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Abstract
An Australian consumer who is injured by a defective product manufactured by an American citizen or company would be well advised to bring his or her action the United States of America rather than the home forum.

This paper considers the forum non conveniens doctrine and the dilemma created by the United States Supreme court in Piper Aircraft Co v Reyno.

Keywords
product liability, forum non conveniens, Piper Aircraft Co v Reyno

Articles

PRODUCT LIABILITY—AN EXAMINATION OF THE EFFECT OF THE DOCTRINE OF FORUM NON CONVENIENS ON AUSTRALIAN LITIGANTS IN THE UNITED STATES OF AMERICA*

by
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Introduction

An Australian consumer who is injured by a defective product manufactured by an American citizen or company would be well advised to bring his or her action in the United States of America rather than the home forum.[1]

Product liability law as developed in the United States of America imposes strict liability upon all those in the chain of placing a defective

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1 It may indeed be the case that the home forum does not have jurisdication and therefore it will be necessary to sue in the United States.

Order 11 Rule 1(4) Supreme Court Rules provides for service of a defendant out of the state when any act or thing for which damages are sought to be recovered was done within the jurisdiction. Whether the act was done within the jurisdiction will depend upon the particular facts of the case. In the case of a claim for negligence it has been held that the tort was committed in the place where the negligent act or omission occurred rather than in the place where the injury occurred. *Lewis Construction Co Pty Ltd v Tichauer SA* 1966 VR 341; *Buttigeig v Universal Terminal and Stevedoring Corp* 1972 VR 626; *MacGregor v Application des Gax* 1976 QR 175.

However, the Privy Council in *Distillers Co (Bio-Chemicals) Ltd v Thompson* 1971 AC 458 held that a failure to warn that the drug marketed was dangerous to pregnant women was a wrong committed at the point of sale (New South Wales) therefore the New South Wales court had jurisdiction. See also P Nygh, *Conflict of Laws in Australia*, (4th ed, 1984) 35-38.

product in the stream of commerce.[2] The manufacturer,[3] wholesaler and/or distributor,[4] retailer,[5] lessor,[6] and licensee[7] are all potentially liable to the injured consumer under the doctrine of strict liability. Indeed there need be no precise legal relationship between the defendant and injured consumer, or the defendant and the maker of the product for the defendant to come within the umbrella of liability. It is sufficient that the defendant is an integral part of the overall producing and marketing enterprise of the defective product.[8] Clearly strict liability is more attractive to plaintiffs than the requirement still prevalent in Australian jurisdictions to either prove negligence, with the burden of proof remaining on the plaintiff throughout,[9] or if the consumer wishes to sue the manufacturer of the defective product, to establish the existence of a contractual relationship with that party.

With respect to the negligence based action the standard of liability still falls significantly below one of strict liability, as strict liability in tort without fault remains the preserve of the *Rylands v Fletcher*[10] situation, or in some cases nuisance, but the doctrine has not been extended to the field of product liability.[11]

It is also difficult for a consumer to establish a contractual relationship with the manufacturer as in most cases the contract of sale will be between the consumer and retailer who may in turn have purchased goods from a wholesaler. Certainly if the purchaser does successfully sue the retailer the latter has a contractual right to sue his supplier for breach of warranty and so on up the chain of distribution to the manufacturer; but this is an expensive and cumbersome way of bringing home to the manufacturer liability for defective goods and sometimes the process breaks down.[12]

The United States presents an attractive forum for the Australian litigant for many other reasons. Contingency fees mean that the foreign plaintiff will not need to find a large amount of money for lawyer's fees before receiving judgment. Courts in the United States generally do not award costs against the 'loser'. The plaintiff can also expect to receive a greater amount in damages from an American court than an Australian court, and discovery and other pre-trial procedures are infinitely better than ours.[13]

2 *Allison Steel Mfg Co v Superior Court of Maricopa County* 511 P 2d 198, 20 Ariz App 185 (Ct App, 1973).
3 *Greenman v Yuba Power Productions, Inc* (1973) 27 Cal Reptr 697.
4 *Barth v B.F. Goodrich Tire Co* (1968) 265 Cal App 2d 228.
5 *Vandermark v Ford Motor Co* (1964) 61 Cal 2d 256.
6 *McClaflin v Bayshore Equipment Rental Co* (1959) 274 Cal App 2d 446.
7 *Garcia v Halsett* (1970) 3 Cal App 3d 319.
8 *Kasel v Remington Arms Co*, 101 Cal Rptr 314, 24 CA 3d 711, (1971)
9 *See Daniels and Daniels v R White and Sons Ltd* (1938) 4 All ER 258.
10 (1868) LR 3 HL 330.
11 RG Blunt, 'The Tort System and Liability of Manufacturers for Product—related Injuries and Death: The Australian Viewpoint' (1980) 54 ALJ 472.
12 In *Lambert v Lewis* (1978) 1 Lloyd's LR 610 the contractual indemnifying process broke down because the retailer could not remember the name of the distributor.
13 *Piper Aircraft Co v Reyno*, 454 US 235, 252 n 18 (1981).

However, Australian litigants in the United States are faced with a number of problems which revolve around selecting the most appropriate forum in America in which to bring the action.

Ideally the plaintiff will be seeking a forum which:—

1. has jurisdiction;
2. will not dismiss the action on the basis of the forum non conveniens doctrine;
3. will apply substantive law which will be favourable to the plaintiff's case.

This is indeed a tall order, and especially so in the case of a foreign plaintiff suing in the United States.[14] Choice of law, although becoming increasingly more complicated will often be resolved favourably. However, it is the doctrine of forum non conveniens which currently presents the greatest barrier for the Australian litigant in the United States as it 'provides a viable means for reducing litigation by foreign plaintiffs'[15] and indeed the judicial tendancy has increasingly been to employ this doctrine.[16]

This paper considers the forum non conveniens doctrine and the dilemma created by the United States Supreme Court in *Piper Aircraft Co v Reyno*.[17]

Forum Non Conveniens

The doctrine of forum non conveniens allows a court which has jurisdiction over an action to dismiss that action when the court determines it would be more appropriate to litigate the matter in another forum.[18] The doctrine presupposes that the court correctly has jurisdiction and venue[19] and that there exists another forum in which the defendant is amenable to process.[20]

14 As is the case in the Australian federal system each state in the US is a separate jurisdictional sovereignty. Product liability and negligence are matters of state law and even though suit by an Australian will usually be brought in a federal court because of diversity of citizenship, the federal court will be applying state law. *See Erie Railroad Co v Tompkins*, 304 US 64 (1938).
15 D Boyce, 'Foreign Plaintiffs and Forum Non Conveniens. Going Beyond *Reyno*'(1985) 64 Tex L Rev 193, 195.
16 AR Stein, 'Forum Non Conveniens and The Redundancy of Court Access Doctrine' (1984-5) 133 U Pa L Rev 781, 784.
17 454 US 235 (1981). (*Reyno* case.)
18 *Gulf Oil Corp v Gilbert* 330 US 501 (1947).
19 Id 504.
20 Id 506-7. The forum non conveniens doctrine presupposes an alternative forum. In *Tramo Oil & Marine Ltd v M/V Mermaid I* 743 F 2d 48 (1st Cir 1984) the Court of Appeals in a maritime case stated there *must* be an alternative forum for dismissal on forum non conveniens ground.

The Basic Doctrine

The doctrine was developed by the Courts of Scotland[21] and was first applied in the United States in admiralty cases.[22] In 1947 the United States Supreme Court in *Gulf Oil Corp v Gilbert*[23] and *Koster v Lumbermens Mutual Casualty Co*[24] confirmed the extension of the doctrine beyond the admiralty jurisdiction to dismissal of common law and equitable suits.[25]

In the *Gulf Oil* case,[26] the Supreme Court reinstated a decision of the District Court dismissing a suit commenced in New York by a citizen of Virginia, against a Pennsylvanian corporation carrying on business in New York and Virginia. The action concerned a fire which occurred at the plaintiff's warehouse in Lynchburg, Virginia. All relvant events occurred in Virginia and all witnesses were located there.

The plaintiff offered two main reasons for commencing the action in New York. First, the plaintiff thought that his claim for damages of four hundred thousand dollars 'may stagger the imagination of a local jury . . . unaccustomed to dealing with amounts of such a nature'.[27] Secondly, the plaintiff argued that his case would be prejudiced by trial in Virginia because it would be impossible to procure a jury with no previous knowledge of the facts.[28]

The Supreme Court approach was a significant departure from the traditional one as it held that the central focus in an enquiry as to the applicability of forum non conveniens was one of convenience. The court therefore rejected the above arguments and affirmed dismissal of the plaintiff's action on the basis of an inconvenient forum. Dismissal on the ground of forum non conveniens left much to the discretion of the judge and his exercise of it would only be overturned if a clear abuse of such exercise was evident.[29] The Supreme Court found that on the facts there had been no abuse of discretion, Virginia being a far more appropriate forum for the trial.

The court in the *Gulf Oil* case[30] stated that the purpose of the forum non conveniens doctrine was to ensure that the plaintiff did not bring

21 *Piper Aircraft Co v Reyno* 454 US 235, 248 n 13 (1981). *See also* KL Hartman, 'Forum Non Conveniens and Foreign Plaintiffs in the Federal Court' (1981) Geo LJ 1251, 1259 But *See* Paulsen and Burrick 'Forum Non Conveniens in Admiralty' (1982) 13 J Mar L & Com, 343, 346-7 suggest that the doctrine was developed in America prior to and independently of the doctrine developing in Scotland.

22 Casenote—*Piper v Reyno*: 'Change of Law and the Forum Non Conveniens Enquiry' (1982) 36 Ark L Rev 273, 292.

23 330 US 501 (1947). (*Gulf Oil* case.)

24 330 US 518 (1947). (*Koster* case.)

25 The US Supreme Court has not conclusively determined whether federal or state law is applied in a diversity case. In several cases the court has been able to avoid the issue by assuming that state and federal doctrine were identical *See Piper v Reyno* 454 US 235, 248 n 13(1981), the *Gulf Oil* case 330 US 501, 509 (1947) and see H Litman, 'Considerations of choice of Law in the Doctrine of Forum Non Conveniens' (1986) 74 Cal L Rev 565, 566 n 8.

26 330 US 501. (1947).

27 Id 510.

28 Id 510.

29 Id 507.

30 Id 501.

actions in a particular forum simply to harass and vex the defendant. Rather it was a device to be used by the court to control 'the temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary. . .'[31] However, the court maintained that 'unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed'.[32]

Public and Private Interest Factors

According to the Supreme Court the criteria federal courts must consider when determining whether to apply their discretion are divided into the 'private interests' of the litigants, and the 'public interests' of the local forum.

In the private interest sphere important considerations include:—

(a) the relative ease of access to sources of proof;
(b) the availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining the attendance of witnesses;
(c) the desirability of a view of the relevant location;
(d) all other practical matters that make trial of a case easy, expeditious and inexpensive;
(e) the enforceability of a judgment if one is obtained.[33]

Public interest factors include:—

(a) congestion of the courts;
(b) the fact that jury duties ought not to be imposed upon a community that has no relation to the litigation;
(c) the interest in having localised controversies decided at home;
(d) in diversity cases the appropriateness of having the case heard by a court which is familiar with the law to be applied.[34]

However, it can be argued that the focus here was not on any unfairness to the plaintiff but simply on the practical burdens a court may encounter in untangling 'problems in conflict of laws, and in law foreign to itself'.[35] Therefore the court was not concerned with which law was to apply to the dispute, but only with the procedural complications of making that determination.[36]

The Circuit Court of the District Court of Columbia in *Pain v United Technologies Corp* [37] took the *Gulf Oil* factors one step further by laying down a four part test in application of these factors namely:—

I. Establish whether an adequate alternative forum exists which possesses jurisdiction over the whole case;

31 Id 508.

32 Id 508.

33 Id 508.

34 Id 508-9.

35 Id 508-9.

36 Litman, 74 Cal L Rev 573.

37 637 F 2d 775 (DC Cir 1980)

2. Consider all relevant *Gulf Oil* factors of private interest, weighing in the balance a strong presumption against disturbing the plaintiff's initial forum choice;
3. If the balance of private interest is in equipoise, the court then must determine whether or not the *Gulf Oil* public interest factors tip the balance in favour of trial in the alternative forum; and
4. The court must ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.[38]

However, in the *Gulf Oil* case[39] itself the Supreme Court refused to identify any specific circumstances which would justify or require either grant or denial of a remedy, but preferred to retain flexibility in weighing all the relevant private and public interest factors and determining each case on its own facts.[40] However, in agreement with the commentator David Boyce, the scale is clearly tipped in the plaintiff's favour.[41]

Despite this strong presumption in favour of the plaintiff's choice of forum the trial court may nevertheless dismiss the action in the exercise of its discretion if it is shown by the defendant that:—

1. the chosen forum would show such oppressiveness and vexation to the defendant out of all proportion to the plaintiff's convenience, or
2. the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems.[42]

The decision in the *Gulf Oil* case[43] did not distinguish between home forum and non home forum plaintiffs, and in fact the Circuit Court for the District Court of Columbia in *Pain*[44] stated that American citizenship per se proves largely irrelevant in the *Gulf Oil*[45] balancing process. A similar viewpoint was adopted in *Alcoa S.S. Company v M/V Nordic Regent*.[46] Consequently pre *Piper Aircraft Co v Reyno*,[47] citizenship of the plaintiff was not a key issue. There was no determination that foreign plaintiffs were disadvantaged as compared to American citizens.

Conclusion

Under the principles enunciated in the *Gulf Oil* case[48] and the *Koster* case[49] a defendant moving for dismissal on forum non conveniens ground had a difficult task. He carried the burden of convincing the court that

38 Id 797-99
39 330 US 501 (1947).
40 *See also Williams v Green Bay and Western Ry Co*, 326 US 549, 557 (1946) where the Supreme Court refused to lay down any strict rule to govern discretion and stressed that each case turns on its facts.
41 Boyce, 64 Tex L Rev 205.
42 *Koster* case 330 US 518, 524 (1947).
43 330 US 501 (1947).
44 637 F 2d 775 (DC Cir 1980).
45 330 US 501 (1947).
46 101 US 258 (1980).
47 454 US 235 (1981).
48 330 US 501 (1947).
49 Id 518.

after reviewing the *Gulf Oil*[50] factors the balance was so strongly in his favour that it would be unfair and oppressive not to dismiss the suit. However, relatively recent cases culminating in the *Reyno* case[51] demonstrate a movement away from requiring the defendant to discharge such a difficult onus.[52] The courts today while giving lip service to the principles of *Gulf Oil*[53] and *Koster*[54] appear to be requiring the defendant to show that the forum is merely inconvenient rather than oppressive or burdensome. This is not an encouraging development from the point of view of an Australian plaintiff wishing to litigate in the American forum.

The United States Supreme Court Decision in *Piper Aircraft Co v Reyno*

The next stage in the evolution and refinement of the doctrine of forum non conveniens came in 1981 with the United States Supreme Court decision in *Piper Aircraft Corp v Reyno*[55] which was the court's first word on the subject since *Gulf Oil*[56] thirty-five years previously.

The Supreme Court in *Reyno*[57] formally acknowledged that the doctrine of forum non conveniens could be used to dismiss actions from federal courts, even though dismissal would have the result of relegating the plaintiff to a forum which had laws 'less hospitable to her cause of action.'[58] This was so even though all forum rules governing forum access were satisfied, that is personal and subject matter jurisdiction and venue. It was even determined that the forum's law would govern the liability issue.[59] Despite these factors the trial court could in its discretion, after weighing the *Gulf Oil*[60] factors decline to assert jurisdiction over the case, after determining that retention of jurisdiction was inappropriate.

The facts in *Reyno*[61] are reasonably straightforward and typical of incidents giving rise to forum non conveniens arguments. The litigation arose out of the crash of a twin-engine Piper Aztec airplane in the Scottish highlands. The pilot and five (5) passengers, all Scottish citizens, were killed instantly. Reyno, a citizen of the United States, commenced wrongful-death actions as administratrix of the estates of the five dead passengers against the Piper Aircraft Company (Piper) and Hartzell Propellor Inc (Hartzell). The propellors had been made in Ohio by

50 Id 501.
51 454 US 235 (1981).
52 C Neslund, 'Forum Non Conveniens: Limiting Access to Federal Courts for Transnational Disputes' (1981) J Int'l and Pol'y 379. Recent Decisions, 'Jurisdiction and Procedure—Forum Non Conveniens' (1986) 15 Vand J Transnat'l L 583, 594-6.
53 30 US 501 (1947).
54 Id 518.
55 454 US 235 (1981).
56 330 US 501 (1947).
57 454 US 235 (1981).
58 Stein, 133 U Pa L Rev 822.
59 The Court of Appeals determined that the forum law would at least apply to the defendant Hartzell. The Supreme Court did not question the Court of Appeals choice of law determination.
60 330 US 501 (1947).
61 454 US 235 (1981).

Hartzell and the plane had been manufactured in Pennsylvania by Piper. Reyno alleged negligence and strict liability on the part of these two defendants. At the time of the accident the aircraft was owned and maintained by Air Navigation and Trading Co Ltd (Air Navigation) and registered in Great Britain. McDonald Aviation Ltd (McDonald) operated the aircraft in Great Britain as part of its air taxi service. Following the accident the British Department of Trade investigated and their report suggested mechanical failure. However, after a nine day hearing by a Review Board no substantial evidence of defective product was found and the Board concluded that the likely cause of the accident was pilot error. There was evidence to suggest the pilot was flying at an unsafe altitude. Separate actions by the relatives of the five passengers had been filed in Scotland against Air Navigation, McDonald and the pilot's estate.[62]

Reyno had originally commenced her action in the Superior Court of California. However, the suit was removed to the United States District Court for the Central District of California on the motion of Hartzell and Piper. Piper then petitioned for transfer pursuant to 28 USCAS 1404(a) to the United States District for the Middle District of Pennsylvania. Transfer was granted. Once in that court, Piper and Hartzell moved for dismissal on the basis of forum non conveniens. They argued that the matter should be litigated in Scotland, not the United States. Both defendants agreed to submit to the jurisdiction of the Scottish court and to waive any defence based upon the Statute of Limitations. The District Court dismissed the action upon these conditions, holding that as the plaintiff was the representative of foreign plaintiffs her choice of forum was of little weight.[63] Further, after a consideration of *Gulf Oil*[64] private and public interest factors Scotland was overwhelmingly the more convenient forum.

The United States Court of Appeals reversed this decision on two grounds: first, dismissal is not appropriate where the law of the alternative forum is less favourable to the plaintiff; and secondly, the District Court had abused its discretion in conducting the *Gulf Oil* analysis.[65]

Certiorari was granted by the United States Supreme Court. They reversed the decision of the Court of Appeals and reinstated the District Court's dismissal.

The Supreme Court closely scrutinised the decision of the District Court and held that it did not err in the exercise of its discretion; and as the forum non conveniens determination is committed to the sound discretion of the District Court it can only be reversed where there has been a clear abuse of discretion.[66]

It is therefore arguable that an abuse of discretion will always be difficult to substantiate by an appellate court, provided the trial judge

62 Id 240.
63 Id 242.
64 330 US 501 (1947).
65 454 US 235, 244 (1981).
66 Id 238.

has 'dutifully recited the *Gulf Oil* factors and stated a conclusion'.[67] Arguably therefore there is no effective appellate review of trial court decisions—they are only subject to cursory appellate scrutiny. The result of this is that in practical terms reversals of forum non conveniens rulings are infrequent.[68]

Piper v Reyno: Change in Substantive Law

It is impossible not to agree with the Supreme Court that giving conclusive weight to the possibility of a change in the law would render the doctrine of forum non conveniens virtually useless.[69] As the court stated, jurisdiction and venue requirements are often easily satisfied giving the plaintiff several forums to choose from. Naturally the plaintiff will select the forum whose choice of law rules are most advantageous to his case. The result would be that a defendant would almost always fail in a motion to dismiss because it would result in an unfavourable change in the law.[70]

The court did however hold that an unfavourable change in the law should be given substantial weight when the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is really no remedy at all.[71]

Such an approach is necessary in any event because the doctrine of forum non conveniens presupposes that there is an alternative forum where the plaintiff can in fact prosecute his claim. If the remedy provided by the forum is so inadequate as to amount to no remedy at all, clearly there is no alternative forum. No basis then exists for the application of the doctrine.

But the Supreme Court's approach is subject to the serious criticism that it 'instructs the court to ignore a factor affecting justice—a change of law—and weigh factors which may or may not affect justice or convenience—residency and citizenship.'[72] The result is a movement away from the principles underlying the forum non conveniens doctrine.[73]

It is suggested that a better approach would be to give some weight to the fact that an unfavourable change in the law may result for the plaintiff if the action is dismissed.[74] More weight should be given to this factor when the alternative forum is only available through submission by the defendant. For the reasons outlined above, this factor should not be conclusive, but certainly it should be taken into account, otherwise the court will be ignoring the fact that the defendant is engaged in reverse forum shopping. In many instances the true motivation behind the forum

67 Stein, 133 U Pa L Rev 832.
68 ibid.
69 454 US 235, 250 (1981).
70 ibid.
71 Id 254.
72 Recent Decisions, 15 Vand J Transnat'l L 594.
73 ibid.
74 If an Australian plaintiff's action is dismissed by the US Courts, strict liability in tort is not available in Australia. The plaintiff would then have to sue in negligence which is more difficult to prove.

non conveniens application is *NOT* that the forum is inconvenient but rather an understandable desire to avoid the application of the more stringent laws relating to product liability. If the court allows this fact to be ignored it makes a mockery of the doctrine. As stated by one commentator:—

> American defendants have turned with increasing frequency to the forum non conveniens doctrine because it has proven to be an effective means to avoid litigating an international dispute in federal court. Although it is common practice, a purely defensive use of forum non conveniens as a litigation strategy conflicts with the doctrines underlying purpose: ensuring that defendants are protected from unnecessary inconvenience.[75]

In *Reyno*[76] the Supreme Court stated in a footnote to their judgment that the fact that the defendant may be engaged in reverse forum shopping 'ordinarily should not enter into a trial court's analysis of the private interest factors.'[77] The Court stated that:—

> If the defendant is able to overcome the presumption in favour of the plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome dismissal is appropriate—regardless of the fact that the defendant is also motivated by a desire to obtain a favourable forum.[78]

With the greatest respect to the court, this statement is hardly apposite to the foreign plaintiff who, according to *Reyno* does not have the advantage of a presumption in his favour that the chosen forum is convenient. By denying a foreign plaintiff this presumption and ignoring the fact that the defendant is seeking dismissal, not because it is 'unnecessarily burdensome' to defend in his own forum but to avoid the more stringent liability imposed by the American court, the court is unwittingly condoning reverse forum shopping. This is particularly harsh on the foreign plaintiff bringing suit in the United States when no other forum has jurisdiction except by the consent of the defendant. It is difficult to see the reason for such discrimination unless it is to relieve the pressure of a backlog of cases on the United States court structure.

In *Fiacco v United Technologies Corp*[79] the Southern District Court of New York took the view that a difference in substantive law was a relevant consideration. The court was being asked to dismiss a plaintiff who jurisdictionally had a right to sue in only one forum. An alternative forum would only have jurisdiction through the defendant's voluntary submission to that jurisdiction.

The case arose from a helicopter crash in the North Sea, off Norway. One plaintiff was American, one English and seven were Norwegian. The defendant, an American helicopter manufacturer, moved to dismiss on forum non conveniens grounds. The court refused dismissal on the basis, inter alia, that it would result in a change in substantive law unfavourable

75 Hartman, Geo L J 1258.
76 454 US 235 (1981).
77 Id 252.
78 Id 252.
79 524 F Supp 584 (SDNY 1981).

to the plaintiff.[80] This approach is to be commended because it at least acknowledges the fact that the defendant in many cases is engaged in reverse forum shopping.

Reyno: Foreign Plaintiff's Choice Entitled to Less Deference

The Supreme Court in *Reyno*[81] affirmed the view taken by the District Court that a distinction is to be drawn between resident or citizen plaintiffs and foreign plaintiffs. A foreign plaintiff's choice is to be given less deference than that of a citizen or resident, and therefore the normally strong presumption in favour of the plaintiff's choice is not applicable. A number of criticisms can be made regarding this approach but the most telling is that the reasoning on which it is based does not withstand close analysis—at least in the case of an American defendant. The Court's reasoning runs as follows:—

> When the home forum has been chosen, it is reasonable to assume that the choice is convenient. When the plaintiff is foreign this assumption is much less reasonable. Because the central purpose of any forum non conveniens inqury is to ensure that the trial is convenient, *a foreign plaintiff's choice deserves less deference.*[82]

This reasoning could not be faulted if the only consideration was the convenience of the forum to the plaintiff. If the plaintiff sues in his home forum it is reasonable to assume that such a forum is convenient for him. But, suing in the home forum says nothing as to the convenience of the forum for the defendant, unless of course it is also the defendant's home forum. If the plaintiff sues in the defendant's home forum then it is equally reasonable to assume that this forum is convenient for the defendant. It is therefore suggested that when a foreign plaintiff sues an American defendant in the latters home forum the plaintiff should at least be entitled to a presumption that the forum is convenient. After all, the court is enquiring into the question of whether the plaintiff's choice of forum will 'vex', 'oppress' or 'harrass' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.[83] The court is considering primarily the convenience of the forum to the defendant—not the plaintiff. There is no logic in presuming that the plaintiff's choice of forum is not convenient, in a true sense of the word, when the plaintiff sues in the defendant's home forum. It is suggested however, that a presumption in favour of the plaintiff may not be so readily inferred when a foreign plaintiff is suing a foreign defendant in an American forum. Apart from this latter situation it is agreed that:—

> The practical obstacles to trial in some alternative forums argue for close scrutiny of forum non conveniens dismissals that might be uniquely prejudical to foreign plaintiffs. *The citizenship of a foreign plaintiff should not lessen the burden (on the defendant) of proving inconvenience in such motions.*[84]

80 The court found that it was essentially a product liability case and all records and potential witnesses regarding the defective nature of the product were located in the US.
81 454 US 235 (1981).
82 Id 256.
83 330 US 501, 508 (1947).
84 Hartman, Geo L J 1282. (Emphasis added.)

Although historically some greater deference has been given to American plaintiffs this is not always so. As has already been noted the Court of Appeals in the *Pain* case[85] stated that American citizenship per se proves largely irrelevant to the *Gulf Oil*[86] balancing process. This view was echoed in the *Alcoa SS Co* case.[87]

Another question raised by *Reyno*[88] is whether a foreign plaintiff who joins with American citizens as co-plaintiffs will be in a better position so far as deference to his or her choice of forum is concerned. There are several cases where American courts have in fact refused to dismiss a foreign plaintiff for forum non conveniens because of this situation,[89] yet others where dismissal has been granted notwithstanding that factor, for example in *Cheng v Boeing Co.*[90] where the facts were similar to *Reyno*[91] it was held that 'the presence of American plaintiffs, however, is not in and of itself sufficient to bar a District Court from dismissing a case on the ground of forum non conveniens.'[92] In fact the Court of Appeals agreed with the District Court's conclusion that Taiwan was the more appropriate forum in that case.

Reyno: The *Gulf Oil* Analysis: Private Interest Factors

The Supreme Court in *Reyno*[93] affirmed the District Court's analysis of the *Gulf Oil*[94] private interest factors. The District Court had determined that although the evidence concerning the design, manufacture and testing of the plane and the propellor was located in the United States, the connections with Scotland were otherwise 'overwhelming'.[95] The real parties in interest were Scottish citizens. Witnesses essential to the defence who could testify regarding the maintenance of the plane, the experience of the pilot and the independent investigations were in Scotland. Trial would be aided by familiarity with Scottish topography and by easy access to the wreckage.

The court concluded that because crucial witnesses would be beyond the reach of compulsory process and because the defendant would not be able to implead Scottish third party defendants, the action should be dismissed.[96] Some commentators have disagreed with this conclusion.[97]

At the least the reasoning of the District Court and the Supreme Court exhibits a predeliction for the American defendant and a rather cursory

85 637 F 2d 775 (D C Cir 1980).
86 330 US 501 (1947).
87 101 US 258 (1980).
88 454 US 235 (1981).
89 *See Swift & Co Packers v Compania Colombiana Del Caribe*, S.A. 339 US 684 (1950).
90 708 F 2d 1406 (9th Cir 1983).
91 454 US 235 (1981).
92 708 F 2d 1406, 1411 (9th Cir 1983).
93 454 US 235 (1981).
94 330 US 501 (1947).
95 454 US 235, 242 (1981).
96 ibid.
97 MG Stewart, 'Forum Non Conveniens: A Doctrine in Search of a Role' (1986) 74 Cal L Rev 1268. The writer concluded 'the case seems wrongly decided'.

treatment of factors which favoured retention of the suit. So far as the source of proof and compulsion of witnesses are concerned, the matter was pretty evenly balanced. The plaintiff's witnesses (both for an action in strict liability and negligence) were located in the United States—the defendant's witnesses in Scotland. The connections with Scotland are therefore not 'overwhelming'. Indeed, the Supreme Court reached this conclusion, but concluded that the District Court did not act unreasonably in deciding that fewer evidentiary problems would be posed if the trial were held in Scotland.[98]

Both the District Court and the Supreme Court placed great weight on the fact that the plaintiff had commenced suit in Scotland against Air Navigation and McDonald, and that these defendants were not amenable to suit in the United States. This clearly pointed to Scotland being the more convenient forum. As the court noted, if Piper and Hartzell could prove that the plaintiff's damage resulted from negligence on the part of Air Navigation and/or McDonald rather than a design defect, Piper and Hartzell would be free from all liability.[99] It would therefore be 'more convenient . . . to resolve all claims in one trial'.[100] No fault can be found in this reasoning when in fact serious proceedings have been commenced by the plaintiff in another forum against a third party who will ultimately have to indemnify the defendant, provided of course the defendant is also amenable to suit in the other forum.[101] It is suggested however, that dismissal would not be appropriate where the defendant merely suggests that the plaintiff ought to be suing a third party in an alternative forum, and the evidence does not support the claim made by the defendant.

This was the approach taken by the District Court for the Southern District of Texas in the case of *Tokio Marine Fire Insurance v Bell Helicopter Textron.*[102]

This case concerned an action in strict liability and negligence by a Japanese company against an American manufacturer of a helicopter which had crashed in Japan. In moving for dismissal on forum non conveniens grounds the defendant argued, inter alia, that suit in America would deprive it of the ability to implead third party defendants. The court dismissed this argument pointing out that the defendant had failed to name any potential third party defendants, and indeed had previously admitted that there was no evidence that the negligence of any third party caused the accident.

98 454 US 235, 257-8 (1981).
99 Id 259.
100 Id 259.
101 It is suggested that the defendant should be amendable to suit in the alternative forum at the time of the commencement of the action against the third party rather than just by submission on the part of the defendant. Otherwise, the plaintiff will be penalized for not suing someone that the alternative forum did not have jurisdiction over. Needless to say, this would be grossly unfair.
102 17, Avi 17, 321 (1982) 509. (*Tokio Marine* case.) This case will be discussed in detail later in the paper.

Reyno: The *Gulf Oil* Analysis: Public Interest Factors

It was held by the Supreme Court that the District Court's analysis of the public interest factors was reasonable. The latter court had concluded that Pennsylvania law would apply to Piper and Scottish law to Hartzell. The trial would therefore be 'hopelessly complex and confusing to a jury'.[103] The Supreme Court agreed that the need to apply foreign law pointed to a dismissal.

A number of criticisms can be made of this approach. Even if the District Court's choice of law analysis is accepted as correct[104] it is difficult to agree with the court's reasoning that the trial would be hopelessly complex and confusing to a jury simply because the plaintiff would be proving negligence against one defendant and strict liability against another.[105] In both strict liability and negligence the plaintiff must prove the defective product caused the injury and the defect existed when the product left the defendant's hands. In negligence the plaintiff has the additional task of proving that the defect was caused by the defendant's negligence.[106]

The Supreme Court confirmed that the prospect of the court having to apply foreign law was a factor pointing towards dismissal. In a footnote however, the court did state that this factor alone is not sufficient to warrant dismissal when a balancing of all factors shows that the plaintiff's chosen forum is appropriate.[107] It is suggested that the prospect of applying foreign law should only point towards dismissal 'if the law is so complex that injustice might result'.[108] In any other case it should not be given any significant weight at all. A plaintiff ought not be deprived of his choice of forum simply because the court does not feel like dealing with more complex issues than the ordinary 'run of the mill' matters. Indeed the District Court of Texas in the 1984 decision *Munusamy v McClelland Engineers Inc*[109] agreed with this analysis. In denying motion for dismissal on forum non conveniens grounds Fisher J stated:—

> The propsect of 'untangling problems in conflict of law' does not deter the court. The court perceives the possibility of applying 'law foreign to itself' as a challenge, not grounds for abdication. If the court is inadequate to either task, the Court of Appeals will indubitably correct any errors.[110]

In *Reyno*[111] both the District Court and Supreme Court found that Scotland had a very strong interest in the litigation. The District Court held that it would be unfair to burden local juries with jury duty when

103 454 US 235, 243 (1981).

104 In contrast the Appellate Court decided that both Hartzell and Piper would be subject to Pennsylvania law. The Supreme Court declined to decide whose choice of law analysis was correct.

105 Scottish law relating to negligence would not differ greatly from the principles of negligence applied in America. Recent Decisions, Y 15 Vand J Transnat'l L 595.

106 WL Prosser, 'Assault Upon the Citadel Strict Liability to the Consumer' (1960) 69 Yale L J 1099, 1114.

107 454 US 235, 260 n 29 (1981).

108 Recent Decisions, 15 Vand J Transnat'l L 595.

109 579 F Supp 149(1984).

110 Id 159.

111 454 US 235 (1981).

their community had little connection with the litigation. After reiterating that there was a local interest in having localised controversies decided at home, the Supreme Court concluded that the interest of American citizens in ensuring that American manufacturers are deterred from producing defective products was insignificant in comparison with Scottish interest in the case.[112] Moreover, the court stated that the American interest in this accident was simply not sufficient to justify the enormous commitment of judicial time and resources required to try the case in the United States.[113]

The approach taken by the District and Supreme Courts relegates to a position of insignificance the interest that citizens of the United States have in deterring American manufacturers from producing defective products. It is suggested that American citizens have a real and significant interest in ensuring that their manufacturers are accountable for their products according to the standards laid down by their domestic laws.[114] The position should not be different just because it is a foreign plaintiff who happens to be injured. It is suggested that substantial weight should be given to this factor where the foreign plaintiff commences suit in the forum where the product has been manufactured. Indeed this approach was taken by the court in the *Tokio Marine* case[115] but regrettably for the prospective Australian plaintiff it is suggested it is the minority approach.

Conclusion—*Reyno*

At first glance *Reyno*[116] may be seen to be drastically limiting the foreign plaintiff's access to the American courts because of the three major principles attributed to it namely (1) less deference will be given to the plaintiff's chosen forum where the plaintiff is a foreign litigant (2) the mere fact that the law of the alternative forum is less favourable to the plaintiff should not in itself bar dismissal and (3) the forum non conveniens determination is one for the District Court and therefore may only be reversed where there has been a clear abuse of discretion.

However, it is argued that *Reyno* is not as totally limiting as its principles would initially suggest, as the Supreme Court continuously stressed the need for flexibility and pointed out, as stressed in its previous decision, that each case turns on its own facts.[117] However, when this is combined with the fact that the forum non conveniens determination is at the discretion of the trial judge, and only reviewable where there is a clear abuse of discretion, what has arguably resulted is *inconsistency* in

112 Id 260.

113 Id 261.

114 Recent Decisions, 15 Vand J Transnat'l L 594-5. It is suggested that this will enhance the value of the products and services offered in exports and also indicates that the US does not promote or allow 'dumping' of inferior or dangerous products in other countries by its own citizens.

115 17, Avi 17, 321 (1982) 509. See later discussion.

116 454 US 235 (1981).

117 Id 250. The Supreme Court analysed its previous decisions and referred to *Williams v Green Bay and Western Ryl Co*, 326 U.S. 249, and stated: 'If central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable.'

application of the doctrine. This is particularly evident in two classes of cases brought by foreign plaintiffs, namely (1) aircraft collision cases and (2) product liability cases involving pharmaceuticals and medical equipment. These two areas and the conflicting and inconsistent decisions will be dealt with in turn.

Aircraft Collision Cases: Post *Reyno*

At first glace *Reyno*[118] seemed to provide a very easy way for defendants to thwart suits brought by foreign plaintiffs. Indeed widespread opinion after the *Reyno* decision was that future foreign aircrash litigation brought in the United States would be summarily dismissed on forum non conveniens grounds.[119] Indeed the case of *Cheng v Boeing Co*[120] is a good illustration of this.

Following the crash of a commercial airliner in Taiwan in 1981, wrongful death actions were commenced in the United States by representatives of passengers killed in the accident. The passengers included citizens of Taiwan, Japan, Canada and the United States. The plane, a Boeing 737-200 had been manufactured in America by the defendant in 1976. Boeing had sold the plane to United Airlines who had operated the plane for eight years before selling it to Far Eastern Transport, a Taiwanese corporation. Suits were commenced against all three companies. The District Court dismissed the action against Far Eastern on the basis that it lacked in personam jurisdiction. The actions against the other two defendants were dismissed on forum non conveniens grounds, the court holding that the case was indistinguishable from the *Reyno* case.[121]

However, as already stated every case outcome depends on its own particular set of facts and a forum non conveniens determination depends on the exercise of discretion by the trial court. The subjective element is strong. Consequently in many cases following *Reyno* trial courts have distinguished that decision and retained jurisdiction. Two major aircraft collision cases that illustrate this are the *Tokio Marine*[122] case and *Friends For All Children Inc v Lockheed Aircraft Corp*[123] (The Babylift case.)

The Texas District Court Approach in *Tokio Marine*: Distinguishing *Reyno*

The *Tokio Marine*[124] decision suggests that when product liability actions are brought against resident manufacturers it is possible that the strong interest of the forum in the resolution of those claims may lead a court to find distinguishing factors favouring retention of jurisdiction.[125]

118 Id 235.
119 GN Tompkins, 'Barring Foreign Air Crash Cases From American Courts—Update' (1982) 18 Forum 93, 105.
120 708 F 2d 1406 (9th Cir 1983).
121 454 US 235 (1981).
122 17, Avi 17, 321 (1982) 509.
123 717 F 2d 602 (DC Cir 1983) See also by way of example *Lake v Richardson-Merrell Inc* 538 F Supp 262 (DC Ohio 1982), *Hodson v Johnson & Johnson*, 524 F 771; *In Re Air India Disaster near Bombay India, on Jan 1, 1978* 531 F Supp 1175 (DC Wash 1982).
124 17, Avi 17, 321 (1982) 509.
125 *See*, MA Mazzola, 'Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswerd Questions of *Reyno*'; (1983) Fordham Int'L LJ 577, 583.

Forum non conveniens dismissal was denied by a Texas District Court which gave significant deference to the decision in *Reyno*[126] but was able to distinguish it from the cause of action before it, although at first glance the two sets of facts appear somewhat similar.

The litigation arose out of a crash in Japan of a Texas manufacturered helicopter owned and operated by Japanese companies. The plaintiff brought an action against Bell Helicopter Textron, the helicopter manufacturer, alleging negligence, strict liability in tort and breach of warranty, and sought damages for the loss of the helicopter, some payments for property damage and other expenses incurred as a result of the crash. At the outset the court held that Japan was an adequate alternative forum under the *Reyno* formula even though neither strict liability in tort nor warranty actions were available.

The defendant's waiver of the three year Japanese Statute of Limitations for negligence meant that the plaintiff could seek redress in Japan against Bell for negligence. The court's next step was a consideration of the *Gulf Oil*[127] factors in order to determine whether forum non conveniens dismissal was justified. Although the court in line with *Reyno*,[128] afforded less deference to the forum choice of the foreign plaintiff it still determined that both private and public interest factors favoured a Texas forum.

On an analysis of the private interest factors the court's first consideration was the ease of access to sources of proof. As the plaintiff's claim was a product liability claim the court held that the majority of evidence, that is documents relating to witnesses and to the design, manufacture and testing of the helicopter were located at Bell's manufacturing plant in Texas. Also the allegedly defective part was in the custody of the plaintiff in the United States. On the other hand, evidence with respect to the defendant's claim of negligent maintenance, pilot error and power loss unrelated to Bell's design of the helicopter, and information as to the crash itself were located in Japan. However, the importance of these facts was diluted by the plaintiff's agreement to furnish Bell with translations of all relevant maintenance records and by the availability of documentary evidence and expert testimony on these issues at trial in Texas. It is submitted that the paramount determining factor in favour of the Texas forum was the defendant's failure to implead any third parties not amendable to process in Texas,[129] and on this point the court was easily able to distinguish *Reyno*.[130]

In determining the public interest factors the court held that as the plaintiff's claim was in product liability Texas was the community with the greatest connection to the litigation, as the helicopter and its parts were designed, manufactured and sold in Texas. Japan's connection on the other hand was centered around the accident itself. A further factor favouring Texas was that after a consideration of the choice of law rules it was held that Texas law would apply to the litigation, and even if the

126 454 US 235 (1981).
127 330 US 501 (1947).
128 454 US 235 (1981).
129 17, Avi 17,321 (1982) 509, 512.
130 454 US 235 (1981).

matter was heard in Japan it was possible that the Japanese courts would apply Texas law because Texas was where the alleged defect occurred. The final relevant public interest factor was the fact that the matter was presently ready for trial if it were to be heard in Texas, whereas on the other hand if it were to be heard in Japan it would take five years before the matter would be resolved by a Japanese court.[131]

The Texas District Court found no difficulty therefore in reconciling their decision with the Supreme Court's decision in *Reyno*.[132] Although it is submitted the *Reyno* principles were applied there were a number of genuine distinguishing factors, namely:—

(a) As discussed, unlike *Reyno* there had been no potential third party defendants not amenable to jurisdiction in Texas, and there was no litigation pending in Japan as a result of the crash which caused the possibility of inconsistent verdicts;

(b) The Supreme Court found that in *Reyno* two issues essential to the defence, the aircraft's maintenance and pilot error were located in Great Britain. In *Tokio Marine*[133] however, while evidence relating to these issues was located in Japan, neither issue was essential to the defence of the case;

(c) The defendant had admitted that there was no evidence of improper maintenance or operation of the helicopter. The accident report determined that the failure of the helicopter gearbox was the probable cause of the accident (in contrast to *Reyno*[134] where pilot error was the likely cause) and also the plaintiff had agreed to make all maintenance records available to the defendant.

It is arguable therefore if one takes into account the *Tokio Marine*[135] 'public interest' approach, particularly the court's emphasis upon the community's interest in the activities of its own manufacturers that *Reyno*[136] may have resulted differently had the action been brought in the Pennsylvania State Court in the first instance, the state of manufacture, instead of the California State Court and thus allowing for transfer to federal jurisdiction.

This proposition is exemplified by comparing the differing results in two aircraft collision cases, *Pain v United Technologies Corp*[137] and *Kahn v UTC*[138]

Both cases arose out of a helicopter accident and resulted in wrongful death actions brought by predominantly foreign plaintiffs against a Connecticut helicopter manufacturer. In *Pain*[139] the action was filed in the District Court of Columbia where forum non conveniens dismissal

131 17, Avi 17, 321 (1982) 509, 513.
132 454 US 235 (1981).
133 17, Avi 17, 321 (1982) 509.
134 454 US 235 (1981).
135 17, Avi 17, 321 (1982) 509.
136 454 US 235 (1981).
137 637 F 2d 775 (DC Cir 1980) (*Pain* case).
138 Av L Rep (CCH) 17, 651 (Super Ct Conn 1981).
139 637 F 2d 775 (DC Cir 1980).

was granted. However, following dismissal by the federal court the same litigation was re-filed in Connecticut and the same forum non conveniens dismissal motion was made by United Technologies the Connecticut manufacturer. The Connecticut State Court refused the motion on the basis of the strong public interest of the state in controlling its resident manufacturers.[140]

Friends For All Children v Lockheed[141] (The Babylift Case): Distinguishing *Reyno*

Additional factors which have been taken into account by the courts in determining whether forum non conveniens dismissal is justified or not include the substantial investment of time and money by plaintiffs in the American forum, and the fact that much discovery has already been accomplished in ascertaining jurisdictional facts. Indeed, the Supreme Court in *Reyno*[142] recognised that requiring defendants seeking forum non conveniens dismissal to submit extensive affidavits detailing the potential witnesses and areas of testimony would defeat the purpose of this motion.

These particular factors and the question of the forums perceived interest in the litigation were the telling factors in the Court of Appeals for the District Court of Columbia's refusal to grant forum non conveniens dismissal in the Babylift case.

Shortly before United States forces were evacuated from South Vietnam President Ford authorised 'Operation Babylift' and orderd a Lockheed C5A transporter to Saigon to evacuate Vietnamese orphans. Shortly after takeoff the plane lost a cargo door, suffered explosive decompression and crash landed. Approximately one hundred and fifty Vietnamese orphans survived the crash. They were flown to the United States and after undergoing medical examination were released to their adoptive parents or to representatives of adoption agencies. Friends for all children as 'legal guardian and next friend' filed a complaint in the United States District Court for the District of Columbia against Lockheed, alleging negligence in the design and manufacture of the aircraft and basing the plaintiff's right to recover on tort and breach of warranty.[143] Lockheed settled all the American infants' claims and then moved to dismiss on forum non conveniens grounds the claims by the plaintiff children who were adopted by foreign parents and who resided in foreign countries.[144] The District Court denied Lockheed's motion and Lockheed appealed to the United States Court of Appeals for the District of Columbia.

At the outset Lockheed made the usual concessions to submit to the varying jurisdictions and waive any applicable Statute of Limitations.

140 This same issue of the State controlling its own manufacturers is also exhibited in the California State Court decisions of *Holmes v Syntex Laboratories* 20 2 Cal Rptr 773 (1984) and *Corrigan v Bjork Shiley Corp* (1986) 182 Cal App 3d 166. But *see contra, Shiley Inc v Superior Court* 250 Cal Rptr 793 (Cal App 4 Dist 1988).
141 717 F 2d 1406 (9th Cir 1983).
142 454 US 235 (1981).
143 717 F 2d 602, 604 (DC Cir 1983).
144 ibid.

The court in *Lockheed*[145] stated that the *Reyno* case[146] confirmed that the court must determine whether an alternative forum exists, and that the basic test is simply whether the defendant is amenable to process in the foreign jurisdiction. In rare circumstances inadequacy of remedy may also justify dismissal of a forum non conveniens application on this ground. The court stated however, that it was not necessary to resolve the question in this case of whether adequate alternative forums were available, because even if they existed other factors made it clear that the forum non conveniens motion should be denied. Simply, the court determined that the availability of an adequate alternative forum is a threshold test only, in the sense that the forum non conveniens motion cannot be granted unless the test is fulfilled.

Next, on an analysis of the private and public interest factors the court noted that the children of 'Operation Babylift' had considerable contact with the forum. Extensive discovery had already taken place there. Furthermore, the plaintiff's and Lockheed's Washington based team of experts, in preparation for trial of the foreign as well as domestic claims, had conducted exhaustive investigations of the crash and its impact. These factors combined with the fact that the whole operation was conceived and run by Americans heavily tipped the balance in favour of the chosen forum. The presence of such contacts reduced the concern that was present in *Reyno* that the plaintiffs might be involved in forum shopping.[147]

On the contrary the court implied that the United States Government might be engaged in reverse forum shopping. The court stated:—

> Indeed, since the United States has settled with Lockheed by agreeing to a formula for indemnification, it would appear that the Government's most concrete interest is merely the size of potential judgements.[148]

This question of forum shopping in reverse has lead to at least one court to refuse forum non conveniens dismissal. The District Court of New York in *Fiacco's*[149] case appears to have regarded the determining factor in retaining jurisdiction as what was the court's perception that if the plaintiff originally had commenced the action against the defendant in Norway (where the litigation arose as a consequence of a helicopter accident) the defendant very likely could have successfully resisted the imposition of Norweigian jurisdiction. Therefore, the defendant's subsequent submission to submit to Norwegian jurisdiction probably reflected a value judgement on its part that Norwegian law would probably render a more favourable result. In this sense the defendants were using the forum non conveniens doctrine as both a shield and a sword:[150] a shield to prevent litigation in the plaintiff's chosen forum and a sword to force the plaintiff to pursue his claim in a forum which would be favourable to the defendants.

145 717 F 2d 1406 (9th Cir 1983).
146 454 US 235 (1981).
147 717 F 2d 602, 609 (DC Cir 1983).
148 Id 618.
149 524 F Supp 584 (SDNY 1981).
150 Mazzola, Fordham Int'l LJ 605.

Indeed it is arguable that a consequence of *Reyno*'s[151] determination to give less deference to the presumption in favour of the plaintiff's chosen forum where that plaintiff is foreign, is to pave the way for American manufacturers to engage in some forum shopping of their own.[152] Although the defendant's attempt failed in the Babylift case it is submitted this is an exceptional situation as will be seen from the proceeding discussion.

Post *Reyno*: Aircraft Collision Cases Following *Reyno*

In aircraft collision cases a number of courts have followed the *Reyno*[153] approach and granted a forum non conveniens dismissal. This it is submitted is the more usual approach taken by the United State's courts and does not auger well for Australian plaintiffs who may be involved in similar aircraft collision cases in the future and wish to sue in America.[154] It is argued that the cases where dismissal has been refused such as the Babylift case and *Tokio Marine*[155] are the exception rather than the rule and the distinguishing factors evident in those cases will infrequently be available to the Australian plaintiff.[156]

The cases speak for themselves. Even immediately following *Reyno*[157] foreign claims asserted by non-residents were barred by the American courts.[158]

151 454 US 235 (1981).
152 But as pointed out by the District Court of Texas in *Manasamy v McClelland Engineers Inc* 579 F Supp 149, 158, (1984) 'it is a zero sum game; the score is tied;, this is because 'the Plaintiff's simply chosen the forum with the most advantageous law available to them. "Convenience" had little if anything to do with the choice. Neither are the Defendant's dismissal motions concerned with convenience. Like the Plaintiff's the Defendants simply seek dismissal to a forum where the law is more advantagous to them. . . . '.
153 454 US 235 (1981).
154 Most of the world's aircraft are manufactured in the United States, eg Boeing, McDonald Douglas and Lockheed.
155 17, Avi 17, 321 (1982) 509.
156 Despite my argument it has to be acknowledged that the *Reyno* decision does not guarantee that foreigners will be summarily dismissed to a foreign forum. There were a number of cases, approximately two years after *Reyno* which do indicate a resistance to dismissal on forum non conveniens grounds eg the *Fiacco* case (already discussed); *Macedo v Boeing Co* 693 F 2d 683 (7th Cir 1982) reversing and remanding to district court for abuse of discretion in granting dismissal to Portugal. But note the presence of American plaintiffs as well as foreign plaintiffs, and the court noted the financial burden on the US plaintiffs who would have to litigate abroad, see also, *Grimandi v Beech Aircraft Corp* 512 F Supp 784, 781 (D Kan 1981)—where detailed discovery in ascertaining jurisdictional facts and a substantial investment of time and money warranted denial of dismissal, and *Aboujdid v Gulf Aviation Co*, 86 AD 2d 564, 565, 448 NYS 2d 427, 428. (1982) where dismissal was denied. The defendants failed to show a more convenient forum than New York. *See also* Mazzola, Fordham Int'l LJ 582.
157 454 US 235 (1981).
158 Even prior to *Reyno* it is arguable that a trend towards dismissal on forum non conveniens ground existed in the US courts. See *Miskow v Boeing Co*, 664 F 2d 205 (9th Cir 1981), cert denied, 455 US 1020 (1982) upholding forum non conveniens dismissals on behalf of Canadian decedents arising out of an aircrash in Canada; *Dahl v United Technologies Corp* (previously discussed) and *Lampitt v Beech Aircraft Co*, 17 Av Cas (CCH) 17, 358 (ED 111 1982) an action was brought by residents of Great Britain and Northern Ireland arising our of a crash in France. Forum non conveniens dismissal was granted.

In *Re Disaster At Riyadh Airport, Saudi Arabia*[159] consolidated wrongful death actions arose out of a fire on board a Saudi Arabian Airlines (SAA) flight in 1980. Although the aircraft landed safely despite the fire on board, all the occupants perished. The Personal Representatives and relatives of the decedents brought actions against SAA and two American corporations, Trans World Airlines (TWA) the company responsible for training the Saudi personnel in aircraft operations, and the Lockheed corporation, the planes manufacturer. Only the foreign claimants remained at the time the forum non conveniens motion was decided. All cases involving American claimants had been settled.

In deciding to dismiss on forum non conveniens grounds the court relied heavily on three factors, namely the *Reyno*[160] decision, the four part test enunciated in *Pain*[161] and upon the fact the defendants had agreed to submit themselves to the jurisdiction of the national courts in either Saudi Arabia, or of each plaintiff's domicile, or in any other country pursuant to Article 28 of the Warsaw Convention. Following *Reyno*,[162] the court held all three alternative forums were adequate, as there was no danger the plaintiff would be deprived of any remedy, even though there was a likelihood of smaller damages awards (as would be the case had Australia been one of the alternative forums).

On balancing the *Gulf Oil*[163] private and public interest factors the court found both pointed towards dismissal—the former primarily because of the concession of liability. The court emphasised the fact that the interest of Saudi Arabia in particular in the litigation was overwhelming when compared with that of the United States. The only United States connecting factors were the aircraft's manufacture and the training of flight crews in aircraft operations. However, the plane was owned and operated by a Saudi Arabian national corporation, had been maintained in Saudi Arabia since delivery from the United Sates and even crashed in Saudi Arabia, with the official investigation and accompanying documentation being located there. A parallel situation would occur if an Ansett, Australian Airlines or Qantas flight crashed in Australia. In fact the balance would tip even more strongly towards Australia as the 'convenient' forum because only the initial flight crews on Boeing aircraft operated by those airlines are trained in the United States, and that is when a new type of aircraft is introduced into the fleet. All subsequent aircrews are trained by Australian personnel.

159 540 F Supp 1141 (DDC 1982).
160 454 US 235 (1981).
161 The 4 part test is set out on p5 of this paper.
162 454 US 235 (1981).
163 330 US 501 (1947).

In the *Riyadh Airport*[164] case *Reyno*[165] was cited as authority for the court's decision. Accordingly the cases were dismissed subject to an agreement by the defendants to abide by four conditions.[166]

In *Ahmed v Boeing Co* [167] the Court of Appeals for the First Circuit affirmed the District Court's forum non conveniens dismissal in a suit brought by the representatives of twenty-two Pakistani citizens killed in an accident involving a Pakistani International Airline flight en route from Saudi Arabia to Pakistan. The District Court accepted an application to dismiss the suit on forum non conveniens grounds if the defendant, Boeing, would agree to appear as a defendant in either Saudi Arabia or Pakistan, to forgo any Statute of Limitations defence, to make available any witnesses' evidence and to pay any judgment tendered against it. The court held this case was 'on all fours'[168] with *Reyno*,[169] as the nationality of the victims, the place of the accident, and the comparative judicial familiarity with the likely applicable law, all strongly favoured trial abroad.[170]

A similar approach was taken in *Overseas National Airways v Cargolux Airlines Interational*[171] where the court held the balance of *Gulf Oil*[172] factors weighed heavily in favour of a foreign forum and therefore considered dismissal on forum non conveniens grounds appropriate. The case involved the destruction of the hull of an aircraft while it was undergoing modification in a hanger in a foreign country. The court pointed out that at least two foreign citizens were essential witnesses, the principal documents were located in the foreign country and written in a foreign language, and foreign contract law applied to the property damage claim.

Forum non conveniens dismissal was also granted in post—*Reyno* litigation arising out of the crash in Taiwan of a Boeing 737 aircraft operated by Far Eastern Transport Corporation: see *Lui Su Nai-Chao v The Boeing Co*[173] and *Cheng v Boeing Co*[174] Of those killed in the crash eighty seven were Taiwanese citizens, eighteen Japanese, four Canadian and there was one American citizen. In dismissing the case the courts relied heavily on the fact that more evidence was available in Taiwan

164 540 F Supp 1141 (DDC 1982).
165 454 US 235 (1981).
166 The conditions were (1) that they would not contest liability for compensatory damages in any of the alternative jurisdictions (2) would not raise the defence of Statute of Limitations as to any currently pending action which was refiled within one year in any one of the jurisdictions (3) that at best one defendant would appear and consent to personal jurisdiction and defend against each plaintiff's compensatory damage claim in the alternative forum and (4) that the defendants would waive any applicable limitation on compensatory damages imposed by the contract of carriage or by the Warsaw Convention and its supplementing protocols. *See* too; Tompkins, 18 Forum 93, 98.
167 720 F 2d 224 (1st Cir 1983).
168 Id 225.
169 454 US 235 (1981).
170 720 F 2d 224, 226 (1st Cir 1983).
171 712 F 2d (2nd Cir 1983).
172 330 US 501 (1947).
173 555 F Supp 9 (1982).
174 708 F 2d 1406 (1983).

than in the United States, for example, as has been similarly shown in other cases, evidence as to the aircraft's maintenance, of the crash investigation and documentation, of parts of the wreckage itself and nearly all the evidence relating to proof of damage, as most of the claimants were Taiwanese residents. Even language barriers and the necessity for translation tipped the balance towards Taiwan as the 'convenient' forum. As would apply to any crash of a Boeing aircraft, evidence as to design and manufacture was located in the United States. However, the fact that the United States is the site of manufacture is not, it is suggested, sufficient on its own to tip the *Gulf Oil*[175] factors in favour of retaining the American forum.

Moreover, even though the plaintiffs tried to distinguish *Reyno*[176] on the ground that all plaintiffs in that case were foreign, the Court held:—

> The plaintiff's choice of an American forum is here outweighed by the private and public interest factors pointing towards dismissal of the action, and that the presence of a handful of American plaintiffs does not preclude such dismissal.[177]

Two more recent cases which support the submission that Australian plaintiff's claims relating to collisions of American manufactured aircraft are on the balance likely to be dismissed by the American courts are *Rubenstein v Piper Aircraft Corp*[178] a 1984 decision of the United States District Court, Florida, and *Chhawchharia v Boeing Co*[179] a 1987 decision of the New York District Court. In both cases *Reyno*[180] was followed.

In the *Rubenstein*[181] case the action arose from an accident in which a plane designed and manufactured in Florida by Piper, a Pennsylvania corporation, crashed in West Germany in 1980. All three victims killed were citizens and residents of West Germany. The Personal Representative of the victims filed an action for wrongful death in Florida against the manufacturer Piper.

In a very brief judgment Spellman J held that 'all contacts concerning the crash rest within West Germany save the one contact which Florida maintains as the state in which the plane was designed and manufactured'.[182] In fact his Honour gave no encouragement to prospective foreign plaintiffs when he said:

> A foreign plaintiff must not be encouraged to initiate suits in a forum other than his or her own for whatever reason, provided that the plaintiff can secure an adequate remedy at home.[183]

One may say that in this case there were only foreign plaintiffs—no American plaintiffs. However, the two previous cases discussed do not

175 330 US 501 (1947).
176 454 US 235 (1981).
177 555 F Supp 9, 21 (1982) and *see* too *Cheng's* case 1411.
178 587 F Supp 460 (1984).
179 657 F Supp 1157 (SDNY 1987).
180 454 US 235 (1981).
181 587 F Supp 460 (1984).
182 587 F Supp 460, 461 (1984).
183 ibid (Emphasis added.)

support the view that the presence of an American plaintiff will bar dismissal, especially where the *Gulf Oil*[184] factors point towards dismissal of the action.

Spellman J in granting the defendant's motion to dismiss for forum non conveniens pointed out there was a serious deficit of evidence to show that the plaintiff would not be afforded an adequate remedy in West Germany,[185] and that the defendant had consented by affidavit to submit to the jurisdiction of West Germany, produce any and all witnesses and documents as ordered by the West German court, and to enforce in Florida or West Germany any judgement rendered against it by the West German court.[186]

The final aircraft collision case that will be discussed in detail in this paper is the 1987 *Chhawchharia* case.[187] The details of the aircrash in Japan would be fresh in the memories of current readers as it attracted a lot of publicity at the time of the crash in August 1985, mainly because seemingly against all the odds there were a couple of survivors.

The plaintiff's complaint sought damages for the wrongful death of her husband, a citizen and resident of Calcutta India, who was a passenger on board a Boeing 747 aircraft owned by Japan Air Lines (JAL) which crashed en route from Tokyo to Osaka.

The defendant Boeing designed and manufactured the aircraft. Boeing was incorporated in the state of Delaware and had its principal place of business in the state of Washington.

The same aircraft had been involved in a prior accident in Japan, where Boeing personnel effected major repairs before it was returned to service. Boeing publically acknowledged that a mistake was made during the repairs. The defendant moved to dismiss the plaintiff's complaint on the grounds of forum non conveniens.

The United States District Court of New York firstly cited *Reyno*[188] and *In Re Union Carbide Corp Gas Plant Disaster*[189] as authority for the fact that little or no deference should be paid to a foreign plaintiff's choice of a United States forum.

The plaintiff contended however, that there was no adequate alternative forum because inefficiencies in the Indian court system would hinder her prosecution of the action there. The court rejected this argument and followed the finding in the *Union Carbide* case 'that the Indian courts provide a reasonably adequate alternative forum'.[190]

The court then had to make an analysis of the *Gulf Oil*[191] factors to determine whether India or the United States was the more convenient

184 330 US 501 (1947).
185 The same would be said of any Australian plaintiff.
186 587 F Supp 460, 461 (1984).
187 657 F Supp 1157, 1159 (SDNY 1987).
188 454 US 235 (1981).
189 634 F Supp 842, 845 (SDNY 1986) aff'd as modified 809 F 2d 195 (2d Cir 1987).
190 Id 202-3.
191 330 US 501 (1947).

forum.[192] With respect to the private interest factors the court concluded that sources of proof and access to witnesses regarding damages weighed in favour of dismissal, although not heavily.[193] With respect to the public interest factors it is suggested the major issue which the court took into account here as militating in favour of dismissal was the fact that the validity of the release[194] and assessment of damages would be governed by the law of India and in addition there was a possibility that the law of Japan, where the tort occurred might govern the remaining issues in the case. Relying on *Reyno*,[195] *Pain*[196] and *Union Carbide*[197] the conclusion was that the applicability of foreign law in the case was a public interest factor militating in favour of dismissal.[198]

The final issue dealt with by the court was the plaintiff's argument, based on *Manu International SA v Avon Products Inc*[199] where the Second Circuit had found 'almost a perversion of the forum non conveniens doctrine . . . '[200] In the *Avon Products* case the court had refused to force a Belgian plaintiff who chose a New York forum 'to go to Taiwan at the behest of defendant which had its home office situated in New York 'when most of the actors involved in the case are not located in Taiwian but in or closer to New York'.[201]

However, the court in *Chhawchhari*[202] easily distinguished the *Avon Products* case[203] and found that Boeing was only trying to remit the plaintiff to the forum where she resided and where many of the likely principal witnesses were located.

In conclusion therefore, the court found that after balancing the *Gulf Oil*[204] factors that dismissal was indicated—India was the more convenient forum.

192 The defendant focused on the argument that the action should not proceed in the Southern District of New York, whereas the plaintiff successfully contended *that the relevant issue was whether any US District court is a convenient forum* as the court could order a transfer pursuant to 28 USC 1404(a).

193 657 F Supp 1157, 1161 (SDNY 1987).

194 Id 1159. In September 1985 an Indian lawyer negotiated a settlement the deceased's family releasing JAL and all others from liability for the deceased's death. The release was subsequently revised to name Boeing as a party released. When the settlement payment was tendered however, the family refused to accept it. The plaintiff's claim that they were induced to release Boeing upon the false representation that its liability is limited to the Warsaw Convention.

195 454 US 235 (1981).

196 637 F 2d 775 (DC Cir 1980).

197 634 F Supp 842, 845 (SDNY 1986) aff'd as modified 809 F 2d 195 (2d Cir 1987).

198 657 F Supp 1157, 1162 (SDNY 1987).

199 641 F 2d 62 (2d Cir 1981).

200 Id 67.

201 Id 67.

202 657 F Supp 1157, 1163 (SDNY 1987).

203 641 F 2d 62 (2d Cir 1981).

204 330 US 501 (1947).

Conclusion: Aircraft Collision Cases—Where does an Australian Plaintiff Stand

There was widespread opinion after the *Reyno* case[205] that any future air crash litigation brought in the United States by foreign plaintiffs would be short lived, as it would be dismissed summarily on forum non conveniens grounds.[206] However, it is obvious from the post-*Reyno* caselaw that this extreme situation did not eventuate—*Tokio Marine*[207] and the Babylift case bear testimony to that. The Supreme Court's repeated emphasis in *Reyno*[208] that every case turns on its own facts must always predominate in any analysis here.

Also the balancing and weighing of the *Gulf Oil*[209] factors is at the discretion of the trial judge—a discretion that can only be overturned where there has been a clear abuse of its exercise. Therefore this subjectivity which attaches to a trial judge's determination could often see a borderline case swing either for or against dismissal in one given fact situation; but because there has been no 'abuse' of discretion neither judgment would be overturned on appeal. Hence the possibility and reality of inconsistent decisions.[210]

However, it is submitted that an Australian plaintiff involved in an aircraft collision would have an uphill battle trying to sue in an American forum where the only real connecting factor with America is the design and manufacture of the aircraft. This is certainly the case where all the plaintiffs are foreign; but even where there are some American plaintiffs involved, it has already been noted that this alone will not bar dismissal. At most it may tip the balance in favour of retention of jurisdiction. There is no guarantee as shown by the *Cheng*[211] case, although there are a number of cases where courts have refused to dismiss because of the presence of American plaintiffs.[212]

As *Tokio Marine*[213] illustrated, when product liability actions are brought against resident manufacturers it is possible that the strong interest of the forum in resolving the claims may lead a court to find distinguishing factors favouring retention of jurisdiction. That statement in itself is saying that the mere fact the defendant is a resident manufacturer will not protect the foreign plaintiff's choice of an American forum. There must always be other factors.

The only sure way for an Australian plaintiff to succeed would be if a United States manufactured plane crashed in America killing American citizens as well as our hypothetical Australian plaintiff.

205 454 US 235 (1981).

206 Tompkins, 18 Forum 105.

207 17, Avi 17, 321 (1982) 509.

208 454 US 235 (1981).

209 330 US 501 (1947).

210 Stein, 133 U Pa L Rev 833. It was pointed out that in both aircraft collision cases and those involving pharmaceuticals, the facts are often identical, but the results are inconsistent.

211 708 F 2d 1406 (1983).

212 *See Swift & Co Packers v Compania Colombiana Del Caribe, SA* 339 US 684 (1950), *Boskoff v Boeing Co*, 16 Av L Rep (CCH) 17, 753 (Sup Ct NY 1981) *Macedo v Boeing Co*, 693 F 2d 683 (7th Cir 1982).

213 17, Avi 17, 321 (1982) 509.