

# NOTES

## SUBSIDIARY CONDUCT AS A BASIS FOR LONG-ARM JURISDICTION OVER A PARENT CORPORATION IN VERMONT

### INTRODUCTION

Vermont's "long-arm" statute<sup>1</sup> permits service of process to be made upon the Secretary of State of Vermont in actions involving a foreign<sup>2</sup> corporation which is unavailable for personal service within the state. Its application is limited to cases in which the foreign defendant has engaged in such conduct in Vermont as will support a personal judgment against it.<sup>3</sup> The statute thus poses a test for the validity of such service which is consistent with the "minimum contacts" test enunciated in *International Shoe Co. v. Washington*.<sup>4</sup> Conduct sufficient to satisfy this test can be a single act if it is of a tortious nature.<sup>5</sup>

Developments in the law of Vermont which have interpreted this statute have dealt primarily with the nature and quality of the

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1. VT. STAT. ANN. tit. 12, § 855 (1973) provides:

If the contact with the state or the activity in the state of a foreign corporation, or the contact or activity imputable to it, is sufficient to support a Vermont personal judgment against it the contact or activity shall be deemed to be doing business in Vermont by that foreign corporation and shall be equivalent to the appointment by it of the secretary of the state of Vermont and his successors to be its true and lawful attorney upon whom may be served all lawful process in any action or proceedings against it arising or growing out of that contact or activity, and also shall be deemed to be its agreement that any process against it which is so served upon the secretary of state shall be of the same legal force and effect as if served on the foreign corporation at its principal place of business in the state or country where it is incorporated according to the law of that state or country.

2. As used herein, "foreign" will refer to corporations which are incorporated and domiciled anywhere without the forum state. The term "alien" will be used in reference to corporations which are incorporated in a foreign country.

3. VT. STAT. ANN. tit. 12, § 855 (1973).

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

5. See *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951). Since the precursor to the present "long-arm" statute included entry into or partial performance of a contract along with commission of a tort as the basis for jurisdictional amenability, such conduct would presumably be sufficient as well.

individual conduct of a defendant necessary to satisfy this test.<sup>6</sup> Until recently, however, there has been no interpretation of what would constitute "contact or activity imputable to" a defendant under this statute. The meaning of this language is of particular importance where the defendant is a parent corporation, having no personal contacts with Vermont, whose business there is conducted by a subsidiary corporation.

In *Davis v. Saab-Scania of America, Inc.*,<sup>8</sup> the Vermont Supreme Court made reference to this "imputable to" phrase in dismissing for lack of jurisdiction an action against the alien<sup>9</sup> parent corporation of a subsidiary found to have substantial connection with Vermont. The ground for dismissal was that there was no showing of any conduct by or "imputable" to the parent in the forum.<sup>10</sup>

This was the first time a Vermont court had been called upon to exercise jurisdiction over an alien corporation having no personal contacts with Vermont solely on the ground that its subsidiary's contacts were attributable to it. Nevertheless, the *Davis* court failed to expressly construe the meaning of "imputable" as used in the statute; nor did it discuss what kinds of activity by a subsidiary would be "imputable" to a parent corporation for the purpose of determining jurisdiction.

The confusion resulting from this failure is evident in the positions taken by parties in a pending case, *Pasquale v. Volkswagenwerk A.G.*<sup>11</sup> As in *Davis*, the suit is against the alien manufacturer of automobiles who conducts business in the United States through a wholly-owned subsidiary. Defendant asserts that *Davis* forecloses the ascription of a subsidiary's conduct to the parent for purposes of determining jurisdiction, whereas plaintiff argues that *Davis* is distinguishable on the facts.<sup>12</sup>

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6. See, e.g., *Anderson v. Abex Corp.*, 418 F. Supp. 5 (D. Vt. 1975); *Miller v. Cousins Properties, Inc.*, 378 F. Supp. 711 (D. Vt. 1974).

7. VT. STAT. ANN. tit. 12, § 855 (1973) (emphasis added). See note 1 *supra* for full text of statute.

8. 133 Vt. 317, 339 A.2d 456 (1975).

9. See note 2 *supra*.

10. 133 Vt. at 320, 339 A.2d at 458.

11. No. G125-75-WrC (Vt. Super. Ct., filed Oct. 17, 1977), appeal docketed, No. 293-77 (Vt. Sup. Ct. Oct. 20, 1977).

12. Defendants' Memorandum at 9, Plaintiff's Answer To Motion For Leave To Appeal

A final resolution of the meaning of "imputable to" in the statute will have far reaching effects upon the conduct of business in Vermont by foreign and alien corporations and upon the rights of Vermont residents in actions growing out of that conduct. In deciding whether and how to conduct business in Vermont, a relevant concern of a parent corporation will be the extent to which certain activities will render it amenable to suit. And while resident consumers are not likely to be guided in their purchases by similar considerations, their rights are nevertheless affected to the extent that a foreign manufacturer's amenability to local suit is limited.

This note will examine the *Davis* case for the light it sheds on interpreting this "imputable to" element of Vermont's "long-arm" statute; explore the state of the law prior to *Davis* for the trends and concerns which have been found important in Vermont insofar as they will aid that interpretation; survey the practice of other jurisdictions in this area of the law; and determine the interpretation of "imputable to" which will be most consistent with prior practice and the peculiar needs of Vermont.

### I. THE *Davis* CASE

*Davis* was an action for breach of express and implied warranties, and negligent manufacture, brought against two defendants: the Connecticut distributor and the Swedish manufacturer of Saab automobiles. Plaintiff acquired his claim by assignment from the purchasers of a Saab who had previously brought suit in Vermont against the Connecticut distributor alone.<sup>13</sup> Because of the substantial identity of parties and complaint, the *Davis* court concluded that res judicata barred any further action in Vermont against the Connecticut defendant.<sup>14</sup>

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at 1, *Pasquale v. Volkswagenwerk A.G.*, No. C125-75-WrC (Vt. Super. Ct., filed Oct. 17, 1977), appeal docketed, No. 293-77 (Vt. Sup. Ct. Oct. 20, 1977) (parties' memoranda of law submitted on motion for leave to appeal the finding of jurisdiction over the German manufacturer). Unlike *Davis*, *Pasquale* is a wrongful death action which arose from the sale in Vermont of an automobile to a Vermont resident. See note 13 *infra*.

13. *Wheale v. Saab Motors U.S.A., Inc.*, No. C20-72 WnC (Vt. Super. Ct., filed Dec. 12, 1972). The plaintiffs in the original action, the Wheales, were Virginia residents who had purchased their Saab in Connecticut from a Connecticut dealer.

14. "Plaintiff has privy status as assignee of the former parties plaintiff; the defendant Connecticut corporation has it as successor to the former defendant. Res adjudicata bars

Because it was raised for the first time in *Davis*, the action against the second defendant, the Swedish manufacturer, could not be disposed of on the same basis. In disposing of this part of the complaint, the *Davis* court faced the issue of whether the conduct of a subsidiary could be "imputable" to a parent corporation for the purposes of determining jurisdiction, but failed to make a clear statement about it. Nevertheless, *Davis* is the first and only case which can arguably offer an interpretation of the "imputable to" language of the "long-arm" statute. Therefore it must be understood insofar as it answers the question of whether the activities of a subsidiary will render its parent amenable to suit in Vermont.

The allegations of the *Davis* complaint respecting the Swedish manufacturer were that the defendant was the alien parent corporation of the Connecticut distributor, that the two corporations had essentially interlocking directorates, and that the subsidiary distributor corporation was doing business in Vermont.<sup>15</sup> Since defendant's motion to dismiss constitutes an admission of all facts well pleaded for the purposes of review,<sup>16</sup> the *Davis* court's decision must be read as though the allegations of the complaint were true. Its statement that the findings of the lower court were silent as to any activity by or imputable to the Swedish manufacturer,<sup>17</sup> then, can be read to mean that the activities of a subsidiary<sup>18</sup> will not be "imputed" to establish a jurisdictional connection between the parent corporation and Vermont.

The argument can be made, however, that such a reading of *Davis* does not necessarily follow. The case could have been disposed of on the grounds that, since the car was bought outside

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prosecution of the action, in the Vermont forum, against the Connecticut corporation." 133 Vt. at 320, 339 A.2d at 458.

15. Printed Case at 1, *Davis v. Saab-Scania of America, Inc.*, No. 330-73 WnC (Vt. Super. Ct., filed Dec. 17, 1973).

16. *Rothberg v. Olenik*, 128 Vt. 295, 296, 262 A.2d 461, 462 (1970).

17. "They argue, and we concur, that the findings below are completely silent with respect to any activities or conduct within Vermont by the Swedish corporation, or any imputable to it." *Davis v. Saab-Scania of America, Inc.*, 133 Vt. at 320, 339 A.2d at 458.

18. See *Davis v. Saab-Scania of America, Inc.*, No. C330-73 WnC (Vt. Super. Ct., filed Dec. 17, 1973). The Superior Court found substantial connection between the subsidiary distributor and Vermont. This included active participation in the Vermont market and the intentional conduct of business there, and was found sufficient to support jurisdiction over that defendant.

Vermont, the statutory requirement that the cause of action arise from the conduct asserted as the basis of jurisdiction<sup>19</sup> was not satisfied. Support for such a holding can be found in *Anderson v. Abex Corp.*,<sup>20</sup> where the Vermont Federal District Court dismissed the complaint for lack of jurisdiction because the cause of action did not arise from defendant's activity in Vermont.<sup>21</sup> The *Anderson* court never reached the question of whether that activity was such as would constitute "doing business" within the meaning of the "long-arm" statute.<sup>22</sup> Arguably, then, because the complaint arose from a sale without the state, the *Davis* court could have proceeded as the *Anderson* court did; its reference to the "imputable to" language would then be unnecessary to its decision and therefore dictum. Nevertheless, the court's analysis in *Davis* indicates that whether the cause of action arises from the defendant's contacts with the state is an additional rather than a primary consideration.<sup>23</sup> Furthermore, *Davis* provides the only current judicial gloss on the meaning of "imputable" as used in the statute and, as stated above, it has been taken as holding by at least one party in pending litigation.<sup>24</sup>

Thus, if not conclusive, *Davis* is at least persuasive of the proposition that conduct of a subsidiary will not be "imputable" to a parent corporation so as to render it amenable to suit in Vermont.

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19. [Doing business in Vermont] shall be equivalent to the appointment . . . of the secretary of the state of Vermont . . . to be [the corporation's] true and lawful attorney upon whom may be served all lawful process in any action or proceedings against it arising or growing out of that contact or activity. . . .

Vt. STAT. ANN. tit. 12, § 855 (1973) (emphasis added). For the full text of the statute, see note 1 *supra*.

20. 418 F. Supp. 5 (D. Vt. 1975).

21. *Id.* at 7-8.

22. *Id.* at 8.

23. "And, as they also point out, the provisions of the statute are not met as to either defendant, because this is not 'any action or proceedings against it arising or growing out of that contact or activity.'" *Davis v. Saab-Scania of America, Inc.*, 133 Vt. at 320, 339 A.2d at 458. See also text accompanying notes 32-35 *infra*.

24. "[D]efendant submits that the plaintiff must show some participation or contact by the defendant in Vermont in addition to its parent relationship with Volkswagen of America." Defendants' Memorandum at 9, *Pasquale v. Volkswagenwerk A.G.*, No. C125-75-WrC (Vt. Super. Ct., filed Oct. 17, 1977), appeal docketed, No. 293-77 (Vt. Sup. Ct. Oct. 20, 1977) (defendants' memorandum of law submitted on motion for leave to appeal the finding of jurisdiction over the German manufacturer).

## II. PRIOR PRACTICE IN VERMONT

Before *Davis*, decisions on the question of "long-arm" jurisdiction in Vermont had evinced a flexible approach to determining when the individual conduct of a defendant had met the "minimal contacts" test. The focus of this approach, as advanced in *O'Brien v. Comstock Foods, Inc.*,<sup>25</sup> was on the nature of the defendant's activities in Vermont—intentional, affirmative acts in pursuit of corporate goals were seen to be sufficient.<sup>26</sup> This analysis embraced the reasoning of an earlier conclusion in *Smyth v. Twin State Improvement Corp.*<sup>27</sup> that a single contact could satisfy the test if it were a tortious act.<sup>28</sup>

Since *O'Brien*, and in accord with it, the Vermont courts have concluded that to satisfy the requirements of "minimal contacts" the activities of a defendant must be such that he knew or should have known they would have potential consequences in Vermont. The application of this principle is well demonstrated in the Vermont Federal District Court's holding in *Miller v. Cousins Properties, Inc.*<sup>29</sup> In *Miller*, jurisdiction was sustained over the owner of a private plane whose scheduled flight to Vermont crashed, and the plane's manufacturer who was authorized to do business in all the United States, on the grounds that they must be held to have known of potential consequences of their conduct in Vermont.<sup>30</sup> In the same case, jurisdiction was denied over a third defendant, the company which maintained the plane in Georgia, because there was no proof they knew the plane was to fly to Vermont.<sup>31</sup>

In addition to this test for the sufficiency of a defendant's "minimal contacts" with Vermont, it is also necessary in Vermont

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25. 123 Vt. 461, 465, 194 A.2d 568, 571 (1963). The court stated that the mere placing of an item in the stream of commerce in New York was not a sufficient act to sustain jurisdiction when it caused injury in Vermont.

26. *Id.* at 464, 194 A.2d at 570-71.

27. 116 Vt. 569, 80 A.2d 664 (1951). The court sustained jurisdiction over a foreign corporation which had voluntarily entered the Vermont market to conduct business and committed a tort in the process.

28. *Id.* at 574-75, 80 A.2d at 667-68.

29. 378 F. Supp. 711 (D. Vt. 1974). See also *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124 (2d Cir. 1963).

30. 378 F. Supp. at 716.

31. *Id.* at 717.

that the cause of action arise from such contact. This is a statutory requirement<sup>32</sup> which has support in several decisions<sup>33</sup> and which can be a basis for denying jurisdiction independent of the sufficiency of a defendant's contacts.<sup>34</sup> A recent case, however, indicates this inquiry should not precede application of the "minimal contacts" test.<sup>35</sup>

Two consistent elements arise from a general survey of these cases. One is a responsiveness of the Vermont courts to the variety of circumstances which call for the exercise of "long-arm" jurisdiction. This can be seen in the Vermont Supreme Court's early willingness to assert jurisdiction on the basis of a foreign corporation's single act in Vermont,<sup>36</sup> and in the Vermont Federal District Court's notice in *Deveny v. Rheem Mfg. Co.*<sup>37</sup> that the movement of companies toward a corporate, multi-state form of doing business required the change from a territorial concept of jurisdiction to the more flexible concept announced in *International Shoe*.<sup>38</sup>

The other element consistent in these cases is the application of a test of foreseeability, rather than mechanical rules, as the measure of a defendant's jurisdictional amenability. This element indicates a concern with being able to protect Vermont residents in a variety of situations which may perhaps have been unanticipated.<sup>39</sup> The application of foreseeability was most recently illustrated in the

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32. VT. STAT. ANN. tit. 12, § 855 (1973). See note 19 *supra*.

33. See, e.g., *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124, 127 (2d Cir. 1963); *Anderson v. Abex Corp.*, 418 F. Supp. 5, 8 (D. Vt. 1975); *Huey v. Bates*, \_\_\_ Vt. \_\_\_, 375 A.2d 987, 990 (1977); *Davis v. Saab-Scania of America, Inc.*, 133 Vt. 317, 320-21, 339 A.2d 456, 458-59 (1975).

34. *Anderson v. Abex Corp.*, 418 F. Supp. 5, 8 (D. Vt. 1975). See text accompanying notes 20-22 *supra*.

35. "As a threshold consideration, it is necessary that a determination be made as to whether the defendant has engaged in 'contacts or activities' in Vermont as contemplated by 12 V.S.A. § 855." *Huey v. Bates*, \_\_\_ Vt. \_\_\_, \_\_\_, 375 A.2d 987, 989 (1977). This would seem to undercut the argument that the *Davis* interpretation of "imputable" is dictum under the *Anderson* method of analysis. See text accompanying notes 20-22 *supra*.

36. *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951).

37. 319 F.2d 124 (2d Cir. 1963).

38. *Id.* at 126-27.

39. E.g., in *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 575-76, 80 A.2d 664, 668 (1951), the court expressed concern that a holding that a single tort will not confer jurisdiction over the tortfeasor would permit the commission of such acts with impunity in Vermont.

Vermont Supreme Court's sustaining of jurisdiction in *Huey v. Bates*,<sup>40</sup> where the foreign manufacturer of an alleged defective crawler-dozer was deemed to have known that the article would be sold to a Vermont resident when it was shipped to an independent dealer in that state.

The position ultimately taken by the Vermont courts on the issue of the "imputability" of a subsidiary's conduct to its parent corporation should be consistent with the interpretation of the remainder of the statute, disclosed by the elements of prior practice discussed above and will be taken up later.

### III. THE APPROACH TAKEN BY OTHER JURISDICTIONS

The United States Supreme Court's decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*<sup>41</sup> has been cited as establishing the rule that mere ownership of a subsidiary doing business in the forum state will not alone be enough to subject the parent to jurisdiction as long as formal corporate separateness between the parent and subsidiary is maintained.<sup>42</sup> A *per se* rule of this sort is attractive for its ease of application, thus its long life in the courts throughout the country is not surprising.<sup>43</sup>

Nevertheless, because it is dated—it preceded *International Shoe*—and was given life during the time when a corporation had somehow to be "present" in the forum to be subject to jurisdiction, the *Cannon* rule is of doubtful modern value.<sup>44</sup> Its currency is further undercut by *International Shoe's* rejection of mechanical approaches to jurisdiction in favor of "fair play and substantial jus-

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40. \_\_\_ Vt. \_\_\_, 375 A.2d 987 (1977).

41. 267 U.S. 333 (1925).

42. See, e.g., *Velandra v. Regie Nationale Des Usines Renault*, 336 F.2d 292, 296 (6th Cir. 1964).

43. See *Vaughn Motors, Inc. v. Societe Anonyme Des Automobile Peugeot*, 30 Misc. 2d 1047, 220 N.Y.S.2d 292 (Sup. Ct. 1961) (upholding the right of a parent corporation to limit amenability to jurisdiction as long as formal corporate separateness is maintained); see also *McPherson v. Penn Central Trans. Co.*, 390 F. Supp. 943 (D. Conn. 1975); *John O. Butler Co. v. Standard Oil Co. (Ohio)*, 365 F. Supp. 501 (N.D. Ill. 1973); *Frito-Lay, Inc. v. Procter & Gamble Co.*, 364 F. Supp. 243 (N.D. Tex. 1973).

44. See Cardozo, *A New Footnote in Erie v. Tompkins: "Cannon is Overruled,"* 36 N.C. L. REV. 181 (1958); Comment, *Jurisdiction Over Parent Corporations*, 51 CAL. L. REV. 574 (1963).

tice."<sup>45</sup> Thus, even states which do follow the rule have used a variety of theories to demonstrate the insubstantiality of corporate separateness in order to avoid its application.<sup>46</sup> Using this approach, a court attempts to discover whether the subsidiary has acted as the agent or alter ego of the parent corporation. In this way, jurisdiction has been sustained where the two corporations have advertised as a single unit<sup>47</sup> or where the parent has contractually assumed the risk of loss by the subsidiary.<sup>48</sup>

While this approach may be useful in avoiding the *Cannon* rule, it places the focus on the relationship between the parent and the subsidiary rather than on the relationship between the parent and the injured party. Whether the parent will be subject to the court's jurisdiction becomes a function of how its attorneys have constructed its corporate organization. Thus a foreign corporation doing business in the forum through a licensing or franchise arrangement with others might be seen to have sufficient contact to sustain jurisdiction, whereas one accomplishing the same objective through a subsidiary corporation might escape jurisdiction.

This kind of analysis also ignores the practical realities of the relationship between the parent corporation and the injury suffered. The parent corporation has voluntarily conducted business in the forum in either case, enjoying the benefits and protections of its laws. When such conduct is the cause of injury, the *form* of its accomplishment should not be significant. Furthermore, this approach seems to equate limited amenability to jurisdiction with limited shareholders' liability in the corporate form of organization. To obtain jurisdiction over the parent, then, it becomes necessary to pierce the subsidiary's corporate veil,<sup>49</sup> an exercise which fails to

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45. 326 U.S. 310, 316 (1945).

46. See, e.g., *Curtis Publishing Co. v. Cassel*, 302 F.2d 132 (10th Cir. 1962) (subsidiary held out as agent of parent); *Luria Steel and Trading Corp. v. Ogdan Corp.*, 327 F. Supp. 1345 (E.D. Pa. 1971) (excessive control of subsidiary by parent); *Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd.*, 210 F. Supp. 930 (D. Utah 1962), *aff'd*, 325 F.2d 713 (10th Cir. 1963), *cert. denied*, 377 U.S. 931 (1964) (fictitious corporate separation).

47. *State ex rel. Grinnell Co. v. MacPherson*, 62 N.M. 308, 309 P.2d 981, *cert. denied*, 355 U.S. 825 (1957).

48. *Curtis Publishing Co. v. Cassell*, 302 F.2d 132 (10th Cir. 1962).

49. See Comment, *Alternative Methods of Piercing the Corporate Veil in Contract and Tort Cases*, 48 B.U.L. REV. 123 (1968).

account for the fairness and substantial justice called for by *International Shoe*.

Another approach is to ignore the corporate formalities and look to economic reality. This was the test put forth by the United States Supreme Court in *United States v. Scophony Corp. of America*<sup>50</sup> and in cases which view the parent and subsidiary as a "single economic entity."<sup>51</sup> In this way, a California court was able to follow the "chain of sales" from an automobile's manufacturer in France to its injured consumer in that state, and sustained jurisdiction over the defendant manufacturer in spite of its corporate remoteness from the injury.<sup>52</sup>

A third method of analysis is somewhat a combination of these two: the existence of corporate identities is acknowledged, but ownership of a subsidiary doing business in the forum is seen as *one* contact of the parent rather than as a means of insulating the parent from suit. In *Velandra v. Regie Nationale Des Usines Renault*,<sup>53</sup> the Sixth Circuit looked at the alien parent manufacturer's connection with the Ohio forum as established by its subsidiary distributor. While the distributor itself would have had sufficient contacts with the forum, the overall percentage of sales realized by the parent through this scheme did not amount to enough to confer jurisdiction over the parent.

Perhaps the most flexible approach, and the one most consistent with the spirit of *International Shoe*, is that which focuses on the foreseeability that a parent's product or conduct will have consequences in the forum or will enjoy the benefits and protections of the forum's laws. Such an analysis was applied in *Dotterweich v. Yamaha Int'l Corp.*<sup>54</sup> In that case, the alien manufacturer of a snowmobile did business through a wholly *independent* distributor in California. When one of its products caused injury in Minnesota,

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50. 333 U.S. 795 (1948).

51. See, e.g., *Taca Int'l Airlines, S.A. v. Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965).

52. *Regie Nationale Des Usines Renault v. Superior Court*, 208 Cal. App. 2d 702, 25 Cal. Rptr. 530 (1962) (per curiam).

53. 336 F.2d 292, 298 (6th Cir. 1964). See also *Perry v. American Motors Corp.*, 353 A.2d 589 (Del. Super. Ct. 1976) (ownership of subsidiary considered as one of several contacts between parent and forum which were together sufficient to establish jurisdiction).

54. 416 F. Supp. 542 (D. Minn. 1976).

the court there sustained jurisdiction over the manufacturer on the grounds that the manufacturer could have foreseen that the distributor would send its product to Minnesota where it would enjoy the benefits and protections of Minnesota law.<sup>55</sup> In the same case, jurisdiction was denied over the alien manufacturer of a component part of the injuring article because of a lack of such foreseeability.<sup>56</sup>

To a certain extent, all of these approaches overlap, and it would be naive to suggest that they represent distinct methods of analysis. For this reason, any further categorization would not be very useful. What is important for the purposes of this note is the focus of these various approaches and the considerations found important in each.

In the final section following, Vermont's peculiar needs will be considered in light of the approaches taken by other jurisdictions and the current state of the law in Vermont; the approach most consistent with prior Vermont practice and protection of the interests of both residents and foreign corporations will be evaluated.

#### IV. CONSIDERATIONS FOR FUTURE VERMONT PRACTICE

The primary question is whether *Davis* should be followed, overruled or ignored in the future, to the extent that it interprets "imputable." Arguably the *Davis* interpretation of "imputable" can be avoided by insisting it is mere dictum.<sup>57</sup> If dictum, it follows that there is no need to overrule it or strictly follow it; until there is a definitive statement about the meaning of "imputable," *Davis* can be persuasive or not depending on the circumstances of a given case. One very close on the facts to *Davis* could call for the *Davis* interpre-

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55. *Id.* at 549.

56. *Id.* at 550. The same reasoning has been applied in other cases. In *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969), the fact that bus bodies were specially designed for use in the forum was said to supply the foreseeability upon which the court's decision hinged. In *Foster v. Mooney Aircraft Corp.*, 68 Cal. App. 3d 887, 137 Cal. Rptr. 694 (1977), the court rejected use of a mechanical checklist of jurisdictional elements and said that indirect dealing with the forum's residents will not predetermine the issue of jurisdiction—the elements of foreseeability and enjoyment of the protection of the forum's laws were found to be controlling.

57. See text accompanying notes 19-22 *supra*.

tation of "imputable," whereas a case less similar could be successfully distinguished.<sup>58</sup>

This view of *Davis* might seem inviting because of its flexibility. Its interpretation of "imputable" would not stand as law, but could be useful where the equities of a given case would make defense in the Vermont forum unfairly burdensome.

One response to this invitation is that the doctrine of *forum non conveniens* is already available for such equitable considerations.<sup>59</sup> Another response is that allowing *Davis* to stand as the only definition of "imputable" would be of little aid for future legal practice or corporate conduct in Vermont. Thus, because the predictability of Vermont law would suffer without a clear meaning of "imputable," the questions insufficiently answered by *Davis* about jurisdictional amenability based on subsidiaries' conduct should be resolved.

Toward this end, the experiences of other jurisdictions should be of aid, and as a threshold determination it should be decided whether *Davis* should be affirmed insofar as it represents the *Cannon* rule that mere ownership of a subsidiary amenable to suit is not alone enough to sustain jurisdiction over the parent.<sup>60</sup>

For a variety of reasons, the adoption of such a *per se* rule should be avoided. As stated above, the *Cannon* rule is antiquated and inconsistent with the concerns expressed in *International Shoe*.<sup>61</sup> Further, its currency in a forum leads the courts there on a search for technical breakdowns in formal corporate separateness and ignores the practical realities of the relationship between the parent corporation and the injured party. Such a rule would also be most inconsistent with prior Vermont practice, and would represent a deviation from the analysis put forward in *O'Brien* and *Huey*.<sup>62</sup>

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58. This is the position taken by plaintiff in *Pasquale v. Volkswagenwerk A.G.*, No. C125-75-WrC (Vt. Super. Ct., filed Oct. 17, 1977), appeal docketed, No. 293-77 (Vt. Sup. Ct. Oct. 20, 1977). See text accompanying note 12 *supra*.

59. See generally *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COL. L. REV. 1 (1929).

60. See text accompanying note 42 *supra*.

61. See text accompanying notes 44 & 45 *supra*.

62. See text accompanying notes 25-40 *supra*.

But the rejection of a *Cannon*-type rule brings along its own problems. At some point, flexibility takes on the character of *ad hoc*-ism which is just as useless in terms of predictability as would be leaving *Davis* without clarification. Balanced against this concern respecting an abundance of flexibility must be the consideration that a rule too inflexible may not provide adequate protection for Vermont residents. From this balance a fair and reasonable local remedy for Vermont residents in actions against foreign manufacturers should derive.

The rule which Vermont courts adopt should seek to safeguard both the interests in predictability of foreign corporations wishing to do business there, and the interests of local consumers in reasonable protection from the hazards occasioned by such conduct. It is appropriate in this regard to examine the current state of the law in Vermont for the protections already provided.

Here it will be noticed that foreign corporations already enjoy substantial protection in the statutory requirement that the cause of action arise from the contacts asserted as the basis of jurisdiction.<sup>63</sup> This requirement is consistent with Vermont's view of the importance of foreseeability expressed in *O'Brien and Miller*.<sup>64</sup> But a further rule which provides *per se* insulation from jurisdiction for a corporation using a subsidiary to conduct business in Vermont would not only run counter to that view, it would also weight the balance of interests unnecessarily in favor of such corporations.

On the other side, it should be noted that Vermont has been willing to move forward to protect its residents in the absence of constitutional restraints,<sup>65</sup> and there is no reason to believe this

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63. See text accompanying notes 32-35 *supra*. Although Vermont courts regard this as a requirement of constitutional due process, *Huey v. Bates*, \_\_\_ Vt. \_\_\_, \_\_\_, 375 A.2d 987, 990 (1977), there is authority to the contrary. See 2 MOORE'S FEDERAL PRACTICE § 4.25[5], at 1173 (2d ed. 1977) and cases cited therein. If there are substantial contacts with the forum state and the cause of action does not arise from that contact, jurisdiction may be sustained. See also *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448-49 (1952).

64. See text accompanying notes 25-31 *supra*.

65. The only limitations upon the jurisdiction of the courts of one of the United States are to be found in the constitution of the state, the Constitution of the United States, and the same extensive powers possessed by the other states of the United States. No express limitation is known to us in any of these sources which prevents appropriate courts of a state from exercising jurisdic-

concern and willingness should not obtain because of a defendant's corporate structure.

As noted above, where the conduct in question is strictly that of the defendant, the focus of inquiry has been on the foreseeability that such conduct would have consequences in Vermont.<sup>66</sup> This sort of analysis was fundamental to the reasoning of the Vermont Supreme Court in *Huey v. Bates*.<sup>67</sup> Although *Huey* did not concern the "imputability" of a subsidiary's conduct, the reliance of its decision on a formula centered on foreseeability indicates the current disposition of Vermont courts toward the reasoning of *O'Brien*, and will be useful in arriving at an interpretation of "imputable."

In *Huey*, the court also noted that the present "long-arm" statute is broader in scope than its predecessor which was interpreted by *O'Brien* to require foreseeability of possible injury.<sup>68</sup> It follows, therefore, that the inclusion of "imputable to" in the new statute was not intended to restrict its compass nor modify its relevant tests.

If "imputable" were interpreted in strict conformity with the *O'Brien* test, however, the result would be a *per se* rule that a subsidiary's conduct is "imputable" to the parent, since it would be virtually impossible to argue that a parent corporation could not "foresee" the conduct of a subsidiary under its control. Such a rule, being equally mechanical of application, would be no less objectionable than the rule of *Davis* which it would purport to better.

If, however, "imputable" is read to create a rebuttable presumption that conduct of a subsidiary is that of the parent, that is, if it is read to create a rule shifting the burden to the parent corpora-

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tion over proceedings therein arising out of tortious acts done within the state, provided always that adequate notice of the litigation be given to the particular defendant against whom liability is sought to be enforced.

*Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 574, 80 A.2d 664, 667 (1951).

66. See text accompanying notes 25-31 *supra*.

67. \_\_\_ Vt. \_\_\_, 375 A.2d 987 (1977).

68. "The *O'Brien* decision involved interpretation and construction of the immediate precursor to the present § 855. Inasmuch as the present statute is broader in scope than its predecessor, if the defendant's contacts and activities meet the *O'Brien* test, they must, of necessity, satisfy the present statutes." *Id.* at \_\_\_, 375 A.2d 989-90. In *O'Brien* the unforeseen arrival of the defendant's can of beans in the Vermont market was found to be too fortuitous an occurrence to satisfy the requirements of the statute.

tion to demonstrate why such conduct should *not* be "imputed" to it, then the folly of creating a wooden rule would be avoided and the ideal of fairness to competing interests would be advanced. An examination of the possible results under the application of this presumption will demonstrate this to be true.

If it is assumed that the presumption is not successfully rebutted by a foreign parent, deferring until later a discussion of what considerations would be relevant to that decision, the conduct "imputed" to the parent must yet be sufficient to satisfy the "minimal contacts" test of *International Shoe*. This means that the fact of a subsidiary's amenability to jurisdiction would not conclude the issue as regards the parent. The "minimal contacts" test must apply individually to the parent corporation in light of the conduct of its subsidiary "imputable" to it.

If the "imputation" of such conduct is sufficient to satisfy the preliminary "minimal contacts" test, the requirement in Vermont that the cause of action arise from such contact would serve to prevent the unfairness and inconvenience to parent corporations that would otherwise be obliged to defend against claims totally unrelated to the nature of their subsidiary's conduct in the state. Thus, the application of the proposed presumption would not open the doors of Vermont courts to *any* complaint against a foreign corporation simply because it has a subsidiary doing business there. Mere ownership of a subsidiary amenable to jurisdiction will not be sufficient of itself to confer jurisdiction over the parent.<sup>69</sup>

Finally it will be necessary for the plaintiff's claim to survive a motion for summary judgment. To do this, the court will have to find that the conduct "imputable" for the purposes of determining jurisdiction is equally "imputable" for determining liability, since the cause of action must arise from that conduct.<sup>70</sup> If it cannot so find, the foreign parent will have successfully defended itself without any great inconvenience or hardship, since such a motion would be routine.

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69. While in effect the application of this presumption may appear identical to the *Cannon* rule, see text accompanying notes 41 & 42 *supra*, the result is not dependent on the formalities of corporate separateness but on the relationship between the subsidiary's contacts and the cause of action.

70. See text accompanying notes 32-35 *supra*.

It is thus only when a court can find that a subsidiary's conduct, from which the cause of action arises, is sufficient to establish liability of the parent that such parent corporations will find themselves defending in Vermont. The proposed presumption of "imputability" would not reach the parent on less substantial claims.

Considering the situation from the plaintiff's point of view, the presumption would work to avoid an unjust result in one particular set of circumstances. When a foreign parent corporation has no individual contact with Vermont, according to *Davis* there can be no jurisdiction over it. This logically follows even where the claim against the parent is based on a theory that the parent is liable for the conduct of its subsidiary. A presumption of the imputability of such conduct would prevent the foreclosure of such a claim on the ground that the foreign parent has no contact with Vermont, other than ownership of the subsidiary, on which to base jurisdiction.

It remains, then, to consider the factors which might be relevant in determining whether the presumption of "imputability" has been overcome by the parent corporation. No complete list would ever be possible, just as no precise formula would ever be possible for making this determination. However, as a guide to choosing and weighting such factors, the following test is proposed: where the facts of a particular case point to a situation of such control of the subsidiary by the parent or such an identity of economic purpose between the two corporations that the subsidiary can be characterized as the functional equivalent of a corporate division, it will be proper to "impute" the subsidiary's conduct to the parent for the purpose of determining jurisdiction.

The advantage of this test over those mentioned above<sup>71</sup> lies in the breadth of its scope. Because it is a test for the "imputing" of conduct, rather than the asserting of jurisdiction or the establishing of liability, it represents the most preliminary of inquiries into a foreign corporation's activities. At such a stage of investigation, breadth is desirable since the test for "imputing" conduct may determine whether the more focused inquiries into jurisdiction and liability will be undertaken or what their outcomes will be. Thus, a

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71. See text accompanying notes 41-56 *supra*.

narrower test, one described by a theory of liability such as agency, would operate to exclude from "imputability" conduct which would be of importance in determining the ultimate issue of liability under a different theory, such as single economic enterprise. Activity which would fail to satisfy the requirements of an agency test because it was not conducted in a representative capacity, could yet be critical or even determinative of liability under a theory focusing on a different aspect of the parent/subsidiary relationship, the identity of the two corporations' goals in conducting a business enterprise.<sup>72</sup> The test proposed here would be sufficiently broad to include whatever theory of liability the plaintiff's action depends upon. A valid cause of action against a parent corporation arising from its subsidiary's conduct in Vermont would not be foreclosed by a test for jurisdiction which is limited on a different theory of liability.

Factors which could be helpful in deciding whether such a situation exists as would satisfy this test include the following: the degree of ownership of the subsidiary by the parent, that is, whether or not it is wholly owned; the degree of actual, active control exercised over the subsidiary by the parent as contrasted with mere acquiescence in the manner of the subsidiary's daily conduct; whether the subsidiary conducts any business other than that of the parent, or simply performs one of the functions necessary to the parent's existence; whether the parent organized the subsidiary or acquired it subsequent to its organization; whether the subsidiary currently acts, or has in the past acted, as agent for the parent; the degree of identity between the boards of directors of the two corporations; the extent to which the parent and subsidiary are part of the same, single enterprise over which the parent exercises control; whether the subsidiary could or would exist without the parent; whether the foreign parent is an alien deserving of special consideration.<sup>73</sup>

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72. See Berle, *The Theory of Enterprise Entity*, 47 *COL. L. REV.* 343 (1947).

73. See von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 *HARV. L. REV.* 1127 (1966). See also Cheatham, *Some Developments in Conflicts of Laws*, 17 *VAND. L. REV.* 193 (1963). The suggestion is that the exercise of "long-arm" jurisdiction over alien corporations might represent an intrusion into the world of foreign affairs and could result in reprisals against American corporations doing business in foreign countries.

Such a test would be a step forward in the protection of the interests of local plaintiffs in a world of increasingly complex corporate organizations. Yet the limitation of its scope to the situations possible under the application of the presumption mentioned above would assure that it comports with the fairness and substantial justice sought by *International Shoe*. The test would necessarily include an element of uncertainty as to the precise limits of its application, but Vermont courts have successfully applied a test of similar uncertainty where the defendant is directly responsible for the conduct in question.<sup>74</sup> Furthermore, no easy formula is possible in this area of the law, and fairness would seem to require that the party with greatest access to information pertinent to the nature of the parent/subsidiary relationship bear the burden of presenting it. Fairness would also seem to require that a plaintiff with a claim based on the attribution of subsidiary conduct to the parent have a local opportunity to present that claim on the ground that such conduct is "imputable" to the subsidiary's parent. The presumption as proposed would provide that opportunity.

Vermont's peculiar situation creates a need for a predictable and a fair rule in this area of the law. The lack of manufacturing in this state produces a substantial reliance upon the goods of foreign manufacturers, and the rule adopted must seek to maximize local remedies for injuries resulting from that reliance. At the same time, Vermont does not want to discourage foreign corporations from doing business in the state and contributing to its economy through the application of Byzantine and arbitrary rules of jurisdiction. The insulation of parent corporations from Vermont's jurisdiction, which *Davis* seems to call for, should be rejected, and the phrase "imputable to" read to create a presumption which places the burden on parent corporations to prove that the conduct of their subsidiaries should not be considered their own.

Craig Weatherly

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74. See text accompanying notes 29-31 *supra*.