5\) and laid down the tests that 1) the defendant must have established sufficient meaningful contacts, ties or relations with the forum and; 2) the maintenance of the suit must not offend traditional notions of fair play and substantial justice. In explaining jurisdiction under this standard, the Court described continuous and systematic business operations amounting to presence in the State for the purpose of all claims, and to more limited activities in the State which could justify jurisdiction with respect to those acts.\(^6\) In 1952, the Court held that jurisdiction of a corporation in relation to claims not related to activity in the forum State (“general jurisdiction”) requires “continuous and systematic” activity there.\(^7\)


\(^5\) It was once understood that the power of State process did not extend across the State line, except in cases in rem and quasi in rem. See Pennoyer v. Neff, 95 U.S. 714 (1878).

\(^6\) 326 U.S. at 317-18.

\(^7\) Perkins v. Benguet Consolidated Mining Co., 341 U.S. 437 (1952) (affairs of foreign corporation overseen in Ohio in wartime).
In *Hanson v. Denckla*, in 1958, where jurisdiction depended on limited activity in the forum State, the Court stressed that judicial power depends on some activity 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.”

The sole product liability case in this group, *World-Wide Volkswagen*, in 1980, introduced “stream of commerce” to the scheme. A car sold by a dealer in New York was in an accident while passing through Oklahoma and the question was of jurisdiction there of the dealers based on no other contact. Although the Court held in denying jurisdiction that mere foreseeability that the car might cause injury in the forum State when driven there by the owner’s unilateral act was not enough to indicate purposeful availment, it also said that “the State may exercise personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State, where the suit arises from a defect in those products.” The force of this dictum was at the heart of the division in *Asahi*.

In 1984 the Supreme Court decided *Helicopteros*, a product liability claim against a foreign defendant, a case that is often cited and no doubt influential without adding much to the articulate jurisprudence of the subject. The distinctions between broad and limited jurisdiction that had been described variously in earlier cases acquired their own names in *Helicopteros*, which dubbed the former “general” and the latter “specific”. The defendant was a Colombian corporation, in which were American interests, operating helicopters under a contract negotiated in Texas, with helicopters manufactured and purchased there, and pilots and maintenance people trained there. The parties agreed that the helicopter crash involved did not arise from activities in Texas, and the Court therefore considered only general jurisdiction, but took occasion to adopt explicitly the distinction between general and specific jurisdictions. It held the contacts insufficient. It is difficult to distil any useful general rule from *Helicopteros*; it is a mark on the measuring stick of contacts, below which they are clearly insufficient and somewhere above which they will suffice.

III. Asahi and the Contacts Impasse

A. The Case

After *International Shoe* and before *Asahi*, the lower courts had tended to look at alien defendants much as they would look at defendants in other States. *Asahi* was a product liability case involving specific jurisdiction of a foreign defendant. Asahi made tire valves, some of which it sold to a Taiwanese company that made inner tubes, some of whose tubes were sold in

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10 *Id.* at 298.
the United States. A fatal accident in California was caused by the blowout of one of those tubes and the Taiwanese defendant in the resulting suit impleaded Asahi, claiming that the fault was in the valve and that the valve was one of those provided by Asahi. The court took note of an attorney’s affidavit that, of about 115 tire tubes in a certain store, 21 were Asahi valves, of which 12 were on tubes of the Taiwanese maker.\textsuperscript{12} The California Supreme Court had upheld jurisdiction of the Superior Court, citing as one of its reasons the interest of California “in ensuring that foreign manufacturers comply with the state’s safety standards” and expressing reluctance to immunize “an ultimately responsible party from liability under the laws of the state”\textsuperscript{13}

The Supreme Court had severed the blurred \textit{International Shoe} test into two distinct tests: (1) contacts; and (2) fairness and reasonableness; if the contacts met the test, then fairness and reasonableness were to be tested, taking account of several elements described in \textit{World-Wide Volkswagen}. Here the Court completed the severance, holding that the latter test could be applied when the former was unresolved. It also emphasized the distinction between domestic and alien defendants, stressing the caution with which jurisdiction should be exercised over the latter, and purposeful activity of the defendant in the jurisdiction was re-emphasized.

When the Court split over contacts it proceeded to consider reasonableness as the decisive factor and held jurisdiction unfair and unreasonable. Justice O’Connor’s plurality opinion stated the question “whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum state in the stream of commerce” would satisfy the two tests.\textsuperscript{14} After finding the contacts insufficient in a part of her opinion in which only three other justices concurred, she adapted the elements that \textit{World-Wide Volkswagen} had laid down to measure unfairness and unreasonableness to the international situation\textsuperscript{15} and found that exercise of jurisdiction would be unreasonable and unfair, and in this she had the concurrence of seven others.\textsuperscript{16} Eight justices divided equally\textsuperscript{17} over the test for contacts based on placing products in the stream of commerce. The difference in their views can be nicely framed by two statements from their opinions.

\begin{itemize}
\item \textsuperscript{12} 480 U.S. at 107.
\item \textsuperscript{13} 39 Cal.3d 35, 49, 702 P.2d 543, 550 (1985).
\item \textsuperscript{14} 480 U.S. at 105.
\item \textsuperscript{15} 480 U.S. at 114-15.
\item \textsuperscript{16} Only Justice Scalia did not expressly join in that part of her opinion, perhaps because, after agreeing that the contacts were inadequate, he considered that unreasonableness and unfairness required nothing more to be said.
\item \textsuperscript{17} With Justice O’Connor, the Chief Justice and Justices Powell and Scalia; with Justice Brennan, Justices White, Marshall and Blackmun.
\end{itemize}
B. The Contrary Opinions

In the plurality opinion, Justice O’Connor reached these general conclusions about foreseeability and expectation from what the Court had said in *World-Wide Volkswagen*:

The “substantial connection” [citations omitted] between the defendant and forum State necessary for a finding of minimum contacts must come about by an *action of the defendant purposefully directed toward the forum State*. [Citations omitted.] The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.  

Justice Brennan, who agreed that exercise of jurisdiction was unreasonable, wrote:

Under this [the plurality’s] view a plaintiff would be required to show “[a]dditional conduct” directed toward the forum before finding the exercise of jurisdiction over the defendant to be consistent with the Due Process Clause…I see no need for such a showing, however. The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State’s laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.  

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18 480 U.S. at 112.
19 480 U.S. at 116-17.
IV. Resolution

A. J. McIntyre

1. The Issue

In the J. McIntyre case, the defendant was an English manufacturer of machines sold in America through an independent distributor, one of which in New Jersey seriously injured its operator. After discovery his complaint was dismissed for lack of personal jurisdiction. The dismissal was reversed by the intermediate court in reliance on the stream-of-commerce doctrine and the Jersey court did not rely only on the stream-of-commerce doctrine but also activities in the United States including promotional advertising, patents, sales by consignment to the distributor and at least one sale in New Jersey. Those reasons were not found adequate in the Supreme Court under existing precedents, and a majority of six justices regarded the decision to depend on the validity of the stream-of-commerce doctrine alone.

2. The Plurality Opinion

The plurality opinion of Justice Kennedy addressed “[t]he imprecision arising from Asahi … result[ing] from its statement of the relation between jurisdiction and the ‘stream of commerce.’” Relying on the test of Hanson v. Denckla that jurisdiction depended on the defendant’s “purposefully avail[ing] itself of the privilege of conducting activities within the forum state,” it embraced Justice O’Connor’s opinion in Asahi, as she did and quoted her:

The “substantial connection” between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. 480 U.S. 112 (emphasis deleted; citations omitted).

Presumably in response to a view of the dissenters, the opinion stressed that the issue is one of exposure to sovereign power. “The principal inquiry in cases of this sort is whether the defendant’s activities manifest an intention to submit to the power of a sovereign.”

21 131 S. Ct. at 2787.
23 131 S. Ct. 2788-89.
The contention of Justice Brennan and three others, that it was sufficient for the defendant to have placed the product in the stream of commerce without any showing of additional conduct, was summarized by Justice Kennedy:

[J]urisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with the Due Process Clause, [for] [a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. 480 U.S. at 117. 24

The Plurality understandably did not undertake to review the procedures and findings of the New Jersey courts but to resolve the question presented by the conclusion that “New Jersey’s courts can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer ‘knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to these products being sold in any of the fifty states.’” 25 And thus the issue came down to the adequacy of placement in the stream of commerce.

3. The Concurring Opinion

The concurrence in the judgment only, by Justice Breyer joined by Justice Alito is occasioned not by any disagreement of substance with the Plurality. He looks, as the Plurality did, at the facts found by the New Jersey courts and agrees that they do not support jurisdiction and quotes with approval Justice O’Connor’s opinion that jurisdiction requires “‘something more’ than simply placing ‘a product into the stream of commerce,’ even if defendant is ‘awar[e]’ that the stream ‘may or will sweep the product into the forum State.’” 26 The opinion states the New Jersey court’s holding the same as does the Plurality in words quoted above and strongly disagrees with it, pointing to the sweeping breadth of its implications among as well as outside the United States. 27

The reason for the limited concurrence is only that the Plurality opinion contains statements broader than needed, that might prejudice consideration of issues arising from “many recent changes in commerce and communication” 28 not presented here.

Thus the decision on the stream of commerce here has a clear majority of six.

24 Id. at 2788.
25 Id. at 2785.
26 Id. at 2792.
27 Id. at 2793-94, Part II B.
28 Id. at 2791.
4. The Dissent

The Dissent by Justice Ginsberg joined by Justices Sotomayor and Kagen is surprising and even a little embarrassing; it does not seem to meet on terms with the majority as to what the case is about or otherwise display her usual scholarly care. Instead of viewing the issue as that raised by the New Jersey Supreme Court’s broad conclusion it delves into the New Jersey fact-finding seemingly at the level of the trial court, citing materials found in the discovery materials evidently not relied on in New Jersey.\textsuperscript{29} It makes an argument against the relevance of State sovereignty beginning with the assertion that “constitutional limits on a state court’s adjudicatory authority derive from considerations of due process, not state sovereignty,”\textsuperscript{30} ignoring that, unless an exercise of sovereignty is present or at least plausible, no occasion arises for the imposition of due process limits. One may be reminded of this preliminary consideration by the famous questions of Lord Ellenborough: “Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?”\textsuperscript{31}

Such a dissent would ordinarily provoke sharp comment in a majority opinion. It has perhaps been saved from criticism by sensitivity to the sexual division in the case. The opinion is not likely to influence the development of the law of this subject.

B. Goodyear\textsuperscript{32}

Goodyear, also a product liability case arising from a foreign product, was decided the same day as \textit{J. McIntyre}. The opinion was unanimous and was written by Justice Ginsberg, who was back in form. A tire made by a Turkish subsidiary of Goodyear making tires mainly for use in Europe failed on a French bus in France, causing the deaths of two boys from North Carolina, where that subsidiary and others were sued. Specific jurisdiction was out of the question, as the tire neither failed nor was made there, but general jurisdiction was sustained in the State courts and defended on a ground among others that other tires from the same subsidiary reached North Carolina in the stream of commerce. Justice Ginsberg’s review of the Court’s precedents on general jurisdiction showed that its requirement of “continuous and systematic” activity in the State and could not be based on the unquestioned jurisdiction of the parent company.

The remaining argument relied on a conflation of general and specific jurisdiction by grafting into the former the stream-of-commerce doctrine represented factually by the entry into the State of a few of the subsidiaries’ tires distributed by other Goodyear affiliates. The Court

\textsuperscript{29} Id. at 2795-97.
\textsuperscript{30} Id. at 2798.
\textsuperscript{31} Buchanan v. Rucker, 9 East 192, 194, 103 Eng. Rep. 546 (K.B. 1808).
held that what Justice Ginsberg referred to as “the stream-of-commerce metaphor” was limited in its relevance to specific jurisdiction. She said:

Flow of a manufacturer’s products into the forum, we have explained, may bolster an affiliation germane to specific jurisdiction. … But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant.

The description of stream-of-commerce as “bolster[ing]” appears to fall short of a belief that it is sufficient in itself. Thus she here leads the Court in recognizing limitations of the metaphor that might not have been inferred from her dissent in J. McIntyre.

V. The Interval after Asahi

The Court had, of course, noted the conflict of circuits between those cited and agreed with by the O’Connor plurality and those that applied an easier foreseeability test, cited in the Brennan opinion. After Asahi, as before, the circuits were divided between the two views there on the sufficiency of the stream-of-commerce test and several found it possible to decide cases on the weight of the facts without embracing one doctrine or the other. Their decisions have not all become irrelevant. The question remains in particular cases what practical action by the defendant satisfies the concept of “purposeful availment” and clues to this may be found in their decisions in the interval, so I retain here the record I had kept of them.

33 Id. at 2855.
34 Id. at 2855.
35 Asahi, 480 U.S. at 111-12: Humble v. Toyota Motor Co., Ltd., 727 F.2d 709 (8th Cir. 1984) (auto parts; foreseeability in delivering parts to Toyota, which sold cars in U.S.); Hutson v. Fehr Brothers, 584 F.2d 833 (8th Cir.) (Italian defendant bought metal chain, sold to U.S. defendant who applied own label and sold to retailer; no solicitation or purposeful availment), cert. denied, 439 U.S. 983 (1978); Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290 (3rd Cir. 1985).
I record in the margin circuits that have appeared since *World-Wide Volkswagen* to hold the view taken by the *Asahi* plurality, those that have appeared to find awareness sufficient following *Asahi*. When the higher standard is met the lower is also and in some instances where the higher is met a circuit has made that the basis of avoiding the issue of choice. Unfortunately, the cases cited here do not indicate reliably how much is required, those of rejection tending to tell us only what were not enough and those of acceptance not telling us what else might have sufficed.

VI. Conclusions

A few conclusions can be stated definitely: 1) The stream-of-commerce pertains only to a claim of specific jurisdiction; 2) It may bolster the claim but more is required and mere awareness or expectancy that the product will reach a State is not enough; 3) What more is required is activity by the defendant “purposefully directed toward the forum State,” “invoking the benefits and protections of its laws.” What activities qualify as such? We can see that knowingly supplying parts for automobiles or other goods distributed around the world, or comparably for ships likely to enter any ports, or distributing in the State goods not specially


41 See DeJames v. Magnificence Carriers, Inc., *supra* note 37 (denying jurisdiction), and compare Hedrick v. Daiko Shoji Co., *supra* note 36 (granting jurisdiction), disapproved in *Asahi* 480 U.S. at 111.
designed for it, and through a scheme not established or controlled by the defendant, do not qualify. Suggested qualifying activities, on the other hand, include “designing the product for the market in the forum State, advertising in the forum State, there, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.” In the nature of jurisprudence, the Court’s decisions are likely to tell us more specifically what cannot be done than what can be. So it is here, with the consequence that it remains for the lower courts principally to continue exploring the activities of foreign and out-of-state defendants that will subject them to a sovereign judicial power. In Justice Kennedy’s words: “The defendant’s conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.”

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42 See Asahi, 480 U.S. at 112-13.
43 Id. at 112.
44 J. McIntyre, 564 U.S. at ___, 131 S. Ct. at 2790.