Catholic University Law Review

Volume 58
Issue 1 *Fall 2008*

Article 10

2008

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NOTE

SPA-CIFIC JURISDICTION: A MASSAGE IN BARBADOS PERPETUATES IMPROPER ANALYSIS OF PERSONAL JURISDICTION IN U.S. COURTS

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A lawyer slips in the shower. The story of *O'Connor v. Sandy Lane Hotel Co.*[1] may begin like a bad joke, but it ends with a serious opinion out of the Court of Appeals for the Third Circuit that perpetuates a critical flaw in the way most federal courts determine the constitutionality of asserting personal jurisdiction over out-of-state defendants.[2]

When a court reaches beyond its borders and exerts its judicial authority over a person in another state or country, it extends its jurisdiction beyond traditional territorial limitations and interferes with the neighboring state's sovereignty.[3] To ensure that a court's assertion of personal jurisdiction over an out-of-state defendant does not violate a person's right to due process, U.S. courts are required to first establish a sufficient relationship between the out-of-state actor and the forum state.[4] Only then can a court legitimately hale alien litigants into its state.[5]

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1. 496 F.3d 312 (3d Cir. 2007).

2. *See infra* Part III.

3. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (discussing that each state is an independent sovereign that may exercise jurisdiction within its territorial bounds to the exclusion of all other states). Traditionally, a state was seen to exercise complete control over the property and people within its territory, to "the exclusion of power from all others." *Id.*

4. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945). There are two categories of relation between actor and forum state that qualify for personal jurisdiction. *See infra* notes 42–49 and accompanying text. If the relationship is continuous and systematic it is assessed under the sub-doctrine of general personal jurisdiction. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966). If the relation does not constitute an ongoing relationship, but is instead fleeting, it is assessed under the sub-doctrine of specific personal jurisdiction. *Id.* at 1144–45.

5. *Int'l Shoe*, 326 U.S. at 316. This limitation protects two separate concerns. First, it protects would-be defendants from the undue burden of litigating disputes in a "distant [and] inconvenient forum." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92

Although the Supreme Court has instructed that an out-of-state defendant must have minimum contacts with the forum state,[6] federal courts are divided over what constitutes a sufficient relationship, especially when the contact is tenuous.[7] As a result, personal jurisdiction is exercised with great irregularity across the country.[8] This incongruity is largely due to the way the doctrine of personal jurisdiction is codified in Rule 4 of the Federal Rules of Civil Procedure.[9] Instead of providing federal courts with a uniform approach to personal jurisdiction, Rule 4(k) directs courts to follow the laws of the states in which they reside.[10] Predictably, this acquiescence to the whims of state legislatures has created a significant disharmony among the federal circuit courts,[11] which has yet to be rectified by the Supreme Court.[12]

Currently, federal courts employ any one of four distinct approaches for determining what constitutes minimum contacts for the purposes of specific personal jurisdiction.[13] This inconsistency puts companies doing business

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(1980). Second, it preserves some semblance of autonomy among governments, both foreign and domestic. *Id.* at 292.

6. Int'l Shoe, 326 U.S. at 318–19 (implying that in order to qualify as a minimum contact, the litigation must arise out of or substantially connect to activities by the defendant that are purposely directed within the forum state).

7. *See* Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 102 (3d Cir. 2004) (Scirica, C.J., concurring in part, dissenting in part) (stating that "[t]he courts of appeals have adopted divergent interpretations of 'arise out of or relate to'" with regard to specific jurisdiction).

8. *See id.* at 102–04 (describing the many divergent views among the federal circuit courts). For a further discussion of the various terms used to describe the relationship satisfying minimum contacts, see *infra* notes 60–64 and accompanying text.

9. *See* FED. R. CIV. P. 4(k)(1)(A) ("Serv[ice] . . . establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . .").

10. *Id.*

11. *See* Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 53 (2004) ("Commentators frequently claim that there is no single, coherent doctrine of extra-territorial personal jurisdiction, and unfortunately, they are correct." (footnote omitted)); *see also* Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 179 n.34 ("[T]he Court has not developed a clear theoretical basis for personal jurisdiction.").

12. *See, e.g.*, Mass. Sch. of Law v. ABA., 142 F.3d 26, 37 (1st Cir. 1998), *cert. denied*, 522 U.S. 907 (1997) (denying writ of certiorari for appeal regarding personal jurisdiction); Nowak v. Tak How Inv., 94 F.3d 708 (1st Cir. 1997), *cert. denied*, 520 U.S. 1155 (1997) (affirming the lower court's denial of personal jurisdiction); *see also* Carnival Cruise Lines Inc. v. Shute, 499 U.S. 585, 589, 595 (1991) (reversing on other grounds and refraining from considering the personal jurisdiction issue); Shoppers Food Warehouse MD Corp. v. Moreno, 746 A.2d 320, 322 (D.C. 2000), *cert. denied*, 530 U.S. 1270 (2000) (holding that the court has personal jurisdiction).

13. *See infra* Part I.B.1–4 and corresponding footnotes. According to the Supreme Court, specific personal jurisdiction is established when a claim arises from or relates to a contact purposefully directed at the forum state. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). Where the defendant "enjoys the benefits and protection of the laws of that state," the district court presiding in that state may exercise personal jurisdiction over the defendant. *Id.*

across state and national borders in a precarious position, with no way of predicting whether they are exposed to liability from one jurisdiction to the next.[14]

Under most circumstances, a court has little sympathy for defendants claiming ignorance of their liability,[15] but in a matter of personal jurisdiction, "predictability" is a paramount factor.[16] The Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to require a "degree of predictability" with regard to personal jurisdiction so that would-be defendants can adjust their conduct to avoid or avail themselves of liability as they so choose.[17]

In the law's current discordant condition, even federal judges are unable to predict whether certain conduct establishes specific personal jurisdiction in their states.[18] Thus, it is completely unreasonable to expect far less sophisticated parties, such as small foreign companies, to manage their exposure with any degree of certainty.[19]

Both the facts and outcome of *O'Connor v. Sandy Lane Hotel* epitomize the problem with the federal system's incongruent approach to specific personal jurisdiction.[20] A couple from Pennsylvania booked a vacation at Sandy Lane Hotel in Barbados.[21] Upon receipt of the reservation, the hotel mailed a

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14. *See* Notes from the Margin, Barbados' Sandy Lane Hotel Sued – Does Pennsylvania Law Apply?, http://notesfromthemargin.wordpress.com/2007/08/07/barbados-sandy-lane-hotel-sued-does-pennsylvania-law-apply.htm (last visited Dec. 17, 2008) (expressing concern over the implications of *O'Connor v. Sandy Lane Hotel Co.* for foreign companies selling services to American citizens).

15. *See* United States v. Marquardo, 149 F.3d 36, 42 n.3 (1st Cir. 1998) ("We restate the age-old principle that ignorance of the law is not a defense to its violation."). Under common law, a person unaware of a law may not escape culpability for violating that law merely because of his or her ignorance. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 27 (1769).

16. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (finding it critical that a "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."); *see also* Kulko v. Superior Court of Cal., 436 U.S. 84, 97–98 (1978); Shaffer v. Heitner, 433 U.S. 186, 216 (1977).

17. *World-Wide Volkswagen*, 444 U.S. at 297; *see also* U.S. CONST. amend. XIV, § 1.

18. *See, e.g.*, O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 315 (3d Cir. 2007) (reversing the lower court's ruling that the court lacked personal jurisdiction); Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 100 (3d Cir. 2004) (reversing the district court's order and dismissing the case for lack of personal jurisdiction); Third Nat'l Bank v. Wedge Group Inc., 882 F.2d 1087, 1092 (6th Cir. 1989) (reversing the lower court's ruling dismissing the case for lack of personal jurisdiction); Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317, 323 (2d Cir. 1964) (reversing the lower court's decision that it lacked personal jurisdiction).

19. *See* Donatelli v. Nat'l Hockey League, 893 F.2d 459, 462 (1st Cir. 1990). This opinion adopted a famous Winston Churchill quote to describe the concept of personal jurisdiction as it is currently established by the Supreme Court, saying the concept is "'a riddle wrapped in a mystery inside an enigma.'" *Id.*

20. *See infra* Part III.

21. *O'Connor*, 496 F.3d at 315–16.

brochure to the couple's home.[22] Prompted by the brochure, Mr. O'Connor made reservations for a massage at the hotel's spa through a series of phone calls to and from the hotel in early 2003.[23] Regrettably, when Mr. O'Connor visited the spa that February, he slipped in the shower and was badly injured.[24]

Upon the couple's return home from Barbados, they filed a suit against the hotel for negligence.[25] The litigation was brought in the United States District Court for the Eastern District of Pennsylvania, even though Sandy Lane Hotel did not hold a Pennsylvania business license, or maintain any employees, assets, or other tangible presence in the commonwealth.[26] The case was initially dismissed in the federal district court for lack of personal jurisdiction, but, on appeal, the United States Court of Appeals for the Third Circuit reversed the lower court's order.[27]

In *O'Connor*, the Third Circuit attempted to write a scholarly, comprehensive opinion that explained when specific personal jurisdiction could properly be extended to out-of-state litigants.[28] Unfortunately, the opinion failed to clarify the doctrine of personal jurisdiction.[29] Moreover, *O'Connor* only perpetuated the improper analysis of specific personal jurisdiction employed by many federal courts across the country.[30]

This Note critiques the imprudent approach toward specific personal jurisdiction presented by the Third Circuit in *O'Connor*. Part I discusses prior law, beginning with the Supreme Court's doctrine of personal jurisdiction. It

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22. *Id.* at 316.

23. *Id.*

24. *Id.*

25. *Id.* Though only Mr. O'Connor suffered the fall in the shower, both he and Mrs. O'Connor were listed as plaintiffs in the suit. *Id.* at 317 n.3 ("Mrs. O'Connor alleges loss of consortium . . . [which] is 'purely derivative' of her husband's negligence claim."). Derivative suits are brought by those who have not suffered any direct injury, and therefore, tie any and all rights to recovery directly to the injured plaintiff's claims. *See, e.g.*, Scattaregia v. Wu, 495 A.2d 552, 554 (Pa. Super. Ct. 1985) ("[B]ecause a loss of consortium action has been viewed as derivative its success . . . has always been dependent upon the injured spouse's right to recover."). Thus in *O'Connor*, the court did not analyze the two claims separately. *See O'Connor*, 496 F.3d at 317 n.3.

26. *Id.* at 315–16. The district court identified all contacts Sandy Lane had within the state of Pennsylvania. O'Connor v. Sandy Lane Hotel Co., No. 04-2436, 2005 U.S. LEXIS 7397, at *5–11 (E.D. Pa. Apr. 28, 2005), *rev'd*, 496 F.3d 312 (3d Cir. 2007). These included five visits by representatives to Philadelphia with the Barbados Tourist Board, periodic newsletter mailings, and the maintenance of a website and toll-free phone number. *Id.* There is no allegation that the hotel kept employees, property, or other assets within the state. *Id.*

27. *O'Connor*, 496 F.3d at 315. The court's opinion was unanimous. *Id.*

28. *See* Shannon P. Duffy, Firm Founder's Shower Fall Leads to Significant Jurisdiction Ruling at 3rd Circuit (Aug. 2, 2007), http://www.law.com/jsp/law/LawArticles/Friendly.jsp?id=90005556574.

29. *See* Braham Boyce Ketcham, *Related Contacts for Specific Personal Jurisdiction Over Foreign Defendants: Adopting a Two Part Test*, TRANSNAT'L L. & CONTEMP. PROBS. (forth. 2008) ("[T]he *O'Connor* decision does little to unify the disparate Circuit [sic] positions.").

30. *O'Connor*, 496 F.3d at 317–25.

elucidates the four modern methods by which lower courts have applied the doctrine. Part II discusses the facts and procedural posture leading up to *O'Connor*. It recapitulates the court's interpretation of specific personal jurisdiction and its approach for identifying minimum contacts. Part III demonstrates how the *O'Connor* decision misapplied the prior law and further obfuscated the proper approach for determining whether federal judges can justly hale out-of-state litigants into their courtrooms.

I. SUPREME COURT PRECEDENT, COMMON LAW, AND ACADEMIC INFLUENCE ON SPECIFIC PERSONAL JURISDICTION

The paramount role of government is to ensure the protection of its citizens and the security of their property.[31] Accordingly, U.S. courts have a "manifest interest" in providing citizens with a forum to seek redress from injury.[32] Under certain circumstances, a court's jurisdiction can extend to parties who have never set foot within the boundaries of the forum state.[33] Personal jurisdiction is the doctrine that distinguishes those who are properly subject to a court's jurisdiction.[34]

The seminal case of *International Shoe Co. v. Washington* established the foundation for the present-day personal jurisdiction test.[35] *International Shoe*

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31. *See* JOHN LOCKE, *The Second Treatise of Government, in* TWO TREATISES OF GOVERNMENT 378 (Peter Laslett ed., Cambridge Univ. Press 1967) (1689) ("[P]reservation of property . . . [is]the end of Government, and that for which Men enter into Society . . . ."); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., Yale Univ. Press 1966) ("One great obj[ec]t of Gov[ernmen]t is personal protection and the security of Property . . . .").

32. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)).

33. *See* GEOFFERY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE 145–47 (9th ed. 2005). Personal jurisdiction, otherwise known as *in personam* or territorial jurisdiction, provides a court with the power to exert its judicial authority over a person. *Id.* at 145. The Federal Rules of Civil Procedure require courts to follow the state guidelines for what constitutes personal jurisdiction. *See supra* text accompanying notes 6–9. Some states, such as New York, have codified requirements that specific elements be established to subject an out-of-state defendant to personal jurisdiction in New York. *See* N.Y. CIVIL PRACTICE LAW & RULES § 302(a)(1) (McKinney 2001) (establishing personal jurisdiction over those who transact business within the state of New York or contract anywhere else to provide goods or services to customers or business associates within the state, so long as the cause of action arises out of that contract). States such as Pennsylvania, however, limit their long-arm statutes only by the parameters established in the U.S. Constitution. *See* 42 PA. CONS. STAT. ANN. § 5322(b) (West 2004) (providing that personal jurisdiction may be "based on the most minimum contact with th[e] Commonwealth allowed under the Constitution of the United States"). If the *O'Connor* dispute was argued before a federal court in New York, or another state with a similarly itemized long-arm statute, it is conceivable that a court may have reached entirely different results. *See supra* text accompanying notes 6–9.

34. *See* HAZARD, *supra* note 33, at 145.

35. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); *see* Comment, Burger King*'s Bifurcated Test for Personal Jurisdiction: The Reasonableness Inquiry Impedes Judicial*

was the first Supreme Court case to expand the scope of personal jurisdiction beyond the requirement of a litigant's physical presence within the court's jurisdictional boundaries.[36] Instead of physicality, the Court relied upon much more enigmatic concepts of presence by adopting the phrase "minimum contacts" as the touchstone of personal jurisdiction.[37]

Furthermore, *International Shoe* pegged the limits of personal jurisdiction to the Due Process Clause of the Fourteenth Amendment.[38] In *International Shoe*, the Supreme Court found that due process did not require physical presence, but rather that a defendant need only have "minimum contacts" with the forum state to such a degree as to "not offend 'traditional notions of fair play and substantial justice.'"[39] This spawned the two prongs of personal jurisdiction: minimum contacts and reasonableness.[40]

Economy and Threatens a Defendant's Due Process Rights, 66 TEMP. L. REV. 945, 945 (1993) [hereinafter Burger King*'s Bifurcated Test*]; *see also* B. Glenn George, *In Search Of General Jurisdiction*, 64 TUL. L. REV. 1097, 1097 (1990) (calling *International Shoe* the seminal case "on personal jurisdiction"); Note, Poyner v. Erma Werke GmbH*: The Long-Arm Statute as a Protectionist Device*, 4 NW. J. INT'L L. & BUS. 323, 323 (1982) (explaining *International Shoe*'s effect).

36. *See Int'l Shoe*, 326 U.S. at 316 (citing Pennoyer v. Neff, 95 U.S. 714, 733 (1877), but also expanding the concept of personal jurisdiction to out-of-state defendants who have minimum contacts with the forum state). Historically, a defendant's presence within the territory of the court was a "prerequisite" to a binding judgment. *Id.* In addition to the physical presence of the defendant, courts could also exercise personal jurisdiction over defendants who had property within the boundaries of the forum state. *Compare* Shaffer v. Heitner, 433 U.S. 186, 211 (1977) (finding that there is a long history of establishing personal jurisdiction over a nonresident based solely on the presence of his or her property within the forum state), *with* Harris v. Balk, 198 U.S. 215, 222–23 (1905) (holding that personal jurisdiction is established if litigant is served with process while inside the court's jurisdiction regardless of how briefly and for what reason he entered the state).

37. *Int'l Shoe*, 326 U.S. at 316; *see* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957) (quoting *Int'l Shoe*, 326 U.S. at 316). According to *McGee*, international commerce and interstate travel called for a more complex scheme to determine the extent of personal jurisdiction than what was used previously. *Id.* at 222–23. As the name "International Shoe Company" belies, the fiction of corporate persons and increasing prevalence of interstate and international commerce created many scenarios in which a forum state was deprived of jurisdiction over meritorious claims under the former antiquated definitions of personal jurisdiction. *Id.*

38. *Int'l Shoe*, 326 U.S. at 311.

39. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))

40. *See, e.g.*, Michael L. Russell, Note, *Back to the Basics: Resisting Novel and Extreme Approaches to the Law of Personal Jurisdiction and the Internet*, 30 U. MEM. L. REV. 157, 166 (1999) (stating that *International Shoe* required courts to ask two questions: "(1) whether the defendant had minimum contacts with the forum, and (2) whether sustaining jurisdiction would offend 'traditional notions of fair play and substantial justice'").

A. Bifurcation within Personal Jurisdiction

Although *International Shoe* is credited as the progenitor of modern personal jurisdiction,[41] it was an article written in Harvard Law Review[42] twenty-one years later that truly established the modern-day framework for personal jurisdiction.[43] In what began largely as an academic exercise, Professors Arthur von Mehren and Donald Trautman proposed a new system of terminology for jurisdictional issues in their 1966 article.[44] Coining the terms "specific jurisdiction" and "general jurisdiction," however, did more than just change civil procedure's lexicon—it had a profound effect on the way practitioners and academics analyzed personal jurisdiction.[45]

According to von Mehren and Trautman, personal jurisdiction consists of two distinct categories: general jurisdiction and specific jurisdiction.[46] A court has general jurisdiction when the out-of-state defendant's contacts with the forum state are extensive enough to allow litigation over any dispute, regardless of whether the claim arises from a particular contact within the forum.[47] On the other hand, a court has specific jurisdiction when the out-of-state defendant has limited contacts within the state, but the litigation being brought has some connection to the defendant's specific contacts.[48] To exercise personal jurisdiction, the article argued, courts must establish one of these two circumstances.[49]

Eighteen years after its publication, Professors von Mehren and Trautman's dichotomous approach to personal jurisdiction was formally adopted by the Supreme Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.[50]

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41. *See* George Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 347 ("The modern law of personal jurisdiction owes its existence, and most of its structure and detail, to Chief Justice Stone's magisterial opinion in *International Shoe v. Washington*.").

42. von Mehren & Trautman, *supra* note 4, at 1121–23.

43. *See* HAZARD, *supra* note 33, at 172.

44. von Mehren & Trautman, *supra* note 4, at 1121–23, 1136, 1144.

45. *See* Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 119–20; B. Glenn George, *supra* note 35, at 1099–1100; Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 610–13 (1988).

46. von Mehren & Trautman, *supra* note 4, at 1136.

47. *Id.*

48. *Id.* at 1144–45.

49. *See id.* at 1136.

50. *See* 466 U.S. 408, 414 n.9 (1984). In *Helicopteros*, the Court wrote that "[w]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum," the Court has established the "essential foundation" of specific personal jurisdiction. *Id.* at 414 (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)). The Court's formulation of specific jurisdiction closely mirrored the view expressed by von Mehren and Trautman. *Id.* at 414 & n.8 (citing von Mehren and Trautman as the authority on specific jurisdiction). In the event that the cause of action does not arise out of or relate to the nonresident's activities within the forum state, the Court stated that general personal jurisdiction could be met if there were continuous and systematic contacts between the forum state and the nonresident. *Id.* at 414 & n.9.

Regrettably, the parties in *Helicopteros* conceded that the plaintiffs' claims against the defendant did not arise out of, or relate to, the company's activities in the forum state.[51] Consequently, the majority opinion avoided any further analysis of specific jurisdiction.[52]

B. Development of the Two-Prong Approach of Specific Personal Jurisdiction: The First Prong

To establish specific personal jurisdiction, a court must satisfy the two-prong approach rooted in *International Shoe* and explicated in *Burger King* and later cases.[53] In the first prong, the court must determine whether the controversy is sufficiently connected to the activities of the out-of-state actor.[54] This is often referred to as the minimum contacts requirement.[55]

Although it took more than a decade to reach the Supreme Court, the doctrine of specific and general jurisdiction was embraced by lower courts and academia almost immediately after its publication. *See, e.g.*, Steinberg v. Int'l Criminal Police Org., 672 F.2d 927, 928 (D.C. Cir. 1981) (citing von Mehren and Trautman); Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am., 651 F.2d 877, 889 (3d Cir. 1981) (citing von Mehren and Trautman's theory of specific and general jurisdiction); Schreiber v. Allis-Chalmers Corp., 448 F. Supp. 1079, 1088 (D. Kan. 1978), *rev'd*, 611 F.2d 790 (10th Cir. 1979) (referencing von Mehren and Trautman's jurisdiction terminology).

51. *See Helicopteros*, 466 U.S. at 415.

52. *Id.* at 415–16. The respondent's concession is particularly frustrating for those seeking mandatory authority on the matter, because by modern standards the claims in *Helicopteros* may in fact have arisen out of, or were at least related to, the defendant's limited contacts with the forum state. *See id.* at 420 (Brennan, J., dissenting).

Helicopteros was brought about after a helicopter carrying four employees of a Peruvian consortium crashed. *Id.* at 410 (majority opinion). Survivors of the decedents sued the Colombian owner of the helicopter for damages in a Texas court. *Id.* at 412. The chief executive officer of Helicol had only visited Texas one time to meet with the decedents' employer to negotiate the contract, which Helicol was performing at the time of the crash. *Id.* at 410. The dissent argued that the contacts between the defendant and Texas were "sufficiently related to the underlying cause of action[,]" and therefore, it was reasonable for the court to assert personal jurisdiction over Helicol. *Id.* at 420 (Brennan, J., dissenting).

53. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that . . . a defendant . . . have certain minimum contacts with [a forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))); *see also* World-Wide Volkswagen Co. v. Woodson, 444 U.S. 286, 291–92 (1980) (reaffirming that a court may exercise personal jurisdiction over a defendant only so long as minimum contacts are present and litigation would not offend notions of fair play or reasonableness); J. Christopher Gooch, Note, *The Internet, Personal Jurisdiction, and the Federal Long-Arm Statute: Rethinking the Concept of Jurisdiction*, 15 ARIZ. J. INT'L & COMP. L. 635, 643 (1998) ("In making the jurisdiction doctrine more flexible, the United States Supreme Court established a two prong test for personal jurisdiction due process . . . ."); Russell, *supra* note 40 at 165.

54. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); *Helicopteros*, 466 U.S. at 414; *Int'l Shoe*, 326 U.S. at 319.

55. *See Int'l Shoe*, 326 U.S. at 316 (requiring minimum contacts for personal jurisdiction); *see also* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 108–09 (1987); *Burger*

The quantity of such contacts is largely inconsequential.[56] In fact, a single qualifying minimum contact is enough to subject an out-of-state actor to litigation within the forum state.[57] The true test is whether the quality and nature of the defendant's activity is proportionate to the obligations and benefits granted by the forum state.[58] In *International Shoe*, the Court reasoned that a person purposely enjoying the benefits and protection of a state's laws must also expect to bear certain obligations that "arise out of or are connected with the activities" as well.[59]

In order to be a valid minimum contact, the Supreme Court requires that the would-be litigant's contact within the forum state was purposely directed toward that state, and that the relationship between this minimum contact and the resultant claim were connected to such a degree that the defendant could reasonably anticipate litigation in the forum state on the claim.[60] This compound prerequisite is often broken down into three conditions referred to as the purposeful availment requirement, the relatedness requirement, and the reasonableness requirement.[61] This Note focuses primarily on the relatedness requirement.

Throughout different opinions, the Supreme Court has used terminology such as "connect,"[62] "arise,"[63] "substantial connection,"[64] and "relate"[65] to describe the degree of relation required between contact and claim in order to

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King, 471 U.S. at 474; *Helicopteros*, 466 U.S. at 414; Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 771 (1984); Gooch, *supra* note 53.

56. 36 AM. JUR. 2D *Foreign Corporations* § 448 (2001) ("[T]he test is qualitative, rather than quantitative, as to whether the necessary minimum contacts exist."); *see also Burger King*, 471 U.S. at 475 n.18; *Int'l Shoe*, 326 U.S. at 319.

57. *Burger King*, 471 U.S. at 475 n.18 (stating that even a lone contact can be sufficient to support the exercise of personal jurisdiction over a nonresident defendant).

58. *Int'l Shoe*, 326 U.S. at 319 ("Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the [forum state's] laws . . . .").

59. *Id. World-Wide Volkswagen* takes this rationale further by emphasizing the importance of such predictability under the Due Process clause. World-Wide Volkswagen Co. v. Woodson, 444 U.S. 286, 297 (1980). The Court explained that out-of-state actors must be able to control their exposure to liability by structuring their conduct within foreign states. *Id.*

60. *See* Russell D. Shurtz, Comment, *www.international_shoe.com: Analyzing* Weber v. Jolly Hotels' *Paradigm for Personal Jurisdiction in Cyberspace*, 1998 BYU L. REV. 1663, 1669–70 (describing the concept of purposeful availment, relatedness, and reasonableness).

61. *See id.* The controversial decision of *O'Connor* turns upon the court's analysis of the relatedness requirement. *See infra* Parts II.B.2 and III.B.

62. *Int'l Shoe*, 326 U.S. at 319.

63. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984); Hanson v. Denckla, 357 U.S. 235, 252 (1958); *Int'l Shoe*, 326 U.S. at 319.

64. Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 109 (1987); *Burger King*, 471 U.S. at 475; *Hanson*, 357 U.S. at 252; McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).

65. *Helicopteros*, 466 U.S. at 414; Shaffer v. Heitner, 433 U.S. 186, 213 (1977).

satisfy the relatedness requirement of minimum contacts. Although similar, each term connotes varying degrees of relation and has caused a serious rift among federal courts.[66] There are at least four distinct interpretations.

1. The Proximate Cause Test

The proximate cause test is the most restrictive standard used to scrutinize the connection between contacts and claims.[67] This approach to minimum contacts can be traced back to Supreme Court cases requiring claims to arise from the contested contact.[68] Judges on the United States Courts of Appeals for the First, Second, and Eighth Circuits have all adopted this approach to some degree.[69]

Courts relying on the proximate cause test require that the defendant's minimum contact with the forum state be the proximate, or legal, cause of the plaintiff's cause of action.[70] In other words, the harm alleged by the plaintiff must be the direct and foreseeable result of the defendant's activities in the forum state.[71]

Proponents of this test find proximate cause to be a superior benchmark for two reasons.[72] First, proximate cause "clearly distinguishes between foreseeable and unforeseeable risks of harm."[73] This distinction between foreseeable and unforeseeable risks is relevant because previous Supreme Court opinions indicate that the ability to foresee whether an actor's contact within the forum state could result in exposure to liability is "'critical to [the]

66. *See infra* Part I.B.1–4.

67. O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 318 (3d Cir. 2007).

68. For examples of Supreme Court cases using the concept of claims that arise out of contact with a forum state see *Burger King*, 471 U.S. at 472; *Helicopteros*, 466 U.S. at 414; Kulko v. Superior Court of Cal., 436 U.S. 84, 89 (1978); *Hanson*, 357 U.S. at 252; *Int'l Shoe*, 326 U.S. at 319.

69. *See, e.g.*, Mass. Sch. of Law v. ABA, 142 F.3d 26, 35 (1st Cir. 1998) (noting that "a claim must 'arise out of . . . [the] defendant's in-forum activities); Sybaritic, Inc. v. Interport Int'l, Inc., 957 F.2d 522, 524–25 (8th Cir. 1992) (using the phrase "aris[ing] out of" to describe the defendant's contacts with the forum"); Pizarro v. Hoteles Concorde Int'l, C.A., 907 F.2d 1256, 1258–59 (1st Cir. 1990) (considering whether the harm "arose out of" the defendant's contacts with the state); Pearrow v. Nat'l Life & Accident Ins. Co., 703 F.2d 1067, 1069 (8th Cir. 1983) (focusing on the phrase "ar[i]s[ing] out of"); Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317, 321–22 (2d Cir. 1964) (considering whether the action "'ar[o]s[e] from business [transacted] within the forum state'").

70. *See* Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1839–40 (2003) ("[T]he proximate cause approach demands a causal relationship between the contacts that satisfied the first prong and the cause of action.").

71. Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 591 (2001) ("[T]he defendant's contact must have directly caused the claim that the plaintiff is bringing.").

72. *See* Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 715 (1st Cir. 1996) (explaining that the First Circuit is recognized as the "main proponent of the proximate cause standard").

73. *Id.* (citing Peckham v. Cont'l Cas. Ins. Co. 895 F.2d 830, 836 (1st Cir. 1990)).

due process analysis.'"[74] Second, if the touchstone of personal jurisdiction is predictability, then asserting jurisdiction over defendants only for foreseeable harm is more equitable than holding defendants responsible for every unforeseeable effect that may occur.[75]

Outcomes from the proximate cause test deviate from those produced by other tests primarily in situations where the plaintiff's cause of action is in negligence and the contested minimum contact is contractual.[76] Under these circumstances, courts strictly applying the proximate cause test will find that the plaintiff's claim does not legally arise from the defendant's activities, and thus fails the relatedness test.[77]

2. "But-For" Test

The but-for test is a less stringent approach because it does not rely on foreseeability.[78] Instead, it considers whether the plaintiff's claim would have occurred *but for* the defendant's contact within the forum state.[79] Such an

74. Burger King Corp. v. Rudzewicz, 471 U.S. at 474 (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980)).

75. *See Nowak*, 94 F.3d at 715 (stressing that foreseeability and proximate cause go hand-in-hand).

76. *See, e.g.*, Pearrow v. Nat'l Life & Accident Ins. Co, 703 F.2d 1067, 1069 (8th Cir. 1983) (dismissing a slip-and-fall case because the cause of action did not arise out of the defendant's activities in the forum state, and therefore found no basis for specific personal jurisdiction). Several other cases support the contention that for the purpose of personal jurisdiction, slip-and-fall claims specifically do not arise out of the defendant's business activities in the forum. *See, e.g.*, Marino v. Hyatt Corp., 793 F.2d 427, 430 (1st Cir. 1986) (noting that the plaintiff's reservation, a contract, had virtually nothing to do with the slip and fall); Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317, 321–22 (2d Cir. 1964) (discussing that the sale of a ticket was in no way connected to the tort).

77. *See, e.g.*, *Marino*, 793 F.2d at 430 (holding that "vague allegations" of a hotel reservation cannot support personal jurisdiction for a tort action); *Pearrow*, 703 F.2d at 1069 ("This connection is too tenuous."); *Gelfand*, 339 F.2d at 321–22 (denying personal jurisdiction "over a personal injury claim or anything like such slender grounds").

78. *See, e.g.*, Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1270 n.21 (5th Cir. Unit A Aug. 1981) (rejecting the defendant's view that a "tort suit cannot arise from a contractual contact").

79. *See id.* ("Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, the contractual contact is a 'but for' causative factor for the tort since it brought the parties within tortious 'striking distance' of each other."). In torts, the theory of causation in fact, or but-for causation, is often referred to by the Latin phrase "sine qua non." VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 259 (11th ed. 2005). This translates to "without which not" and is defined as "[a]n indispensable condition or thing; something on which something else necessarily depends." BLACK'S LAW DICTIONARY 1418 (8th ed. 2004)

approach has been adopted by the Fifth,[80] Sixth,[81] Seventh,[82] and Ninth Circuit Courts of Appeals.[83]

Outcomes under the but-for test deviate from those produced by the other tests in situations where the defendant's contacts cause a third party to harm the plaintiff.[84] Under these circumstances, courts strictly applying the but-for test will find relatedness, because *but for* the defendant's contact, the plaintiff's claim would not have arisen.[85]

3. Substantial Connection Test

Unlike the but-for or proximate cause tests, courts using the substantial connection test do not rely solely on the presence of causation between contact and claim to satisfy the relatedness requirement.[86] Instead, these courts apply a broader analysis by examining whether the connection between the contact and the complaint is substantially relevant.[87] Proponents of the substantial connection test derive their authority from Supreme Court cases requiring the

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80. *See Prejean*, 652 F.2d at 1270 n.21.

81. *See* Creech v. Roberts, 908 F.2d 75, 80 (6th Cir. 1990) (explaining that the plaintiff would never have undergone surgery but for viewing the television program advertising the procedure); Lanier v. Am. Bd. of Endontics, 843 F.2d 901, 909 (6th Cir. 1988) (using the term "but for" in explaining the defendant's contacts).

82. *See* Deluxe Ice Cream Co. v. R.C.H. Tool Corp., 726 F.2d 1209, 1216 (7th Cir. 1984) (explaining that the "transaction of any business" in the state will suffice for purposes of personal jurisdiction analysis).

83. *See* Shute v. Carnival Cruise Lines, Inc., 897 F.2d 377, 385 (9th Cir. 1990) (explicitly adopting the but-for test), *rev'd on other grounds*, 499 U.S. 585 (1991). The Ninth Circuit is one of the most adamant proponents of the but-for test. *See* Nowak v. Tak How Inv., Ltd., 94 F.3d 708, 714 (1st Cir. 1996). According to the Ninth Circuit, proximate cause is too restrictive a test for relatedness. *See Shute*, 897 F.2d at 385; *see also Nowak*, 94 F.3d at 715 ("strict adherence to a proximate cause standard in all circumstances is unnecessarily restrictive"). Alternatively, under but-for causation analysis, any contact counts as a minimum contact as long as it is responsible for the harm alleged. *See, e.g.*, *Deluxe Ice Cream Co.*, 726 F.2d at 1216 (permitting injuries that merely "lie in the wake" of a contact).

84. *See Nowak*, 94 F.3d at 716 (suggesting that normally the proximate cause test would not be satisfied, but that a more lenient approach akin to the but-for test would be sufficient for jurisdiction).

85. Int'l, Ltd. v. Ashworth, Inc., 132 F.3d 111, 114 (1st Cir. 1997) ("The 'arising from' clause in the [Massachusetts long-arm statute] is to be generously construed in favor of asserting personal jurisdiction by applying the following 'but for' causation test: Did the defendant's contacts with [Massachusetts] constitute 'the first step in a train of events that result[ed] in personal injury[?]'").

86. *See* Third Nat'l Bank v. Wedge Group, Inc., 882 F.2d 1087, 1091 (6th Cir. 1989) (holding that the relatedness requirement requires only that the claim have a "substantial connection with" the defendant's in-state contacts, rather than proximate or legal causation); *cf.* Lanier v. Am. Bd. of Endontics, 843 F.2d 901, 909 (6th Cir. 1988) (holding that the relatedness requirement was satisfied when the claim was "made possible by" defendant's in-state contacts).

87. *See Third Nat'l Bank*, 882 F.2d at 1091 (using the term "substantial connection"); *Lanier*, 843 F.2d at 909 (focusing on whether the defendant's connection with the forum was "substantial enough").

defendant's contact to "relate to"[88] or have a "substantial connection" with the plaintiff's claim.[89] Notable opinions in the United States Courts of Appeals for the Second, Third, and Sixth Circuits have adopted this approach.[90]

One Third Circuit opinion in particular relied on *Burger King* as its authority for the substantial connection test.[91] In *Mellon Bank*, the court drew from *Burger King* when it evaluated the existence of specific jurisdiction by focusing on whether a contractual agreement constituted a sufficient minimum contact.[92] The court recognized that causation alone was insufficient, and that the Constitution requires a more flexible analysis that considers the unique circumstances of each situation.[93]

Thus the substantial connection test is different from other relatedness tests because it does not rely on bright-line factors such as causation.[94] By considering the totality of the circumstances surrounding the contact, proponents argue that courts are not entangled in all-or-nothing tests that are inevitably over or under inclusive.[95]

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88. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408, 414 (1984); Shaffer v. Heitner, 433 U.S. 186, 213 (1977).

89. *See* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 109 (1987); *Burger King*, 471 U.S. at 475; Hanson v. Denckla, 357 U.S. 235, 252 (1958); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957); *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (using the phrase "connected with").

90. *See* Remick v. Manfredy, 238 F.3d 248, 256 (3d Cir. 2001) (stating that the defendant's contract with a resident could be a sufficient nexus to allow personal jurisdiction); *Third Nat'l Bank*, 882 F.2d at 1091.

91. Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992).

92. *Id.* In *Mellon Bank*, the circuit court found that:

> The fact that a non-resident has contracted with a resident of the forum state is not, by itself, sufficient to justify personal jurisdiction over the nonresident. The requisite contacts, however, may be supplied by the terms of the agreement, the place and character of prior negotiations, contemplated future consequences, or the course of dealings between the parties.

Id. (citing *Burger King*, 471 U.S. at 479).

93. *Id.*

94. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318–19 (1945). *International Shoe* warned against the use of "mechanical or quantitative" tests to determine personal jurisdiction, and proponents of the substantial connection test have abided to the fullest extent. *Id.*; *see also Remick*, 238 F.3d at 256 ("In determining jurisdiction over a breach of contract claim, we must consider the totality of the circumstances . . . .").

95. *See, e.g.*, Thomason v. Chemical Bank, 661 A.2d 595, 603–04 (Conn. 1995) (noting that its approach was less restrictive than the "causal connection" approach, but more restrictive "than the federal constitutional test for general jurisdiction, under which this state could have elected to exercise jurisdiction over causes of action wholly unrelated to the defendant's conduct in this forum").

4. The Sliding Scale Test

The fourth approach for testing the relatedness requirement is called the sliding scale test.[96] Under the sliding scale test, "'the weaker the plaintiff's showing of minimum contacts, the less the defendant need show in terms of unreasonableness to defeat jurisdiction.'"[97] Though used sparingly in modern courts,[98] the sliding scale test has been the subject of several academic commentaries since the *Helicopteros* decision in 1984.[99]

According to proponents of the sliding scale test, the Court's inability to find personal jurisdiction in the *Helicopteros* case illustrated the flaw of using specific and general jurisdiction as mutually exclusive doctrines.[100] Under the sliding scale test, general jurisdiction sits on one end and specific jurisdiction on the other.[101] Courts consider the defendant's activities as a whole to determine what degree of relation between those contacts and the plaintiff's claim is required to satisfy the relatedness requirement.[102] This means that a court can weigh the "quantity and quality of the defendant's forum contacts" against the reasonableness of asserting jurisdiction.[103]

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96. William M. Richman, *Part I—Casad's Jurisdiction in Civil Actions, Part II—A Sliding Scale to Supplement the Distinction between General and Specific Jurisdiction*, 72 CAL. L. REV. 1328, 1345–46 (1984) (reviewing ROBERT CASAD, JURISDICTION IN CIVIL ACTIONS (1983)).

97. TH Agric. & Nutrition, LLC v. Ace European Group Ltd., 488 F.3d 1282, 1287 (10th Cir. 2007) ("'the reasonableness prong of the due process inquiry evokes a sliding scale'") (quoting OMI Holdings, Inc. v. Royal Ins. Co. of Can., 149 F.3d 1086, 1092 (10th Cir. 1998)); *see also* Richman, *supra* note 96, at 1345 ("As the quantity and quality of the defendant's forum contacts increase, a weaker connection between the plaintiff's claim and those contacts is permissible; as the quantity and quality of the defendant's forum contacts decrease, a stronger connection between the plaintiff's claim and those contacts is required.").

98. For an example of cases using the sliding scale see *TH Agric.*, 488 F.3d at 1287 (discussing the use of the sliding scale to determine the reasonableness prong); Chew v. Dietrich, 143 F.3d 24, 29 (2d Cir. 1998) (calling for flexibility in the relatedness requirement); LAK, Inc. v. Deer Creek Enters., 885 F.2d 1293, 1303 (6th Cir. 1989) (suggesting a sliding scale might have been appropriate if the contacts were more substantial); Vons Cos. v. Seabest Foods, Inc., 926 P.2d 1085, 1096–97 (Cal. 1996) (declining to follow the substantial nexus test); Shoppers Food Warehouse v. Moreno, 746 A.2d 320, 336 (D.C. 2000) (requiring only a "discernible relationship").

99. *See, e.g.*, Frederic L. Kirgis, *Fuzzy Logic and the Sliding Scale Theorem*, 53 ALA. L. REV. 421, 438 (2002); William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 615 (1993); Richman, *supra* note 96, at 1336; Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545, 1584 (1994).

100. Richman, *supra* note 96, at 1330–45.

101. *Id.* at 1340, 1345.

102. *Id.* at 1341.

103. *Id.* at 1345. This test has failed to find a foothold outside of theoretical jurisprudence because it is at odds with Supreme Court precedent, which largely favors a strict dichotomy between general and specific jurisdiction. *See* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 306 (4th ed. 2004) (writing that the Supreme Court still favors a "fairly sharp dichotomy" between general and specific jurisdiction, and that this precedent is at odds with the sliding scale test).

C. Development of the Two-Prong Approach of Specific Jurisdiction: The Second Prong

Regardless of a court's analysis under the relatedness element, once a court is satisfied with the existence of minimum contacts, the court must consider the second prong.[104] To satisfy the second prong, a judge must determine, based on a series of factors, if haling the defending party into the court's jurisdiction would offend traditional notions of "'fair play and substantial justice.'"[105] The Supreme Court has listed factors such as:

> the burden on the defendant[;] . . . the forum state's interest in adjudicating the dispute[;] . . . the plaintiff's interest in obtaining convenient and effective relief[;] . . . the inter-state judicial system's interest in obtaining the most efficient resolution of controversies[;] . . . [and the] shared interest of the several States in furthering fundamental substantive social policies.[106]

Providing further insight into this prong, the plurality opinion in a later Supreme Court case, *Asahi Metal Industry Co.*, applied these factors to a case involving personal jurisdiction over a Japanese company.[107] In *Asahi*, the plurality opinion not only considered the extreme distance a Japanese company must traverse in order to appear before a California court, but also the burdens imposed on Japanese defendants haled into a foreign legal system.[108]

The Court determined that these anticipated hardships outweighed the slight "interests . . . the plaintiff and the forum State" had in finding jurisdiction over Asahi.[109] As a result, Justice O'Connor found that "the exercise of personal jurisdiction by a California court over [the defendant] . . . would be unreasonable and unfair."[110]

II. *O'CONNOR V. SANDY LANE HOTEL CO.*: THE OPINION

In February 2002, lawyer Patrick J. O'Connor and his wife took a trip to Barbados.[111] On the recommendation of friends and travel agents, they stayed

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104. *See* Burger King*'s Bifurcated Test*, *supra* note 35, at 954 (stating that most courts follow a two-part analysis in which the reasonableness inquiry is the second prong after minimum contacts).

105. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)); *see also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775–80 (1984).

106. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (internal citations omitted); *see also Burger King*, 471 U.S. at 477; *Keeton*, 465 U.S. 775–80.

107. Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 114 (1987).

108. *Id.*

109. *Id.* The fact that the plaintiff in *Asahi* was not a citizen of California also weighed heavily against the court's interest in hearing the dispute. *Id.*

110. *Id.*

111. O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 315 (3d Cir. 2007).

at the Sandy Lane Hotel in St. James parish.[112] After their trip, the O'Connors decided to return to Sandy Lane the following year.[113] Shortly after booking their second reservation, the resort mailed a brochure to the O'Connors' home promoting Sandy Lane's spa services.[114] The brochure strongly recommended that guests make reservations for spa treatments in advance of their arrival.[115] After perusing the brochure, the O'Connors made reservations for the various spa services.[116] Through a series of phone calls both to and from Barbados, the O'Connors and Sandy Lane settled on dates, times, and prices for particular spa services.[117]

On February 26, 2003, while staying at the hotel, Mr. O'Connor arrived for a scheduled appointment at the spa.[118] As part of the service, Mr. O'Connor was invited to use the shower in a personalized treatment suite.[119] Unfortunately, Mr. O'Connor's feet were slippery from the oils applied during his massage, and the shower floor was not outfitted with mats.[120] As he entered the shower, Mr. O'Connor "slipped, fell, and tore his rotator cuff."[121]

A. Procedural Posture

Upon their return to Pennsylvania, Mr. and Mrs. O'Connor filed actions in negligence against Sandy Lane in the Court of Common Pleas for Philadelphia County.[122] Sandy Lane removed the case to the United States District Court for the Eastern District of Pennsylvania and filed a motion for summary judgment.[123] On the matter of specific jurisdiction, Judge Joyner's ensuing district court opinion held that the plaintiffs' "cause[s] of action [do] not arise

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112. *Id.* Despite its modest name, Sandy Lane Hotel is a luxurious five-star Caribbean resort, frequented by "royalty, movie stars, and many of the business world's most discerning personalities." *See* Sandy Lane—Luxury Golf and Spa Resort at St. James in Barbados, http://www.sandylane.com/introduction/index.html (last visited Dec. 17, 2008).

113. *O'Connor*, 496 F.3d at 316.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* The hotel advertises that "[t]he Spa at Sandy Lane features 11 personalized treatment suites each with shower, bathroom and either outdoor garden, private hydro pool or skylight." Sandy Lane Facilities Page, http://www.sandylane.com/spa/facilities.html (last visited Aug. 13, 2008).

120. *O'Connor*, 496 F.3d at 316; *see also* Duffy, *supra* note 28.

121. *O'Connor*, 496 F.3d at 316.

122. *Id.* Mrs. O'Connor was a co-plaintiff and alleged a loss of consortium. *Id.* at 317 n.3.

123. O'Connor v. Sandy Lane Hotel Co., No. 04-2436, 2005 U.S. LEXIS 7397, at *1 (E.D. Pa. Apr. 28, 2005), *rev'd* 496 F.3d 312 (3d Cir. 2007). Judge J. Curtis Joyner rightly pointed out that the motion was more accurately recognized as a 12(b)(3) motion to dismiss for lack of personal jurisdiction. *Id.* at *5.

from Defendant's contacts with Pennsylvania."[124] The case was dismissed,[125] and the O'Connors appealed.[126]

B. The Third Circuit's Opinion

The United States Court of Appeals for the Third Circuit began its analysis by acknowledging that the O'Connors conceded at oral argument that Sandy Lane Hotel lacked the "continuous and systematic" contacts necessary to support general personal jurisdiction in Pennsylvania.[127] The court then moved on to assess the case in terms of specific personal jurisdiction.[128] The opinion divided this analysis into three parts: purposeful direction, relatedness, and reasonableness.[129]

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124. *Id.* at *4. More specifically, the alleged minimum contacts in question were Sandy Lane's phone calls, e-mails, and brochure mailings to the O'Connor residence regarding Mr. O'Connor's spa appointment. *Id.* The district court based its ruling on deficiencies in all of these alleged minimum contacts. *Id.* at *4–5. First, the court found that the brochure mailed to the plaintiff's home was not a minimum contact, because the plaintiff never alleged that the brochure induced him to make a spa appointment. *Id.* at *4. The court held that without a sufficient causal connection between the contact and the claim, there was no minimum contact. *Id.* Second, with regard to the formation of a contract over the phone for spa services, Judge Joyner cited three federal opinions from within the Third Circuit that held that contractual contacts with the forum state could not give rise to specific personal jurisdiction over nonresident defendants when the claim was in negligence. *See id.* (citing Gehling v. St. George's Sch. of Med., Ltd., 773 F.2d 539, 544 (3d Cir. 1985); Scheidt v. Young, 389 F.2d 58, 60 (3d Cir. 1968); Wims v. Beach Terrace Motor Inn, Inc., 759 F. Supp. 264, 267 (E.D. Pa. 1991)). Because neither the mailings to the home nor the reservations made over the phone could satisfy as minimum contacts, the case was dismissed for lack of personal jurisdiction. *Id.* at *12.

125. *Id.* at *11–12. To be more precise, before being dismissed entirely, the case was first transferred to the United States District Court for the Southern District of New York, because the court misunderstood New York as the location of two Sandy Lane representatives. *Id.* at *2–3. This mistake was corrected by the court two months later, however, when the court discovered that Sandy Lane did not have any representatives in New York. *Id.*

126. O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 315 (3d Cir. 2007).

127. *Id.* at 317. Although the plaintiffs conceded their contention that Sandy Lane Hotel was subject to general jurisdiction in the Eastern District of Pennsylvania, a notable portion of their appellant brief did present such a claim. *Id.* at 315 n.1. The O'Connors' argument for general jurisdiction, however, appears unsubstantiated in consideration of the fact that Sandy Lane's only ongoing and systematic contacts with Pennsylvania included "five business trips to Philadelphia by Sandy Lane employees, the mailing of newsletters to approximately 800 Pennsylvania addresses, and Sandy Lane's relationships with public relations and marketing firms in New York City. *Id.* at 315 (citing Plaintiffs' Brief at 6–8, 21–23).

128. *Id.* at 317.

129. *Id.* This three prong analysis appears to stray from the two prong test of *International Shoe* and subsequent Supreme Court cases, but many lower courts have adopted this style, which has no substantive distinction from the form found in *International Shoe*. *See infra* notes 163–64 and accompanying text.

1. Identifying Purposefully Directed Contacts

First, the court identified Sandy Lane Hotel's actions within the forum state that could have constituted minimum contacts.[130] The court determined that the seasonal newsletters mailed to the O'Connors' Pennsylvania home, the spa brochure sent shortly after the O'Connors made reservations for February 2003, and the phone calls and e-mails traded between the two parties "for the purpose of forming an agreement to render spa services" constituted purposeful contacts directed at the forum state.[131] The court found that Sandy Lane deliberately targeted the O'Connors while they were within the geographic boundaries of Pennsylvania.[132]

2. Satisfying the Relatedness Requirement

The court next addressed the second requirement of specific personal jurisdiction, the relatedness requirement.[133] In order to be sufficiently related, the court stated that the O'Connors' claims must "'arise out of or relate to'" at least one of the defendant's purposefully directed contacts.[134] The court's analysis began by laying out and then systematically rejecting the three predominant approaches adopted by the lower federal courts: the proximate cause test, the but-for test, and the hybrid test.[135]

Initially, the court pointed out that even though previous Third Circuit precedent failed to categorically adopt "a definitive approach to the relatedness requirement,"[136] in *Miller Yacht Sales, Inc. v. Smith*, the court had held that a defendant's minimum contacts were not required to be the legal cause of the plaintiff's injuries.[137] Although the court stopped short of "adopting a bright-line test" for relatedness, the *O'Connor* decision claimed that the *Miller* court was resolute in its rejection of the proximate cause test.[138]

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130. *O'Connor*, 496 F.3d at 318.

131. *Id.*

132. *Id.*

133. *Id.* at 320.

134. *Id.* at 317 (quoting Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408, 414 (1984); Grimes v. Vitalink Commc'ns, 17 F.3d 1553, 1559 (3d Cir. 1994)).

135. *Id.* at 318–21. The court combined the substantial connection test and the sliding scale test as a single approach. *See id.* at 321 (asserting that a "hybrid approach" such as the sliding scale or the substantial connection test is not the law in the Third Circuit).

136. *Id.* at 320. The court lamented the fact that the Supreme Court failed to further expound upon this requirement. *See id.* at 318. The opinion also claimed that there was a dearth of authority in the Third Circuit. *Id.* at 320 ("This Court has never adopted a definitive approach to the relatedness requirement."). This, however, may not be entirely accurate. *See* Remick v, Manfredy, 238 F.3d 248, 256 (3d Cir. 2001); Mellon Bank (East) PSFS Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992). The *O'Connor* court's failure to draw from, or at the very least, distinguish, these precedential rulings is mysterious.

137. *O'Connor*, 496 F.3d at 320 (citing Miller v. Yacht Sales, Inc. v. Smith, 384 F.3d 93, 99–100 (3d Cir. 2004)).

138. *See id.*; *Miller*, 384 F.3d at 99.

Next, the *O'Connor* opinion rejected the hybrid test as being contrary to Third Circuit law.[139] The court described the approach as one that merged the general and specific jurisdiction doctrines together in a "freewheeling totality-of-the-circumstances test."[140] The *O'Connor* opinion criticized this method for allowing courts to adjust "the scope of the relatedness requirement according to the 'quantity and quality' of the defendant's contacts."[141]

Lastly, the court voiced its dissatisfaction with the but-for test.[142] The court acknowledged that the but-for test kept the doctrines of specific and general jurisdiction separate,[143] but explained that the fatal shortcoming of the test was that it had "'no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain.'"[144] The court did acknowledge that most courts that rely on the but-for test temper the test's over inclusiveness by emphasizing the reasonableness requirement of the personal jurisdiction analysis.[145] Nevertheless, Judge Chagares expressed doubt that this was sufficient to salvage the test, given that but-for causation has "more holes than the [reasonableness requirement] can plug."[146]

Having rejected all three established relatedness tests, the court crafted its own method.[147] The court stated that the central function of the relatedness requirement is to maintain balance between the obligations and benefits that accompany an actor's presence in a forum state.[148] According to the court, this means that the relatedness requirement is satisfied when a "meaningful link exists between a legal obligation that arose in the forum and the substance of the plaintiff's claims."[149]

The court began its method by applying the but-for test to Sandy Lane's contacts within Pennsylvania.[150] The court found that Mr. O'Connor "decided to purchase spa treatments 'as a result' of [defendant's] solicitation."[151]

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139. *O'Connor*, 496 F.3d at 321.

140. *Id.*

141. *Id.*

142. *Id.* at 322.

143. *Id.*

144. *Id.* (quoting Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 715 (1st Cir. 1996)). In the words of William L. Prosser, "the causes of an event go back to the dawn of human events and beyond." WILLIAM L. PROSSER, PROSSER & KEETON ON THE LAW OF TORTS 234 (W. Page Keeton et al., eds., 5th ed. 1984).

145. *O'Connor*, 496 F.3d at 322.

146. *Id.*

147. *See id.* at 320–21.

148. *Id.* at 323.

149. *Id.* at 323–24.

150. *See id.* at 322–23 ("[B]ut-for causation provides a useful starting point for the relatedness inquiry.").

151. *Id.* at 323. It is difficult to believe that the spa brochure mailed to the O'Connor's home was the *sine qua non* of Mr. O'Connor's shower injury, but this is the assertion made by the plaintiffs in the district court. *See id.* at 323. And although the plaintiff usually would bear the

Therefore, Sandy Lane's brochure was the but-for cause, for the reason that without the solicitation, Mr. O'Connor would not have purchased a spa treatment and injured himself in the shower.[152]

The court also held that the defendant's mailings and phone calls regarding the spa reservations were sufficient to establish minimum contacts with Pennsylvania.[153] These conversations constituted the formation of a contract, and under Pennsylvania law, certain obligations and benefits arise from such activities.[154] One of those obligations, asserted the court, was the implicit guarantee that Sandy Lane would exercise due care during the performance of the contract.[155] The O'Connors claimed that Sandy Lane's failure to exercise due care "directly and closely relate[d]" to the hotel's contractual obligation.[156] In short, the court equated the plaintiffs' claim to the defendant's obligation, assumed when the hotel made contractual contact with the forum state.[157]

3. Satisfying the Reasonableness Requirement

The court then briefly assessed the reasonableness requirement.[158] The *O'Connor* opinion noted that the establishment of minimum contacts made jurisdiction presumptively constitutional, and that only the most compelling case would render jurisdiction offensive to "'traditional notions of fair play and substantial justice.'"[159] The court held that the presumption of constitutionality had not been rebutted.[160]

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burden of convincing the court of such a fact, the district court's failure to hold an evidentiary hearing diminished that burden to the point that "'the plaintiff[s] need only establish a prima facie case of personal jurisdiction and . . . [are] entitled to have [their] allegations taken as true and all factual disputes drawn in [their] favor.'" *See id.* at 316 (quoting Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 97 (3d Cir. 2004)) (alteration in original). Thus, for the purpose of appellate review, the circuit court had to assume that the brochure was a but-for cause of Mr. O'Connor's decision to book a massage. *Id.* at 323 ("We accept that statement as true because the District Court held no evidentiary hearing . . . . Thus, but for the mailing of the brochure, Mr. O'Connor never would have purchased a massage, and he would not have suffered a massage-related injury." (internal citation omitted)).

152. *Id.* at 323.

153. *Id.* at 322–24.

154. *Id.* at 323.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 324–25.

159. *Id.* (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

160. *Id.* at 325. The court admitted that many of the reasonableness factors weighed in the defendant's favor, especially the distance needed to travel between Barbados and Pennsylvania, the burden of familiarizing itself with a foreign legal system, and the substantive interest Barbados courts had in presiding over litigation involving corporations domiciled within its boundaries and events occurring on it its own soil. *See id.* at 324–25. Nonetheless, the Third Circuit found these factors insufficient to outweigh the presumption that trial in Pennsylvania was just. *See id.* at 325.

Having analyzed the facts of the case under all three elements of the specific personal jurisdiction doctrine, the court held that Pennsylvania courts could rightfully exercise specific personal jurisdiction over Sandy Lane Hotel.[161] The Third Circuit court reversed the lower court's order and remanded the case to district court for further proceedings.[162]

III. ANALYSIS OF THE *O'CONNOR* OPINION

Though the *O'Connor* opinion has been credited with settling the law on personal jurisdiction in the Third Circuit,[163] it has fallen well short of that mark, and in doing so, highlights a common problem in the analysis of specific personal jurisdiction.

A. Form Versus Substance: Two Prongs or Three Requirements?

In its assessment of specific personal jurisdiction, the Third Circuit's application of a three element approach was a significant divergence from the two prong test established by *International Shoe* and found in the Supreme Court's traditional analysis.[164] However, this tripartite structure is commonly applied by district and circuit courts across the federal judicial system,[165] and appears to deviate from the Supreme Court merely in form rather than substance. By splitting the minimum contacts prong into the two steps of purposeful direction and relatedness, courts can more easily focus on the two mutually exclusive and equally critical elements described in *International Shoe*.[166] The *O'Connor* opinion's delineation may clash with the outlines of first-year law students, but it is a well-established structure among practitioners.[167]

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161. *Id.* at 325.

162. *Id.*

163. Duffy, *supra* note 28 (noting that the *O'Connor* opinion sought to clarify the doctrine of personal jurisdiction).

164. *Compare* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (requiring minimum contacts and the satisfaction of traditional notions of fair play and substantial justice), *with O'Connor*, 496 U.S. at 317 ("The inquiry as to whether specific jurisdiction exists has three parts. First, the defendant must have 'purposefully directed [its] activities at the forum.' Second, the litigation must 'arise out of or relate to' at least one of those activities. And third, if the prior two requirements are met, a court may consider whether the exercise of jurisdiction otherwise 'comport[s] with fair play and substantial justice.'" (alterations in original)).

165. *See, e.g.*, Harlow v. Children's Hosp., 432 F.3d 50, 57 (1st Cir. 2005) (holding that (1) "the plaintiff's claim must be related to the defendant's contacts," (2) "the defendant's contacts with the state must be purposeful," and (3) "the exercise of jurisdiction must be reasonable under the circumstances" (citations omitted)).

166. *Int'l Shoe*, 326 U.S. at 316 (noting that the "minimum contacts" analysis must comport with "traditional notions of fair play and substantial justice").

167. *See, e.g.*, Chad Holley, Note, *All Hat and No Horse?* McBee v. Delica *and the Extraterritorial Application of the Lanham Act*, 37 SW. U. L. REV. 183, 200 n.147 (2008) ("The Ninth Circuit has a three-part test for determining whether a defendant has had 'minimum contacts' with the forum. The test is satisfied if '(1) the defendant has performed some act or

B. The Court's Improper Analysis of the Three Relatedness Tests

The *O'Connor* opinion correctly analyzed and rejected the proximate cause[168] and but-for tests.[169] Both of these approaches to determining relatedness are bright-line tests similar to the "mechanical" criteria shunned by Chief Justice Stone in *International Shoe*.[170] The court erred, however, in its analysis of what it called the hybrid tests. Under this singular classification, the court combined two distinct approaches to the relatedness requirement: the substantial connection test and the sliding scale test.[171]

By failing to distinguish the two tests, the court rejected the substantial connection test for the shortcomings of the sliding scale test.[172] In fact, the substantial connection test is by far the purest derivative of the Supreme Court's requirements for relatedness as first set out in *International Shoe*.[173]

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consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable.'" (quoting Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1155 (9th Cir. 2006))).

168. *See id.* The proximate cause test is inappropriate because it institutes an overly stringent relatedness requirement to compensate for a weakened reasonableness requirement. *See, e.g.*, Russo v. Sea World of Florida, Inc., 709 F. Supp. 39, 42 (D.R.I. 1989) (analogizing the questioning of whether the claim arises or relates to a contact with the issue of proximate cause in tort law); State *ex rel.* La Manufacture Francaise Des Pneumatiques Michelin v. Wells, 657 P.2d 207, 211 (Or. 1982) (finding no personal jurisdiction because the defendant's contact in forum state had "no relevance to the substance of this claim"); Kingsley & Keith (Canada) Ltd. v. Mercer Int'l Corp., 456 A.2d 1333, 1338 (Pa. 1983) ("[T]he acts of the nonresident defendant within the forum state [must] represent the factual predicates upon which a cause of action are to be based."). The problem with proximate cause, however, is that *International Shoe* was not concerned with whether the defendant's contact was the proximate cause or factual predicate of the plaintiff's claim. *See Int'l Shoe*, 326 U.S. at 319 (requiring only that a court find nonresident defendants accountable for the obligations that "arise out of or are connected with" their activities inside the forum state). Given that the majority opinions in *Asahi*, *Burger King*, *Helicopteros*, *World-Wide Volkswagen*, *Hanson*, *McGee*, and *International Shoe* all avoided using the term "legal causation" when discussing relatedness, the Court's language suggests that other relationships between the contact and the claim can also create sufficient minimum contacts for the sake of specific jurisdiction. *See supra* notes 60–63 and accompanying text.

169. *See O'Connor*, 496 F.3d at 322 ("But-for causation cannot be the sole measure of relatedness because it is vastly overinclusive in its calculation of a defendant's reciprocal obligations."). The but-for test is flawed because mere connection through a causal chain does not always indicate a sufficient degree of relationship between contact and claim to notify a defendant that he should "reasonably anticipate being haled into court there." *See id.*; *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

170. *Int'l Shoe*, 326 U.S. at 319; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478, 485 (1985) (rejecting any "mechanical tests" or "talismanic . . . formulas" for the determination of personal jurisdiction).

171. *O'Connor*, 496 F.3d at 322 (listing both the substantial connection test and the sliding scale test as part of the same hybrid group).

172. *Id.* at 321–22 (finding the hybrid test too unstructured).

173. *See supra* notes 88–89 and accompanying text. In *International Shoe*, the Court generally referred to the defendant's connection to the forum. *Int'l Shoe*, 326 U.S. at 319 ("The exercise of that privilege [to do business within a state] may give rise to obligations, and, so far as

By considering the totality of the circumstances surrounding the contact, and not merely whether it is the cause of the claim, courts can consistently determine whether there is a substantial connection among the defendant, the claim, and the forum.[174]

Furthermore, the substantial connection test wholly avoids mechanical, bright-line determinations.[175] The *O'Connor* opinion rejected the substantial connection test based on the court's misinterpretation of the totality-of-the-circumstances technique.[176] The court believed that this approach assessed all circumstances surrounding the entire litigation and weighed the aggregation of all purposefully directed contacts.[177] According to the court, the lines between general jurisdiction and specific jurisdiction are unconstitutionally blurred when such an approach is used.[178]

In actuality, an appropriately applied substantial connection test would not scrutinize all potential contacts collectively, but rather each contested contact individually.[179] For instance, if the contact in question involves a contract between a defendant and a plaintiff, the court should examine negotiations that led up to the contract, anticipated penalties of the contract, its terms, whether it has been partially or fully performed, and where such performance takes place.[180] From these additional details, a court can flesh out whether that particular contact, the plaintiff's claim, and the forum state are all substantially connected.[181]

The Supreme Court case that most closely aligns with the substantial connection test is *Burger King*.[182] Applying a quasi-substantial connection test of its own, the majority opinion in *Burger King* refused to be bogged down by analysis of whether the relationship between the defendants' contacts with the

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those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.")

174. *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82 (arguing that courts should distinguish related contacts from fortuitous, but unrelated, contacts).

175. *See O'Connor*, 496 F.3d at 320.

176. *See id.* at 319–21 (criticizing the totality of the circumstances test for providing "no rigid distinction between general and specific jurisdiction").

177. *Id.* at 321–22 (correctly stating that a standard that mixes several factors should have no impact on the relatedness requirement).

178. *See id.* at 319–20.

179. *See, e.g.*, Vons Cos. v. Seabest Foods, Inc., 926 P.2d 1085, 1093 (Cal. 1996) (holding that a court may examine the defendant's individual contacts within a state).

180. *Id.* (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479 (1965)).

181. *See* Rush v. Savchuk, 444 U.S. 320, 327 (1980) (describing the rationale of the minimum contacts test being "'the relationship among the defendant, the forum, and the litigation.'" (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977))).

182. *Burger King*, 471 U.S. at 479 (observing that the dispute in question grew out of a contract that had a "substantial connection" with the forum state); *see supra* Part I.B.3.

forum state and the plaintiff's claims were causally connected.[183] Similarly, the court avoided delving into whether the cause of action arose from the contract between the two parties.[184]

Instead, the court took a broader view, taking into account the details of the two parties' ongoing business relationship, and stating that a contract alone cannot sufficiently establish minimum contacts in the state where the contact was formed.[185] The analysis, asserts the Court, must ascertain whether the contract had a substantial connection with the state in which it was made.[186] Only then can the requirements of minimum contacts be fully satisfied.[187]

In *Burger King*, the Court closely examined the conditions surrounding the contract between the defendant and the plaintiff to determine whether the contact had substantial connections with the forum state.[188] The Court found that the defendants knew they were entering into a long-term relationship with the plaintiff; that most, if not all, of the plaintiff's performance would occur in the forum state; and that taxes and laws enforced by the forum state would be controlling.[189] The Court concluded that the defendants could have reasonably predicted that disputes arising from the contract were just as likely to be litigated in Florida as they were in the defendants' own state.[190]

O'Connor failed to incorporate the lessons of *Burger King*, and therefore missed a critical application of the substantial connection test. Although the sliding scale test that the Third Circuit court condemned clearly defies the personal jurisdiction doctrine, the court overreached.[191] Lumping the sliding scale test with the substantial relationship test[192] was erroneous, and ultimately resulted in the court overlooking good law.

C. Why the Approach Used by the Court in O'Connor *Fails*

The first error in the *O'Connor* opinion was the court's failure to elucidate the method it ultimately adopted when it assessed the case's minimum contacts and relatedness requirement.[193] The opinion provided very little explicit guidance for how future courts should test the sufficiency of minimum

183. *See Burger King*, 471 U.S. at 485–86.

184. *See id.*

185. *See id.* at 479; *see also* Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 317 (1943) (examining more than just the place the contract was formed).

186. *Burger King*, 471 U.S. at 479 (observing that the dispute in question "grew directly of 'a contract which had a *substantial connection* with [the forum state]'" (quoting McGee v. Int'l Ins. Co., 355 U.S. 220, 223 (1957))).

187. *Id.* at 481.

188. *Id.* at 480–81.

189. *Id.*

190. *Id.* at 482.

191. *See supra* notes 170–71 and accompanying text.

192. O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 321 (3d Cir. 2007).

193. *See id.* at 323.

contacts.[194] Furthermore, it overemphasized causation and the importance of a contract's existence.[195]

1. An Overemphasis on Causation

By deconstructing the application of *O'Connor*'s unexplained test, two substantive errors are evident in the court's analysis. At its outset, the *O'Connor* approach overemphasized the issue of causation, making it the threshold factor in the relatedness requirement inquiry.[196] Evaluating cause and effect is a suitable means of testing the relationship between a claim and a contact when assessing minimum contacts, but it should not be the exclusive means.[197]

In its analysis of the relatedness requirement, the court discussed the spa brochure as a potential minimum contact in some length.[198] Certainly, the brochure had a but-for connection with the arising litigation,[199] but that connection was entirely too tenuous to bear any weight in the instant case because the brochure was not negligently written, nor was it a substantive element of the ensuing contract.[200] Because the Supreme Court has suggested that a single contact may be insufficient if the contact is too attenuated, the brochure cannot constitute a sufficient minimum contact standing alone.[201]

2. An Overemphasis on the Existence of a Contract

The second flaw in the *O'Connor* test was its overemphasis on the contractual nature of the phone calls regarding Mr. O'Connor's spa

194. *Id.* at 324 (offering a vague directive that there must be a "meaningful link between a legal obligation that arose in the forum and the substance of the plaintiff's claims").

195. *See id.* at 323–24.

196. *See id.* at 323 (emphasizing the need for a "more direct causal connection than provided by the but-for test").

197. *See* Helicopteros Nacionales Colombia, S.A. v. Hall, 466 U.S. 408, 420 (1984) (Brennan, J., dissenting) (writing that the Court severely limited the type of contacts that will satisfy the constitutional requirement by refusing to consider controversies that "relate to" contacts as well as those that "arise out of" a defendant's contacts); Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 715 (1st Cir. 1996) ("We see no reason why, in the context of a relationship between a contractual or business association and a subsequent tort, the absence of proximate cause per se should always render the exercise of specific jurisdiction unconstitutional.").

198. *O'Connor*, 496 F.3d at 318.

199. *Id.* at 323.

200. *Id.* at 316 (noting that Mr. O'Connor contracted for spa services over the phone).

201. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) (suggesting that it is unlikely that a singular act by a corporate agent would be sufficient to create personal jurisdiction); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 n.18 (1985) (noting that singular acts related to the forum may be insufficient if the circumstances surrounding the acts create only an attenuated connection with the forum).

reservation.[202] Contracts are not minimum contacts per se.[203] Although the formation of a contract may establish a substantial connection between the two parties, the relatedness analysis requires a substantial connection between the claim, the contract, *and* the forum state.[204] If the contract and the forum state lack a substantial connection, the contract cannot satisfy the relatedness requirement.[205]

In the *O'Connor* case, Mr. O'Connor and Sandy Lane formed an agreement while the plaintiff was in Pennsylvania.[206] That fact, however, does not automatically generate a manifest interest for the commonwealth of Pennsylvania.[207] The contract was still fully executory.[208] In particular, the parties had not exchanged money or services in Pennsylvania.[209] This is hardly the ongoing, substantial, inter-state business relationship found in the Supreme Court's *Burger King* analysis.[210] It was merely an informal reservation with no discernable impact on the state in which it was made.

If Mr. O'Connor had been on his cell phone during those phone calls and was returning back from New York after a deposition, would it be appropriate to allow every state along Interstate 95 to have jurisdiction over this case? What if the call was made on a flight from Philadelphia International Airport to Los Angeles? Surely the courts in the Midwest, Great Plains, and Rocky Mountains would not be debating what latitudinal lines the plane flew over when the offer, acceptance, and consideration were each established.[211]

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202. *See O'Connor*, 496 F.3d at 323.

203. *Cf.* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (holding that due process was satisfied because the suit was based on a contract "which had substantial connection with that State"). Based on *McGee*, it can be inferred that contracts with insubstantial connections to the state do not satisfy due process.

204. *See* Rush v. Savchuk, 444 U.S. 320, 327 (1980) (describing the rationale of the minimum contacts test being "the relationship among the defendant, the forum, and the litigation" (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977))).

205. *See id.* at 326–27.

206. *O'Connor*, 496 F.3d at 315–16.

207. *See McGee*, 355 U.S. at 223 (stating that the forum state had a manifest interest in providing a forum because the plaintiff paid for services via mail from the forum state and was a resident of the forum state where the contract would be performed).

208. *See O'Connor*, 496 F.3d at 316.

209. *See id.*

210. *Compare* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479 (1985) ("[The defendant] deliberately reached out beyond [his home state] and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from the affiliation with a nationwide organization."), *with O'Connor*, 496 F.3d at 321–23 (involving a singular agreement for spa services during a vacation).

211. Admittedly, the airplane hypothesis is an extreme scenario, but it illustrates the fact that no court should rely solely on the fact that a contract was partially formed within its boundaries when establishing specific personal jurisdiction. *See* Brilmayer, *supra* note 174 ("A contact is related to the controversy only if it is the geographical qualification of a fact relevant to the merits."). Instead, courts contemplating specific jurisdiction should assess the factors

IV. CONCLUSION

Although the *O'Connor* opinion attempted to provide a comprehensive analytical approach for the Third Circuit to use when addressing specific personal jurisdiction, its approach to the relatedness requirement only muddied the water further for future courts. *O'Connor* abdicates its responsibility to provide a cohesive, constitutional approach for determining what degree of relatedness is required between a claim and a contact. Instead of adopting the substantial connection test, the court presents a flawed analysis that not only obfuscates its own methodology, but incorrectly overemphasizes causation and the existence of contracts.

For the sake of providing due process, hopefully some authoritative body in the future recognizes the critical situation our legal system has fallen into. Without a consistent scheme, there can be no predictability, and without predictability, no court in this country is able to dispense personal jurisdiction within the bounds of the Constitution.

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surrounding the contract and determine whether the state has a more substantial connection with the contact than mere physical proximity. *See id.*