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## "REYNO": ITS PROGENY AND ITS EFFECTS ON AVIATION LITIGATION.

GARRETT J. FITZPATRICK\*

### I. INTRODUCTION

In *Piper Aircraft v. Reyno*<sup>1</sup> ("Reyno") the United States Supreme Court addressed the doctrine of *forum non conveniens*, thirty four years after it established guidelines for that doctrine in the seminal companion cases of *Gulf Oil Corp. v. Gilbert*<sup>2</sup> and *Koster v. Lubermans Mutual Casualty Co.*<sup>3</sup> *Forum non conveniens* is a common law doctrine that allows a court to decline to exercise jurisdiction in certain circumstances, notwithstanding the fact that jurisdiction and venue are appropriate according to the applicable statutes.<sup>4</sup> This paper will address the holding of *Reyno* as well as the impact that it has had.

In reiterating and stressing the private and public interest factors laid down in *Gilbert*,<sup>5</sup> the Court in *Reyno* forged ahead and expressly noted that plaintiffs may not defeat a *forum non conveniens* motion merely by showing that the substantive law of the chosen forum is more favorable than the law that would be applied by the courts of their own nation.<sup>6</sup> The Court also pointed out that the district court<sup>7</sup> properly de-

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<sup>1</sup> 102 S.Ct. 252 (1981).

<sup>2</sup> 330 U.S. 501 (1947).

<sup>3</sup> *Id.* at 518.

<sup>4</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 507.

<sup>5</sup> *Id.* at 508. See *infra* text accompanying notes 15, 19.

<sup>6</sup> 102 S.Ct. at 261.

<sup>7</sup> *Reyno v. Piper Aircraft*, 479 F. Supp. 727 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980), *rev'd*, 102 S.Ct. 252 (1981).

cided that the presumption in favor of the plaintiff's forum choice applied with less than maximum force where the plaintiff and the real parties in interest are foreign.<sup>8</sup> *Reyno* not only gave much needed direction to the often confusing doctrine of *forum non conveniens*, but also was hailed as a major victory for United States manufacturers and their insurers. Its facts involving an aviation accident, *Reyno* has already spawned a progeny of aviation accident cases utilizing the doctrine of *forum non conveniens*, with varying results.

## II. BACKGROUND OF "FORUM NON CONVENIENS"

In *Gulf Oil Corp. v. Gilbert*,<sup>9</sup> the plaintiff brought an action in the Southern District of New York, apparently in an effort to receive a more generous damage award from a New York jury. The plaintiff resided in Virginia where he operated a public warehouse. He alleged that the defendant carelessly handled a delivery of gasoline to his warehouse, causing an explosion and fire which consumed the warehouse.<sup>10</sup> Plaintiff sought damages for his and his customers' property. Defendant was a corporation organized under the laws of Pennsylvania and doing business in both Virginia and New York. In New York the defendant raised the doctrine of *forum non conveniens*, claiming that Virginia was a more appropriate forum because it was there that the plaintiff lived, the defendant did business, where all events in that particular litigation took place, where most witnesses resided and where there were alternative forums in both the state and federal courts.<sup>11</sup> The district court dismissed the action and required removal to a Virginia court on the grounds of *forum non conveniens*.<sup>12</sup> The Second Circuit reversed,<sup>13</sup> and the Supreme Court reversed again, upholding the district court's original dismissal.

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<sup>8</sup> 102 S.Ct. at 265-66.

<sup>9</sup> 330 U.S. 501 (1947).

<sup>10</sup> *Id.* at 502-03.

<sup>11</sup> *Id.* at 503.

<sup>12</sup> *Gilbert v. Gulf Oil Corp.*, 62 F. Supp. 291 (S.D.N.Y. 1945), *rev'd*, 153 F.2d 883 (2d Cir. 1946).

<sup>13</sup> *Gilbert v. Gulf Oil Corp.*, 153 F.2d 883 (2d Cir. 1946), *rev'g*, 62 F. Supp. 291 (S.D.N.Y. 1945).

Mr. Justice Jackson, delivering the opinion of the Supreme Court, stated that a motion to dismiss on the grounds of *forum non conveniens* rests in the sound discretion of the trial court.<sup>14</sup> In exercising this discretion, the trial court should apply the private and public interest factors to the factual patterns of each case. The Court noted the following factors to be considered in assessing the private interest of the litigant:

[T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.<sup>15</sup>

The Court also stated that a plaintiff may not choose an inconvenient forum merely to "vex", "harass", or "oppress" the defendant by inflicting upon him expense or trouble not necessary to the plaintiff's right to pursue a remedy.<sup>16</sup> The Supreme Court recognized that a plaintiff's strategy may be designed to force his adversary into the most inconvenient trial possible.<sup>17</sup>

It is notable, however, that the Court further stated that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum shall rarely be disturbed."<sup>18</sup> Interpretation of this statement is a key issue, as will be seen in *Reyno*, because less weight will be accorded to a foreign plaintiff's choice of forum. The factors to be considered in assessing the public interest are: 1) administrative burdens on a forum that has minimal contact with the controversy; 2) jury duty is a burden which ought not to be imposed on the people of a community which has no relation to the litigation; 3) in cases which touch the affairs of many persons, there is sound reason for holding the trial in their view and reach, rather than in remote parts of the country where they can learn of it

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<sup>14</sup> 330 U.S. at 508.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> *Id.*

by report only; 4) the local interest in having localized controversies decided at home; and 5) the appropriateness of having a trial of a diversity case in a forum which is at home with the state law which must govern the case, rather than having the court in some other forum untangle problems in conflict of laws and in foreign law itself.<sup>19</sup>

The third arm of the three part test to be satisfied before a dismissal under *forum non conveniens* will be granted, is the finding that an alternative forum exists.<sup>20</sup> Whether or not the defendant is subject to jurisdiction in the foreign forum, the granting of a *forum non conveniens* motion is usually conditioned upon the defendant submitting itself to that jurisdiction. Generally, the conditions a defendant must follow are:

- 1) consent to the jurisdiction of the foreign court;
- 2) the foreign court must in fact exercise jurisdiction;
- 3) agree to satisfy judgments by the foreign court;
- 4) waiver of statute of limitations;
- 5) agree to facilitate discovery;
- 6) translation of documents; and
- 7) make witnesses available to the action in the foreign jurisdiction.

In response to what was viewed as the harshness of the dismissal under the doctrine of *forum non conveniens*, Congress enacted 28 U.S.C. Section 1404(a) which provides that "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."<sup>21</sup> Under Section 1404, transfer can only be to another district court or division. The current standard is more easily satisfied than that required under *Gilbert* for obtaining a dismissal on the grounds of *forum non conveniens*.<sup>22</sup> The doctrine of *forum non conveniens*, therefore, has not been displaced and is still applied when the alternative forum is a foreign country as op-

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<sup>19</sup> *Id.* at 508-09.

<sup>20</sup> *Id.* at 506-07.

<sup>21</sup> 28 U.S.C. § 1404(a) (1976).

<sup>22</sup> Tompkins, *Barring Foreign Air Crashes From American Courts: Part Two*, 23 FOR THE DEFENSE 12, 13 (July, 1981).

posed to another federal court.<sup>23</sup>

### III. PIPER AIRCRAFT V. REYNO

*Reyno* arose from the crash of a small commercial aircraft on a charter flight on July 27, 1976, in Talla, Scotland.<sup>24</sup> The seven-year-old, twin-engine Piper Aztec was carrying five passengers and a pilot, who were all Scottish subjects.<sup>25</sup> They all perished in the accident.<sup>26</sup> Five wrongful death and several other actions were originally filed in California State Court by Gaynell Reyno, a nominal plaintiff and a former secretary in the plaintiffs' attorney's office, on behalf of the five passengers and their survivors.<sup>27</sup> The suits named Avco Lycoming, the engine manufacturer, Hartzell Propellers, an Ohio corporation, and Piper Aircraft Company, a Pennsylvania corporation as defendants.<sup>28</sup> McDonald Aviation, Ltd., a Scottish air-taxi service, operated the aircraft but was not a named defendant in the United States actions.<sup>29</sup>

On defendants' motion, the suit was removed to the District Court for the Central District of California.<sup>30</sup> Pursuant to section 1404(a)<sup>31</sup> the suit was transferred to the district court for the Middle District of Pennsylvania.<sup>32</sup> Co-defendants Piper and Hartzell moved for dismissal based on the doctrine of *forum non conveniens*.<sup>33</sup> The district court dismissed the action, noting that an alternative forum existed in Scotland, because the defendants had agreed to submit to jurisdiction of the Scottish courts and waive any statute of limitations defenses

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<sup>23</sup> See, e.g., *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980); *Schertenleib v. Traum*, 589 F.2d 1156 (2d Cir. 1978).

<sup>24</sup> *Reyno v. Piper Aircraft*, 479 F. Supp. 727, 728 (M.D. Pa. 1979).

<sup>25</sup> *Id.* at 728-29.

<sup>26</sup> *Id.* at 728. An investigation was conducted by the British Department of Trade Investigation *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* Avco Lycoming was subsequently dismissed from the suit. *Id.*

<sup>29</sup> *Id.* at 729.

<sup>30</sup> *Id.* See also 28 U.S.C. § 1441(a) (1976).

<sup>31</sup> See *supra* text accompanying note 21.

<sup>32</sup> 479 F. Supp. at 729.

<sup>33</sup> *Id.*

they had.<sup>34</sup> The court then proceeded to cite and assess the public and private interest factors set forth in *Gilbert* to the facts at hand.<sup>35</sup>

The district court stated that although the plaintiffs' choice of forum is normally given substantial deference, the weight accorded such choice will be lessened when the real parties in interest are foreign nationals such as the next-of-kin of the Scottish decedents, as opposed to American citizens.<sup>36</sup> The court stated: "[T]he courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly, when foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States."<sup>37</sup> The court also noted that most of the events, with the exception of the manufacture of the plane, occurred outside the United States. These events included: the accident; the citizenship of real parties in interest; citizenship of decedents; accident investigation; ownership, operation and maintenance of the aircraft; citizenship of the pilot; and the location of the wreckage.<sup>38</sup> In addition, almost all of the witnesses were in Scotland. In connection with ease of access to sources of proof, the court reasoned that because the witnesses and other evidentiary material were located in Scotland, they would be beyond the compulsory process of American courts.<sup>39</sup> The fact that the Scottish owner and operator of the aircraft could not be impleaded as third party defendants was deemed to be one of the strongest private interest factors in favor of defendants' motion.<sup>40</sup> The court also noted that a view of the wreckage and terrain would be desirable, but this factor did not weigh heavily.<sup>41</sup>

The first public interest factor addressed by the court re-

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<sup>34</sup> *Id.* at 728.

<sup>35</sup> *Id.* at 730.

<sup>36</sup> *Id.* at 732.

<sup>37</sup> *Id.* at 731.

<sup>38</sup> *Id.* at 732.

<sup>39</sup> *Id.* at 733.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* The terrain was mountainous and there is associated with this type of terrain turbulence which may have contributed to the pilot's inability to feather the inoperative engine and the subsequent spin.

volved around the fact that different law applied to different parties. After analyzing the choice of law rules applicable to the case, it was determined that the law of Pennsylvania would apply to Piper, but Scottish law would apply to the issues of Hartzell's liability and damages.<sup>42</sup> The court found that this determination would make trial "hopelessly complex and confusing to the jury."<sup>43</sup> The court also noted the congestion in the Middle District of Pennsylvania and the unfair burden to that community in terms of cost in time and jury duty in trying an action which was essentially a Scottish controversy.<sup>44</sup> Furthermore, the court rejected the plaintiffs' assertion that dismissal was unfair because Scottish law was less favorable to the plaintiffs.<sup>45</sup> The court also rejected the plaintiffs' argument that the defendants were precluded from seeking a *forum non conveniens* dismissal since they had previously moved to transfer the action.<sup>46</sup>

The United States Court of Appeals for the Third Circuit reversed the decision of the district court on virtually all the points discussed above and remanded for trial.<sup>47</sup> The Third Circuit based its decision on two alternate grounds: (1) that the district court abused its discretion in its application of the *Gilbert* analysis;<sup>48</sup> and, (2) that dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiffs, noting the absence of strict liability in Scotland.<sup>49</sup> Piper and Hartzell petitioned the United States Supreme Court for certiorari on this latter issue and it was granted. The question presented by the petitioner's brief was stated in the following manner:

Whether in an action in federal district court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of *forum non con-*

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<sup>42</sup> *Id.* at 734.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 737.

<sup>45</sup> *Id.* at 738.

<sup>46</sup> *Id.*

<sup>47</sup> 630 F.2d 149 (3d Cir. 1980), *rev'd*, 102 S.Ct. 252 (1981).

<sup>48</sup> 630 F.2d 149 (3d Cir. 1980).

<sup>49</sup> *Id.*



*veniens* merely by showing that the substantive law that would be applied if the case were litigated in the district court is more favorable to them than the law that would be applied by the courts of their own nation.<sup>50</sup>

The grant of certiorari was limited to the issue of whether the plaintiffs may defeat a *forum non conveniens* motion merely by showing that the substantive law of the chosen forum is more favorable than the substantive law of the foreign forum.<sup>51</sup> The Court reversed, holding that the Court of Appeals erred in holding that an unfavorable change in the law automatically barred dismissal of an action.<sup>52</sup> Justice Marshall delivered the opinion, affirming the district court's opinion, which said that the Court of Appeal's approach was "inconsistent" with earlier *forum non conveniens* cases and was also "inconsistent" with the purposes of the doctrine.<sup>53</sup> The Court stated that: "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in a *forum non conveniens* inquiry."<sup>54</sup> Therefore, only if the alternative forum's law is clearly inadequate or so unsatisfactory that no remedy would be available at all, should this factor be given substantial weight.<sup>55</sup> Critical of the Court of Appeals for failing to recognize the need to retain flexibility in *forum non conveniens* cases, the Court pointed out that if this factor was given conclusive weight it would render the doctrine unworkable.<sup>56</sup> The Court also held that the district court properly decided that the presumption in favor of the plaintiffs' forum choice applied with less than maximum force where the real parties in interest or the plaintiffs themselves are foreign.<sup>57</sup>

Moreover, the Court noted that *forum non conveniens* determinations are committed to the sound discretion of the

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<sup>50</sup> Brief for Petitioner at i, *Piper Aircraft Corp. v. Reyno*, 102 S.Ct. 252 (1981).

<sup>51</sup> 102 S.Ct. at 255.

<sup>52</sup> *Id.* at 257.

<sup>53</sup> *Id.* at 262.

<sup>54</sup> *Id.* at 261.

<sup>55</sup> *Id.* at 265.

<sup>56</sup> *Id.* at 262.

<sup>57</sup> *Id.* at 268. See also *supra* text accompanying note 37.

trial court and may be reversed only where there has been a clear abuse of discretion.<sup>58</sup> The Supreme Court held that the district court's analysis of the *Gilbert* public and private interest factors was *not* an abuse of discretion.<sup>59</sup> The Court agreed substantially with the district court's analysis, again stressing that the most important private interest factor was the inability to implead potential third parties.<sup>60</sup> It would therefore be more convenient to adjudicate all claims in one proceeding in Scotland where co-defendants Piper and Hartzell agreed to submit themselves to the jurisdiction of the Scottish courts.<sup>61</sup> The Court also concluded that the district court's analysis of the public interest factors was also reasonable, pointing out the severely confusing choice of law problems and difficulty with the application of Scottish law.<sup>62</sup> In addition, Scotland had a strong interest in the litigation of this claim.

In an *amicus curie* brief, Boeing Co., Lockheed Corp. and McDonnell-Douglas Corp. urged the Court to overturn the Court of Appeals decision and continue to protect manufacturers against foreign plaintiffs.<sup>63</sup> They alleged that foreign accident suits against them "have been brought by claimants who have sought out or been sought out by American lawyers and have come to the United States seeking the more favorable laws and more generous awards available here."<sup>64</sup> The interest shown by Boeing, Lockheed and McDonnell-Douglas clearly evinces the importance that American manufacturers placed upon the *Reyno* decision and the doctrine of *forum non conveniens* as an important procedural safeguard. American manufacturers, especially in the aviation industry, were concerned with the trend whereby foreign plaintiffs in-

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<sup>58</sup> 102 S.Ct. at 266.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 267.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 263.

<sup>63</sup> *Id.* at 268.

<sup>64</sup> Wermiel, *Justices Make It Harder For Foreigners to Sue U.S. Firms Over Accidents Abroad*, *The Wall St. J.*, Dec. 9, 1981, at 12 cols. 3, 4 (citing *Amicus Curie* brief of Boeing, Lockheed, and McDonnell-Douglas).

volved in accidents abroad would seek out American courts for the recovery of damages.

*Reyno* was indeed a victory for aviation manufacturers and will affect future aviation litigation. To what extent, however, is not yet certain. The remainder of this paper will explore the application of the doctrine of *forum non conveniens* as it has applied to aviation litigation in the past year following *Reyno*.

#### IV. POST "REYNO" FORUM NON CONVENIENS CASES

In the first case decided by a federal trial court after *Reyno*, the defendant's motion to dismiss on the grounds of *forum non conveniens* was denied. *In re Aircrash Disaster Near Bombay, India on January 1, 1978*,<sup>65</sup> was decided by the District Court for the Western District of Washington. The accident which gave rise to the litigation occurred when an Air India Boeing 747 aircraft crashed into the sea shortly after take off from Santa Cruz Airport in Bombay, India.<sup>66</sup> All persons aboard were killed. Plaintiffs, nearly all of whom were Indian nationals, brought wrongful death actions against United States corporations, alleging that the crash was caused by malfunctions in components manufactured by those defendants.<sup>67</sup> The defendants asserted that the accident was caused by the pilot's disorientation in combination with his long standing medical problems including alcoholism, diabetes, gross tremors and fasting to lose weight.<sup>68</sup> However, defendant's motion to dismiss on the basis of *forum non conveniens* was denied.<sup>69</sup> Defendants alleged that their defense would depend upon demonstrative, documentary, and testimonial evidence to be found only in India.<sup>70</sup> This necessary evidence included the wreckage; cockpit voice recorder and flight date recorder; aircraft records (operational, flight, and maintenance); the crew's training and qualification records;

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<sup>65</sup> 531 F. Supp. 1175 (W.D. Wash. 1982).

<sup>66</sup> *Id.* at 1176.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1177.

<sup>69</sup> *Id.* at 1191.

<sup>70</sup> *Id.* at 1177.

the investigative report by the Indian government; Indian government witnesses; eye witnesses to the crash; Air India employee witnesses, including maintenance and service personnel; the pilot's medical records; witnesses to the pilot's medical condition; witnesses of the crew's activities on the night before the accident; other witnesses such as air traffic controllers and airport personnel; and evidence of weather conditions.<sup>71</sup> Defendants also asserted that virtually all potential witnesses on damages would be found in India, and therefore, the court deciding the case should be familiar with Indian social, cultural, and economic values, which are substantially different from our own.<sup>72</sup> It was also asserted that India had a compelling interest in this litigation.<sup>73</sup>

Although the court found merit in the defendant's arguments, it refused to dismiss. The major factor supporting the denial of dismissal was that no alternative forum could be found. It was improbable that the courts of India would hear the claim because the statute of limitations had run in India and the defendants could not waive this defense.<sup>74</sup> The district court, therefore, would not dismiss plaintiff's action.<sup>75</sup>

In the next post *Reyno* case decided, *Lui Su Nai-Chao v. Boeing Co.*,<sup>76</sup> the Federal District Court for the Northern District of California was provided an opportunity to address the doctrine of *forum non conveniens*. This case arose out of a crash on August 22, 1981, of a Boeing 737 owned and operated by Far Eastern Air Transport (F.E.A.T.). The crash occurred on a flight between the Taiwanese cities of Taipei and Kaohsiung. Twelve minutes after take-off from Taipei radio contact was lost. The 737 had reached its assigned cruise altitude of 22,000 feet when a number of Taiwanese witnesses reportedly saw the aircraft break up in the air. The wreckage was scattered over a seven mile area in rugged terrain, and 104 pas-

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1179.

<sup>75</sup> *Id.* at 1191.

<sup>76</sup> No. C-81-4235 (N.D. Cal., April 12, 1982).

sengers were killed.<sup>77</sup> Five hundred and sixty-four plaintiffs, seven of whom were United States citizens and four of whom were Taiwanese citizens presently residing in the United States, had filed in the Northern District of California asserting wrongful death claims against Boeing, the manufacturer, and United Airlines, who had sold the aircraft to F.E.A.T. in 1976.

The court in *Lui Su Nai-Chao* did an excellent job in capsulizing the holdings in both *Gilbert* and *Reyno*. Closely following the Supreme Court guidelines as set down in those cases, the district court dismissed the case in a three-part opinion.

First, the court found that the "threshold requirement of an adequate alternative forum was satisfied in this case and proceeded to an analysis of the private and public interest factors set forth in *Gilbert*, and reaffirmed in *Reyno*."<sup>78</sup>

Second, the court considered the private interest factors. In connection with the factors involving ease of access to sources of proof and compulsory process of witnesses, the court found that in weighing these interests it would be fair to have the trial in Taiwan because the evidence and the witnesses as to causation and damages outweighed any evidence and witnesses for manufacturers' liability. Additionally, compulsory process of necessary witnesses and documents from Taiwan was not possible; and the court's ability to assert the jurisdiction over all parties to the litigation, including potential third party defendants, was uncertain.

Third, the court considered the public interest factors. The court pointed out that the dockets in California were very congested. As in *Reyno*, the plaintiff's position that the forum's interest in deterring the production of defective products within the United States was not sufficient to justify retention of this litigation. The court also pointed out that choice of law problems existed and that Taiwanese law would probably be applied. Based upon its analysis, the district

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<sup>77</sup> Eighty-seven victims were residents of Taiwan, 18 were from Japan, 4 were citizens of Canada, and one a United States citizen. *Id.*

<sup>78</sup> *Id.*

court concluded that dismissal under the doctrine of *forum non conveniens* was warranted provided that the courts of Taiwan have and would assert jurisdiction over the actions, the defendants would submit themselves to the jurisdiction of the Taiwanese courts and would make their employees available to testify in Taiwan, the defendants agreed to waive the statute of limitations, and the defendants consented to satisfy any judgment that may be rendered against them in Taiwan.

In *Lampitt v. Beech Aircraft Corp.*<sup>79</sup> involving facts very similar to *Reyno*, the Federal District Court for the Northern District of Illinois dismissed the action on *forum non conveniens* grounds. Captain Lampitt was piloting a Beech Super King Air 200 operated by a British Company, Eagle Aircraft Services.<sup>80</sup> Lampitt and his Portuguese co-pilot were the sole occupants of the aircraft. During the flight, radar contact with the aircraft was eventually lost.<sup>81</sup> British and French jets intercepted the plane, but they were unable to make radio contact.<sup>82</sup> After crossing the English Channel, the aircraft crashed near Nantes, France.<sup>83</sup> British and French officials conducted a joint investigation of the crash.<sup>84</sup>

Plaintiffs, the heirs of Lampitt, were all citizens of Great Britain or Northern Ireland.<sup>85</sup> They brought the action in a Federal District Court in Illinois against the United States manufacturer of the aircraft, Beech Aircraft Corporation.<sup>86</sup> The plaintiffs alleged that Lampitt's death was not caused by the crash but by a failure of the aircraft oxygen system.<sup>87</sup> However, Beech's motion to dismiss based upon the doctrine of *forum non conveniens* was granted by the district court, which relied primarily upon the fact that most of the evidence and the witnesses were located overseas.<sup>88</sup>

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<sup>79</sup> 17 Av. Cas. (CCH) 17,358 (N.D. Ill. 1982).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 17,359.

In analyzing the private interest factors, the district court found that the defendants would have "difficulty in obtaining discovery from British witnesses" if the case were to be tried in Illinois.<sup>89</sup> The court also pointed out that Illinois "had no interest in the outcome of this litigation, and its connection to Beech [was] tenuous at best".<sup>90</sup> The court recognized that the fact that Illinois law was more favorable to plaintiffs than British law was not a factor to be given substantial consideration.<sup>91</sup> Lastly, an alternative forum existed because Beech agreed to submit to jurisdiction of the British court, to waive certain defenses, and to honor any judgments.<sup>92</sup>

*In re Disaster at Riyadh Airport, Saudi Arabia, on August 19, 1980*,<sup>93</sup> was decided shortly after *Lampitt*. Plaintiffs' decedents were passengers on Saudi Arabian Airlines, Flight 166, a regularly scheduled flight between Riyadh and Jeddah, Saudi Arabia.<sup>94</sup> As the aircraft lifted off from Riyadh Airport, a fire broke-out on board. Although the pilot was able to maneuver the aircraft back to the airport without incident, all of the occupants had perished.<sup>95</sup>

Plaintiffs alleged that the deaths were caused by inhalation of smoke and poisonous gases and by the failure of the doors and emergency exits to open or be opened.<sup>96</sup> Plaintiffs sued Saudi Arabian Airlines (S.A.A.), the operator of the aircraft, TWA, the company which trained S.A.A. personnel in the operation of the aircraft, and Lockheed, the manufacturer of the aircraft.<sup>97</sup> The cases were originally filed in various jurisdictions throughout the country, but in the interest of the efficient use of judicial resources, the Judicial Panel on Multi-District Litigation determined that all actions should be consolidated in the Federal District Court for the District of

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<sup>89</sup> *Id.* at 17,360.

<sup>90</sup> *Id.* at 17,359.

<sup>91</sup> *Id.* at 17,360.

<sup>92</sup> *Id.*

<sup>93</sup> 540 F. Supp. 1141 (D.D.C. 1982).

<sup>94</sup> *Id.* at 1143.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

Columbia.<sup>98</sup>

The eight cases brought on behalf of resident real parties in interest had been settled, leaving only cases brought on behalf of foreign real parties in interest.<sup>99</sup> Defendants' joint motion to dismiss on *forum non conveniens* grounds was granted conditionally; the defendants had to agree to submit themselves to jurisdiction in either Saudi Arabia, the scene of the airplane accident, or each plaintiff's domicile or in any country having jurisdiction of plaintiffs' cause of action, and the defendants had to agree to concede liability upon transfer to the foreign forum leaving damages as the only issue.<sup>100</sup> Having conceded liability, the balance tipped in favor of defendants motion for dismissal on the grounds of *forum non conveniens*.<sup>101</sup>

The court first considered the private interest factors.<sup>102</sup> Since the defendants had conceded liability, the only issue remaining was the issue of damages. The evidence necessary to determine the damages question existed abroad, a fact which strongly favored the use of appropriate foreign forums.<sup>103</sup> In addition, all necessary witnesses would most likely have the foreign domiciles of the decedents and thus they would be beyond compulsory process; therefore, a foreign forum where they were under compulsory process was necessary.<sup>104</sup> The court also realized that it would be more cost efficient to use witnesses in their own domiciles, or in Saudi Arabia, which is closer than the United States.<sup>105</sup> The court was therefore considering transportation costs. The availability of third parties was not a factor, since all defendants conceded liability. In considering the public interest factors, the court noted the burden upon the federal courts and their congested calendars. The court also noted that the foreign forum clearly had a

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<sup>98</sup> *Id.* at 1144.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1143-45, 1155.

<sup>101</sup> *Id.* at 1148-49.

<sup>102</sup> *Id.* at 1146-51.

<sup>103</sup> *Id.* at 1148-49.

<sup>104</sup> *Id.* at 1148.

<sup>105</sup> *Id.* at 1149.



more significant interest in this dispute since the accident itself occurred in Saudi Arabia, one of its corporations was involved, its courts would better be able to protect its own citizens' rights, and its law as well as social and economic factors were significant.<sup>106</sup>

Dismissal was not found to be appropriate, however, in *Tokio Marine and Fire Insurance Co. v. Bell Helicopter Textron*.<sup>107</sup> This case was filed in Federal Court for the Southern District of Texas.<sup>108</sup> The plaintiffs sought damages of \$1.8 million as a result of a helicopter crash in Japan on May 13, 1978. The helicopter, a Bell Model 214B, was designed and manufactured in Texas by Bell Helicopter Textron and sold to Mitsui, U.S.A., who in turn sold it to Mitsui, Japan.<sup>109</sup> Thereafter the helicopters were leased to Asahi.<sup>110</sup> The accident occurred two years after the original sale of the helicopter by Bell. The helicopter was being used by Asahi for transportation of construction materials when it crashed, killing a Japanese construction worker.<sup>111</sup> The Japan Aviation Accident Investigation Committee determined the cause of the accident to be the failure of the speed reduction gear box, which caused a sudden loss of engine power to the main rotor blade.<sup>112</sup> The plaintiffs, who were insurance subrogees of Asahi, brought the action against Bell to recover property damages and sums paid to the family of the deceased construction worker.<sup>113</sup> The plaintiff alleged various product liability theories. The defendant denied any liability and asserted that the accident was a result of negligent maintenance and pilot error.<sup>114</sup> The defendant made a motion to dismiss on the basis of *forum non conveniens* and the motion was denied.<sup>115</sup>

The court first decided that Japan was an adequate alterna-

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<sup>106</sup> *Id.* at 1151-53.

<sup>107</sup> 17 Av. Cas. (CCH) 17,321 (S.D. Tex. 1982).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

tive forum within the meaning of *Reyno*, despite the fact that the law was less favorable in Japan where an action based upon strict liability or implied warranties does not exist. The court however, held that the *Gilbert* factors favored retention of the case in Texas.<sup>116</sup> Moreover, the court noted that in *Reyno*, there were potential third party defendants who were not amenable to jurisdiction in the United States.<sup>117</sup> In the instant case, the defendants never tried to implead third parties who they contended were potentially responsible for the accident.<sup>118</sup> The court also noted that the investigation in Japan that concluded that the cause of the accident was the defective speed reduction gear box, was attended by five Bell employees.<sup>119</sup> The court stated that the public interest factors favored retention of the case in Texas because it had a local interest in the products liability claim against one of its corporations. The court also stated that Texas law would apply, therefore favoring a Texas forum.<sup>120</sup>

In *Wahlin v. Edo*<sup>121</sup> the New York Supreme Court dismissed an action for *forum non conveniens*. The action arose out of a crash of a Piper PA-34 Seneca aircraft near the Malmo Sturup Airport in Sweden on February 28, 1980 in which plaintiffs' decedents, the pilot and two passengers, were killed. The complaint alleged that defendant Edo designed, manufactured and sold a certain instrument known as a Gyro Horizon which was installed on the aircraft while defendant Piper designed, manufactured and sold the aircraft and approved installation of the Gyro Horizon. These were wrongful death actions based on products liability claims. Defendants contended that the action should be dismissed for *forum non conveniens* under section 327 of the New York Civil Practice Law.<sup>122</sup> In addition, the defendants relied upon *Silver v. Great*

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> 17 Av. Cas. (CCH) 17,562 (N.Y. Sup. Ct. 1982).

<sup>122</sup> N.Y. CIV. PRAC. LAW § 327 (McKinney Supp. 1982). That section provides:  
When the court finds that in the interest of substantial justice the ac-

*American Insurance Co.*,<sup>123</sup> for the contention that *forum non conveniens* relief should be granted when it plainly appears that New York is an incorrect forum, and that another forum is available that will best serve the ends of justice and convenience of the parties.<sup>124</sup>

The court found that an alternative forum in Sweden did exist and that there was a substantial nexus between the litigation and Sweden.<sup>125</sup> In relying upon *Reyno*, the court said that "the possibility of a change in law can not be given substantial weight in this inquiry."<sup>126</sup> The action was dismissed under section 327 of the New York Civil Practice Law.<sup>127</sup>

These six post-*Reyno* cases point out that dismissal for *forum non conveniens* will turn on the particular facts of each case. *In re Disaster at Riyadh Airport Saudi Arabia*,<sup>128</sup> *Lui Su Nai-Chao v. Boeing Co.*,<sup>129</sup> *Lampitt v. Beech Aircraft Corp.*,<sup>130</sup> and *Wahlin v. Edo*<sup>131</sup> seem to point out that United States trial courts are willing to dismiss cases involving foreign plaintiffs. They all rejected plaintiffs' attempts to establish a nexus with the United States by characterizing these actions as American products liability actions. These courts have found that the interest of the United States in deterring the production of defective products was not sufficient to overcome the great commitment of judicial time and resources necessary for adjudication.<sup>132</sup>

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tion should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

*Id.*

<sup>123</sup> 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

<sup>124</sup> 29 N.Y.2d at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402.

<sup>125</sup> 17 Av. Cas. (CCH) at 17,564.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> 540 F. Supp. 1141 (D.D.C. 1982).

<sup>129</sup> No. C-81-4235 (N.D. Cal., April 12, 1982).

<sup>130</sup> 17 Av. Cas. (CCH) 17,358 (N.D. Ill. 1982).

<sup>131</sup> 17 Av. Cas. (CCH) 17,562 (N.Y. Sup. Ct. 1982).

<sup>132</sup> See Tompkins & Fucigna, *Barring Foreign Air Crash Cases From American Courts—Update*, 24 FOR THE DEFENSE 10, 14 (Oct., 1982) [hereinafter cited as *Update*].

On the other hand, *Tokio Marine and Fire Insurance Co. v. Bell Helicopter Textron*,<sup>133</sup> and *In re Air Disaster near Bombay, India on January 1, 1978*,<sup>134</sup> clearly illustrate that under *Reyno*, the fact that plaintiffs are foreign is not, in and of itself, sufficient to allow a dismissal under *forum non conveniens*. Rather, the courts will still closely follow those guidelines set forth in *Gilbert*.<sup>135</sup> Is there an adequate alternative forum? Do the private and public interest factors weigh in favor of defendants' motion to dismiss? These cases indicate that even after *Reyno*, there can be no guarantee that a foreign air crash case will be dismissed routinely to a foreign forum.<sup>136</sup>

The *Reyno* decision, at a minimum, establishes that the courts are to give the plaintiffs' initial choice of forum less than maximum force when the real parties in interest are foreign. Nonresidents are presumed to be as knowledgeable of their own country's law as with United States law. The public policy rationale of *Reyno* is to discourage the manipulation of our judicial system through clever forum shopping by foreign plaintiffs.<sup>137</sup> Furthermore, *Reyno* stands for the premise that dismissal for *forum non conveniens* cannot be defeated by plaintiffs' argument that the substantive law in the foreign forum is less favorable to their claim.

The following list of factors taken from the various *forum non conveniens* cases should provide some insight into whether dismissal can be expected:<sup>138</sup>

1. Are defendants amenable to jurisdiction in the alternative forum? It may be necessary to:

- a. Waive any objection to jurisdiction in the alternative forum;
- and

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<sup>133</sup> 17 Av. Cas. (CCH) 17,321 (S.D. Tex. 1982).

<sup>134</sup> 531 F. Supp. 1175 (W.D. Wash. 1982).

<sup>135</sup> See *supra* text accompanying notes 15, 19.

<sup>136</sup> See *supra* Update note 132, at 18.

<sup>137</sup> See Note, *Forum Non Conveniens: Standards for the Dismissal of Actions from United States Federal Courts to Foreign Tribunals*, 5 *FORDHAM INT'L L.J.* 533 (1982).

<sup>138</sup> See Tucker, *Forum Non Conveniens: Recent Developments*, ABC NEWSLETTER OF PRODUCTS LIABILITY, Fall 1982.

- b. Waive objection to compulsory process requiring appearance of witness and production of documents in the alternative forum; and
- c. Consent to full faith and credit of any judgment rendered in the alternative forum; and
- d. Waive for a reasonable period of time the statute of limitations applicable in the alternative forum.

2. Does the relative convenience of the parties dictate the trial of the matter in the alternative forum?

3. What law applies with regard to liability and damages?

4. Where are the principal places of business of defendants?

5. Do the events out of which the action arose give a substantial relationship or nexus with the chosen forum?

6. Would either party be substantially disadvantaged by having to try the action in the alternative forum?

7. Would judgment by the court in the foreign forum be enforceable in plaintiff's original choice of forum?

8. Does the convenience of the witnesses dictate the trial of the matter in the alternative forum?

9. Would the relative expense of maintaining the action be less in the alternative forum?

10. Would a view of the premises or knowledge of local conditions be helpful in deciding the case?

11. Would prosecution of the action in the United States courts place an unfair, inequitable and disproportionate burden on the courts of the United States?

12. Do plaintiffs or defendants have any relationship with the United States forum related in any way to the accident?

13. Does the United States forum have an interest in providing a forum for the parties to the action?

14. Does the United States forum have an interest in regulating the situation or conduct involved?

15. Would trial in the alternative forum avoid multiplicity of actions and inconsistent adjudication?

16. Does relative ease of access to sources of proof favor the alternative forum?

17. Is compulsory process for the attendance of witnesses available in the United States forum?

18. Is a fair trial more likely in the alternative forum?

19. Is there any public interest in the case in the United States forum?

20. Does court congestion favor the alternative forum?

21. Would trial in the United States forum impose jury duty on a community having no relation to the litigation, thus creating an injustice and a burden on local taxpayers?

22. Would trial in the United States forum pose difficulties and inconvenience as a result of presentation of testimony by deposition?

23. Have any considerable proceedings and expenditure of court time taken place in the United States?

There is no doubt that the decision in the *Reyno* case is of great importance to manufacturers and their insurers. The *Reyno* case has revived and expanded an important procedural device for the defense in aviation litigation.

