

BUSINESS INTERESTS AND THE LONG ARM IN 2011

Paul D. Carrington*

I share the perception expressed by Professor Miller that the Supreme Court has been captured by the Chamber of Commerce.¹ That sense of direction was manifested in its unanimous and correct decision to constrain the state of North Carolina in the case of *Goodyear Dunlop Tires Operations, S.A. v. Brown*,² and in a perverse way, by the Court's incorrect decision to prevent the enforcement of New Jersey law in the case of *J. McIntyre Machinery, Ltd. v. Nicastro*.³

The purpose of special long-arm jurisdiction, as established in *International Shoe Co. v. Washington*,⁴ was to enable state governments to enforce their laws, especially those laws regulating or imposing costs on firms seeking to benefit from the marketplace located within the state.⁵ That constitutional purpose can be said to reflect the wisdom of Adam Smith, who, before he proclaimed the economic advantages of open markets,⁶ observed that moral constraints on human behavior depend on a measure of proximity or personal connection with the persons affected by our conduct.⁷ On that account, we understand that business firms have little sense of moral responsibility to the citizens of distant states or for the observance of the laws of distant states. And states seldom enact and enforce laws made to protect distant citizens of other states or nations at the expense of their local citizens or firms. Therefore, a state cannot rely on the law or the officers of a distant state to protect its citizens from risky or harmful decisions by business executives in that distant state.

The *Goodyear* case provides a stellar example of the appropriate limits of long-arm jurisdiction.⁸ North Carolina has no business regulating tire safety on French buses.⁹ France may depend primarily on instruments other than tort liability to encourage the use of safe tires on French buses and to address the

*Professor of Law, Duke University School of Law.

1. Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465 (2012); see also Erwin Chemerinsky, *Closing the Courthouse Doors*, 14 GREEN BAG 2D 375, 389 (2010) ("One way of interpreting these decisions, and others like them, is that the conservative justices are simply pro-business and pro-prosecutor and are denying access to the courts to consumers, employees, and criminal defendants. This certainly explains the rulings." (footnote omitted)).

2. 131 S. Ct. 2846 (2011).

3. 131 S. Ct. 2780 (2011).

4. 326 U.S. 310 (1945).

5. See *id.* at 319.

6. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Kathryn Sutherland ed., Oxford World's Classics 1998) (1776).

7. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 134–37 (D.D. Raphael & A.L. Macfie eds., Oxford University Press 1979) (1759).

8. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

9. See *id.*

costs of accidents.¹⁰ Ordinary French bus passengers suing in a French court have a more limited right to hire a lawyer on a contingent fee,¹¹ have no right to conduct discovery,¹² and if they lose, may have to pay the defendants' legal expenses.¹³ Further, North Carolina has no legislative jurisdiction to regulate the cost or safety of bus travel in France. If North Carolina is to exercise such legislative responsibility to protect North Carolinians on French buses by imposing North Carolina tort law and civil procedure, then the price of the bus ticket should be a bit higher for North Carolinians than for their fellow French passengers. Partly because that is obviously not feasible, the Court was absolutely right in its unanimous decision to protect a foreign firm from the application and enforcement of North Carolina law that was not substantively applicable to the event giving rise to the case.¹⁴

But New Jersey clearly needs, and relies upon, twentieth century special long-arm jurisdiction to regulate the safety of workplaces in that state.¹⁵ In the United States, we rely primarily on tort law to deter business practices that impose costs and risks on workers, consumers, and their environment.¹⁶ For that

10. See generally David Corbé-Chalon & Martin A. Rogoff, *Tort Reform à la Française: Jurisprudential and Policy Perspectives on Damages for Bodily Injury in France*, 13 COLUM. J. EUR. L. 231, 235 (2007) (noting the differences between the American and French systems for calculating personal injury damages).

11. Contingent fees are not unknown in France, but would generally not be used in a personal injury case. See Richard W. Hulbert, *Comment on French Civil Procedure*, 45 AM. J. COMP. L. 747, 748 (1997) ("A plaintiff cannot engage a French [attorney] on a purely contingent fee basis."). But see HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 259 tbl.8.1 (2004) ("Major Paris law firms are using contingency fees increasingly as well as being permitted to base fees in part on results achieved." (internal citations omitted)); Otto Sandrock, *The Choice Between Forum Selection, Mediation and Arbitration Clauses: European Perspectives*, 20 AM. REV. INT'L ARB. 7, 26 (2009) ("Contingency fees are also allowed within certain limits.").

12. Hulbert, *supra* note 11, at 751 ("[A]merican procedure offers wide investigative/discovery techniques in a civil case . . . These have no counterparts in the French practice."); see also PETER E. HERZOG WITH MARTHA WESER, *CIVIL PROCEDURE IN FRANCE* 233 (Hans Smit ed., 1967) ("Discovery of papers and tangible evidence in the hands of an adverse party is possible only in very limited cases."); cf. Avner Levin & Patricia Sanchez Abril, *Two Notions of Privacy Online*, 11 VAND. J. ENT. & TECH. L. 1001, 1015 (2009) (citing James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1156 (2004)) ("European laws are very protective of personal privacy in many areas, from consumer rights . . . to discovery in civil litigation.").

13. Sandrock, *supra* note 11, at 26 (citing NOUVEAU CODE DE PROCEDURE CIVILE [N.C.P.C.] art. 700 (Fr.)) ("Unlike the situation in Germany, there is no strict rule on the distribution of the fees and expenses for the winners and losers of court proceedings. Instead, Article 700 of the Code of Civil Procedure provides that the judge must rule on the amount which the loser will have to pay the winner, taking into account equity and the loser's economic situation. The judge can also decide that there will be no reimbursement at all of costs and expenses." (footnote omitted)).

14. See *Goodyear*, 131 S. Ct. at 2855.

15. See *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 589 (N.J. 2010), *rev'd sub nom.* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

16. See CARL BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW* 2 (2001). For insightful comment, see also

reason, we provide tort plaintiffs with contingent fee lawyers,¹⁷ discovery,¹⁸ the American Rule on the allocation of costs,¹⁹ and long-arm jurisdiction enabling states to impose liability on those creating risks of harm to citizens within their jurisdiction.²⁰ In contrast, France and England may rely heavily on administrative regulation of business practices.²¹ In either of those nations, the machine causing the harm in New Jersey might have been subject to closer inspection by officials, and the firms involved in their sale and use would almost certainly have paid higher taxes to fund the regulatory process and to provide health care for the injured worker.

The protection of workers in New Jersey is a concern, indeed a duty, of the New Jersey government. As the legendary Adam Smith observed, no one in a foreign country is deeply concerned about the consequences to a New Jersey worker of an avoidable accident.²² But local competitors of the British manufacturer, in New Jersey or other states, are burdened by that concern because of the applicability of New Jersey tort law. There are numerous Justices of the Supreme Court who have manifested displeasure with American tort law imposing risks and costs on those citizens engaged in commerce,²³ and in

John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 263–67 (2007) (discussing how the plaintiff's bar has affected the American tort system).

17. See SUNG-HO J. AHN, LITIGIOUSNESS, CONTRACT DESIGN AND THE ECONOMIC MOTIVES OF THE CONTINGENT FEE LAWYER 1 (1998) (citing JAMES S. KAKALIK & NICHOLAS M. PACE, RAND INST. FOR CIVIL JUSTICE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 37–38 (1986), available at <http://www.rand.org/pubs/reports/2006/R3391.pdf>); LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA 254 (2011); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.4.1, at 526–31 (1986); Patricia Munch Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL J. ECON. 213, 213 (1983); Witt, *supra* note 16, at 266 (“With the help of the contingent fee, the gladiator-for-hire might be converted to the service of the wronged individual.”); Herbert M. Kritzer, *Rhetoric and Reality . . . Uses and Abuses . . . Contingencies and Certainties: The American Contingent Fee in Operation* 55 (Inst. for Legal Studies, Disputes Processing Research Program, Working Paper No. 12-2, 1996).

18. See, e.g., FED. R. CIV. P. 26–37 & 45 (describing the procedures for discovery).

19. ALAN J. TOMKINS & THOMAS E. WILLGING, TAXATION OF ATTORNEYS’ FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS 49 (1986) (explaining the American Rule of parties paying only their own litigation costs); see also Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 39 (1984) (discussing whether the American Rule is “encouraging the ‘right’ types of litigation”).

20. See Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 40 (2010); see also Erin F. Norris, Note, *Why the Internet Isn’t Special: Restoring Predictability to Personal Jurisdiction*, 53 ARIZ. L. REV. 1013, 1014 (2011) (explaining that courts expanded the doctrine of long-arm jurisdiction in the mid-twentieth century “because technology [had] made it possible to cause injury in a state yet avoid being subject to jurisdiction in that state”).

21. See, e.g., L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 26–27 (5th ed. 1998) (noting the wide array of industries that French administrative law regulates).

22. See SMITH, *supra* note 7, at 135–37.

23. See, e.g., *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1080 (2011) (“The vaccine manufacturers fund from their sales an informal, efficient compensation program for vaccine injuries; in exchange they avoid costly tort litigation and the occasional disproportionate jury

McIntyre, they seized an opportunity to deny the power of New Jersey to enforce its tort law against an alleged offender.²⁴

But, alas, I am not so sure that the United States Chamber of Commerce approves of the result in *McIntyre*. Consider that decision from the vantage of an American firm manufacturing a competing product. A firm making the machine in Ohio would have to assess the costs associated with the risks to workers when it ships a three ton tool with a big blade into New Jersey. That firm perhaps pays, as a cost of its business, a liability insurance premium that is assessed to cover that risk. Perhaps the Chamber of Commerce would therefore be concerned that the Court's decision gives a competitive advantage to foreign firms seeking to sell their machines in the United States.

Does the Constitution of the United States tell the Supreme Court to give such an advantage to a foreign competitor? I cannot read its text that way. To be sure, if the three ton machine just happened in some unlikely way to find its way from England to New Jersey, its innocent English manufacturer should not be burdened with the unfortunate consequences occurring in New Jersey. But, the proven facts suggest otherwise. True, the plaintiff did not conduct extensive and expensive discovery to expose all the details of *McIntyre*'s efforts and expectations regarding the sale of its machine in New Jersey.²⁵ It is remotely possible that *McIntyre* had no intention to profit from the New Jersey market for its machine. And perhaps it was blissfully unaware that it was exposing a New Jersey worker to serious risk. But, somehow, those possibilities seem very unlikely. The burden should be placed on a manufacturer of a large, dangerous product that finds its way into New Jersey and causes harm, to present evidence demonstrating that it, with reason, did not anticipate any risk befalling a citizen of that state as a consequence of its business practices. There is an ancient Latin phrase to be invoked: *res ipsa loquitur*.²⁶ The facts speak for themselves.

To invoke the absence of personal jurisdiction over a foreign "citizen" such as the *McIntyre* firm,²⁷ the duty should have been imposed on the prospering defendant to show that its gain was not associated with any foreseeable risk of harm to a New Jersey worker. In failing to impose such a duty, the Supreme Court of the United States negligently denied to the sovereign state of New Jersey the right and responsibility to enforce its laws even-handedly against

verdict." (footnotes omitted)); *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 663 (2006) (noting that workers' compensation statutes "remove the risk of large judgments and heavy costs generated by tort litigation" for employers); *Norfolk & W. Ry. Co. v. Freeman Ayers*, 538 U.S. 135, 186–87 (2003) (Breyer, J., concurring) (criticizing current tort law compensation methods and noting that several Supreme Court Justices have called upon Congress to respond to the problem).

24. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) (plurality opinion).

25. See *id.* at 2790 (explaining that *Nicastro* failed to prove purposeful availment through discovery).

26. See *Byrne v. Boadle*, 159 Eng. Rep. 299, 300 (Ex. 1863) (finding that "[t]here are certain cases of which it may be said *res ipsa loquitur*").

27. The *McIntyre* firm is an English corporation. *McIntyre*, 131 S. Ct. at 2786.

foreign firms as well as against their domestic competitors.²⁸ Surely, the Constitution does not forbid the states to regulate foreign corporations or citizens in the same manner and by the same method of private law enforcement that it employs to regulate domestic firms.

The *McIntyre* case was thus wrongly decided. And the decision seems to this reader to reflect an irresistible impulse of numerous Justices to protect Business from tort claims. Even foreign Business competing in our domestic markets!

28. *See id.* at 2791.