

**Insights and Ironies:
The American Bhopal Cases***
20 Tex. Int'l L.J. 307 (1985)

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When the news of the December 3, 1984, disaster at Bhopal, India, broke in Europe, I was in the company of a distinguished European lawyer. I predicted that we should soon hear of American lawyers at Bhopal, and then of lawsuits filed in the United States on behalf of the victims and survivors. My distinguished colleague was, first, amazed; then, when reminded of the American way of litigation, bemused. He thought a court in the United States should not busy itself with extraterritorial events on behalf of aliens. He pointed out that no regulatory interest of the United States vis-à-vis the United States parent company could fairly extend to the Indian subsidiary. He thought it improper for American lawyers to take any initiative in such a venture.

In this limited time let me share with you my reflections on the points my foreign colleague raised. For purposes of getting on with the discussion, let us assume that certain allegations of the Indian victims' complaints against the United States parent company are sufficient and true. In other words, let us assume that the parent did exercise that measure of control¹ over the Indian subsidiary in matters of safety which would make the parent responsible, at least in part, for the disastrous leak of methyl isocyanate which killed some two thousand people and injured many thousands more.

Now, by virtue of having filed suit here, counsel have set in motion on behalf of the victims powerful machinery capable of yielding substantial settlement of their claims against the United States parent. For all the criticism, informed and uninformed, of American lawsuits, lawyers, and **(1985) Tex. Int'l L.J. 308** litigiousness in general, I think we can all agree that no more effective mechanism has yet been devised for obtaining an "out-of-court" settlement, as

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1. See Brief in Support of Plaintiffs' Motion to Transfer Pursuant to 28 U.S.C. § 1407, *In re Disaster at Bhopal, India*, MDL No. 626 (Judicial Panel on Multidistrict Litigation, Dec. 21, 1984). An affidavit of a former managing director of Union Carbide in India reportedly has been filed with the Panel, asserting that West Virginia officials of Union Carbide overrode the affiant's objections to constructing storage tanks for methyl isocyanate in Bhopal. It also reportedly asserts that the United States parent's management committee approved all capital outlays over \$500,000. See Press, *Bhopal: Battling for Business*, NEWSWEEK, Feb. 4, 1985, at 80.

promptly as the defendant's resolve will allow, than filing a class action in this country.²

It is true that properly instructed juries can award these plaintiffs only rather low special damages, by American standards, given their relatively low earnings and medical expenses. It is also true that general damages for pain and suffering can enlarge the exposure for the United States defendant only to a still tolerable level. But the plaintiffs' leverage is not fatally weakened on that account. The real threat to the United States defendant is punitive damages. Last year in the somewhat analogous *Silkwood v Kerr-McGee Corp.* radiation death case, the Supreme Court held such an award under state law not preempted by federal nuclear safety law.³ Such an award would be devastating if, as is likely, the defendant has been unable to insure against it, or, as is not uncommon, the insurers can successfully defend on grounds of public policy against the insured's claim for payment to cover it.

Yet the defendant will not make a settlement offer as long as it believes the plaintiffs can lose their case at the outset. The company will surely move for dismissal of these cases on the ground of *forum non conveniens*. As my colleagues point out, determination of the *forum non conveniens* issue is likely to conclude the entire controversy.⁴ Should the motion be denied, the defendant would no doubt come forward with a prompt settlement offer in view of the risk I have just described. On the other hand, should the motion be granted, and the grant sustained on appeal, the plaintiffs would be unlikely to seek an Indian forum. Even if Indian tort litigation were reasonably analogous to our own, India would not give the victims access to counsel through contingency fee agreements.⁵

The problem for the plaintiffs is that there is a strong likelihood that the *forum non conveniens* motion will be granted.⁶ It is not that the litigation is too complex to be manageable. Our courts can handle it if any can. The trouble is, rather, that the cases seem, at first consideration, so very *Indian*. **(1985) Tex. Int'l L.J. 309** The underlying concern, I think, is that if these cases were allowed to go to trial here, our courts would try them under our law. We would wind up applying to operations at the Bhopal plant our own environmental standards. Extraterritorial application of United States environmental regulations seems inappropriate on the Bhopal facts. It seems self-evident that the conduct of the

2. See Lewin, *Faster Settling of Mass Claims*, N.Y. Times, Aug. 7, 1985, at 32, Col. 1.

3. 104 S. Ct. 615, *reh'g denied*, 104 S. Ct. 1430 (1984). Punitive damages are reported to be unavailable in India. See *Bhopal: City of Death*, INDIA TODAY, Dec. 31, 1984, at 4, 18; *but see Galanter, Legal Torpor: Why So Little Has Happened in India after the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273, 276 & n.16 (1985).

4. See Robertson, *Introduction to the Bhopal Symposium*, 20 TEX. INT'L L.J. 269, 270-72 (1985).

5. See *infra* note 59 and accompanying text. This is why the defendant can move for dismissal without fear of having to defend in the hostile Indian forum.

6. See *infra* note 33 and accompanying text. In referring to a single motion I assume that much if not all of the state litigation will be removed to federal courts, where it will be transferred and consolidated with the federal cases. On February 6, the Judicial Panel on Multidistrict Litigation transferred the federal cases to the Southern District of New York for consolidated pretrial litigation. Taylor, *Bhopal Suits Combined in New York*, N.Y. Times, Feb. 7, 1985, at D1, col. 3.

operation in India was and remains a concern of Indian law. Our laws reflect altogether different conditions and priorities. In short, the prospect of litigation of these cases in the United States generates headwagging because it seems to foreshadow some ultimate breach of international good manners.

So I think it necessary to clarify at the outset that there is very probably no conflict of laws on liability. Indian law is the *same* as ours. It is true that Indian personal injuries cases do not seem to come to litigation. No doubt tort victims there cannot afford to pay counsel fees in advance of any recovery. But the older English tort cases would help to supply rules of decision if the need for decisional law did arise. As for the law we would apply, it would be the law of some state. Thus, whether the suit were tried under Indian or American law, there would be liability, assuming the truth and sufficiency of the allegations, under ordinary tort principles. There might possibly be strict liability under the rule in the English case of *Rylands v Fletcher*,⁷ followed in a number of states. That is, where defendant exercises a measure of control over a hazard, and the hazard escapes, with resultant damage to the plaintiff, there is liability without a need to show fault.

Now, I have said that these theories of liability in our country are a matter of state, not federal, law. In fact, no rigorous national regulatory standards can be imposed on the United States defendant in this litigation. We speak of “American” law, but it appears that in a case of this kind we do not have any.

Of course, there is a comprehensive body of national laws regulating our environment and the safety of our workplaces. We have laws to deal with clean air,⁸ toxic substances,⁹ pesticides,¹⁰ hazardous wastes,¹¹ and occupational safety and health.¹² We have an environmental administrative agency (**1985) Tex. Int’l L.J. 310** with power to set standards.¹³ We have financial responsibility arrangements and compulsory insurance funds¹⁴ to take care of certain environmental disasters. Congress has provided criminal penalties for violators of environmental law.¹⁵ The attorney general, or the agency, or a private citizen, may be able to sue to obtain compliance; governments and private parties may be able to *sub* for reimbursement of cleanup costs, response costs, or harms to natural resources.¹⁶

7. 3 L.R.-E. & I. App. 330 (H.L. 1868).

8. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982).

9. *See, e.g.*, Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2629 (1982).

10. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1982).

11. *See, e.g.*, Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6922-6987 (1982).

12. *See, e.g.*, Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1982).

13. *See, e.g.*, TSCA, 15 U.S.C. §§ 2601-2629 (giving the Environmental Protection Agency (EPA) authority to control the manufacture and storage of toxic substances); FIFRA, 7 U.S.C. §§ 136-136y (giving EPA the authority to regulate the production of pesticides).

14. *See, e.g.*, Comprehensive Environmental Response, Compensation and Liability Act (Superfund Act), 42 U.S.C. §§ 9601-9657 (1982); Price-Anderson Act, 42 U.S.C. § 2210 (1982).

15. *See, e.g.*, RCRA, 42 U.S.C. § 6928(d); Clean Air Act, 42 U.S.C. § 7413(c).

16. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7413(b) (EPA Administrator’s injunction suit); Superfund Act, 42 U.S.C. § 9606(a), (b) (Attorney General’s suit); RCRA, 42 U.S.C. §

But it is the peculiar deficiency of this comprehensive federal regulatory structure that it does not provide a means by which people who are hurt, or their survivors, can get damages.

What about nonstatutory remedies, then? We did have a vigorously developing body of federal common law to deal with interstate and possibly transnational pollution. That was authorized by the Supreme Court in the well-known case of *Illinois v. City of Milwaukee*.¹⁷ But the Court took back the authorization less than ten years later in the same litigation, holding that Congress had preempted federal, but not state, common law in the “comprehensive” environmental legislation to which I have already referred.¹⁸

It might have been argued that private rights of action for damages were implicit in environmental legislation. But that accommodation was disapproved by the Supreme Court in 1982 in the *National Sea Clammers* case.¹⁹

There is no way, then, that personal injuries victims, whether foreign or residing in the United States, can obtain relief under *federal* law for environmental torts. Even in the wake of Bhopal, as my colleague Tom McGarity reveals,²⁰ our most concerned legislators propose only additional regulations and requirements. A federal cause of action for personal injuries victims is not on their agenda. This, of course, explains why the Bhopal suits in federal courts have been filed only under diversity of citizenship jurisdiction.²¹ There is no federal question in these cases.²² **(1985) Tex. Int’l L.J. 311**

It might seem not entirely futile, however, to inquire into the extraterritorial applicability of federal environmental regulation. In theory, it is possible that a violation by the United States parent vis-à-vis the Bhopal plant could furnish some evidence of negligence, or even lay a basis for a finding of negligence per se, under state law. But it is hard to believe that national environmental law would be given such extraterritorial resonance in the absence of polluting conduct here with transfrontier effects.²³ So in the end, the United States parent’s liability, if any, under state law, will probably have to turn on its acts or omissions affecting the Bhopal plant that can be found tortious in themselves, rather than violative of federal environmental standards.

6972, (citizen suits); Superfund Act, 42 U.S.C. §§ 9611-9614 (public or private actions for reimbursement); id § 9611(1) (private reimbursement action for certain foreign claimants); id. § 9607(a) (reimbursement of cleanup and response costs, and for damage to natural resources).

17. 406 U.S. 91 (1972). The federal common law of nuisance authorized in *Illinois* has been held available to private plaintiffs. The leading case was *Nat’l Sea Clammers Ass’n v. City of New York*, 616 F.2d 1222, 1233-34 (3rd Cir. 1980) (Gibbons, *J.*), *rev’d on other grounds*, *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981).

18. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

19. *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981).

20. McGarity, *Bhopal and the Export of Hazardous Technologies*, 20 TEX. INT’L L.J. 333, 336 n.14 (1985).

21. 28 U.S.C. § 1332 (1983).

22. 28 U.S.C. § 1331 (1983).

23. *See, e-g.*, 42 U.S.C. § 9611(1) (providing reimbursement procedure for foreign claimants sustaining losses abroad occasioned by pollution-generating activity conducted under the laws of this country).

The irony is that if any national interest is evoked by these claims— and apart from any political interest, I think that at a minimum an interest in protecting our foreign trade relations is rather self-evident²⁴—we cannot vindicate it by evenhandedness in applying rules of liability national in scope.²⁵ The only way in which American courts can vindicate a national interest here, as opposed to a West Virginia or Connecticut or New York interest, if any, appears to be to make themselves accessible to the aliens' suits. I think this reflection ought to have some bearing on the motion to dismiss for forum non conveniens.

Interestingly, current proposals of the American Law Institute seem to lend weight, by way of analogy, to the argument that access to this country's tribunals should be afforded the Bhopal claimants. Under these proposals, in cases of transfrontier pollution, a duty to make reparation arises as against the country in which the polluting activity occurred, in favor of an aggrieved country.²⁶ In such cases, the Institute would allow that duty to be satisfied **(1985) Tex. Int'l L.J. 312** by the responsible country's giving access to its tribunals to private citizens of the aggrieved country who have been injured by the pollution.²⁷ The Institute sets up a principle of nondiscrimination; it proposes that the same access and remedies be furnished the foreign claimant in domestic courts in these cases as would be available to a citizen of the forum country.²⁸

I think we can begin to draw some conclusions from what has been said thus far. Maintaining the Bhopal cases in our courts would not violate principles of international comity. Rather, as the American Law Institute's new proposals suggest, granting access would be an exercise in comity.²⁹ Nor would our courts

24. Consider, in this connection, such events in the wake of the disaster as the turning back from both a French and a Brazilian port of ships bearing cargoes of Union Carbide methyl isocyanate, Lueck, *Carbide Reports Profit of \$13 Million*, N.Y. Times, Jan. 29, 1985, at 33, col. 1; the bombing of a Union Carbide plant in Germany, *Union Carbide Factory Attacked in Germany*, N.Y. Times, Dec. 7, 1984, at 12, col. 4; bombing threats against two Union Carbide plants in Sidney, Australia, *Sidney Plants Threatened*, N.Y. Times, Dec. 9, 1984, at 22, col. 5; and calls for boycotts of the company's products from an international conference of consumer groups meeting in Thailand, *Disaster Dominates a Parley*, N.Y. Times, Dec. 16, 1984, at 19, col. 5.

25. *But see* Judge Weinstein's ingenious suggestion in *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690, 703 (E.D.N.Y. 1984) (holding in diversity suit that "national consensus law" rather than any one state's law would govern liability in view of predominant national interest), *remanded from*, 635 F.2d 987 (2d Cir. 1980), *cert. denied. sub nom.*, *Chapman v. Dow Chemical Co.*, 454 U.S. 1128 (1981) (holding case did not arise under federal common law for jurisdictional purposes).

26. RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 601 (Tent. Draft No. 4, 1983).

27. *Id.* § 602.

28. *Id.* *See also* Superfund Act, 42 U.S.C. § 9611(1) (giving foreign claimants same remedies as United States claimants if treaty or other reciprocal rights available). *But see* *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975) (excluding foreign purchasers of defendant's securities from class action for fraud). *But see infra* notes 33, 37 and accompanying text.

29. This conclusion is fortified by Indian officials' informal expressions of preference for litigation in the United States. *See infra* note 41 and accompanying text. *But see* *Rizzo v. Goode*, 423 U.S. 362 (1976) (disapproving trial court's orders concerning Philadelphia police in part on grounds of comity, although Pennsylvania appeared before the Court in support of the decree).

measure the events in Bhopal against sophisticated environmental regulations inappropriate to those events. Rather, on liability, our courts would apply the judge-made law common to both India and our states. This body of law would apply only to those controlling activities of the United States defendant in this country which might fairly connect it to the Bhopal tragedy.

The concerns of comity that often bring doubt and hesitation to assertions of adjudicatory jurisdiction, as opposed to legislative jurisdiction, in transnational cases may have been somewhat exaggerated in the past. In a recent English case, for example, the House of Lords cheerfully approved the dissolution by the Court of Appeal of an injunction against an American suit issued by the High Court of Justice in London. In *Castanho v. Brown & Root (U.K.) Ltd.*,³⁰ a paraplegic Portuguese oil worker was claiming against a United States parent corporation for injuries sustained in the North Sea. There was jurisdiction over the tort in England as well as in the United States. There was a similar result in the very different case of *British Airways Board v. Laker Airways*.³¹ Sir Freddy Laker was alleging conspiracy on the part of British and foreign airlines to drive his airline out of business. Here, no action could have been brought to try the merits in England. In *Laker*, as in *Castanho*, the House of Lords saw no reason to deprive the plaintiff of his American forum.³² **(1985) Tex. Int'l L.J. 313**

Against this background, it is unfortunate that our own courts have become increasingly inhospitable to foreign claimants.³³ Even American residents have been denied access in transnational cases.³⁴ Congress has recently

30. 1981 A.C. 557 (H.L.).

31. [1984] 3 W.L.R. 413 (H.L.).

32. The result to the contrary in *Smith, Kline and French Laboratories, Ltd. v. Block*, [1983] 1 W.L.R. 730 (C.A.), was explained in *British Airways Bd. v. Laker Airways*, [1984] 3 W.L.R. at 426. The *Smith, Kline and French* case was one in which the claim was "bound to fail." The injunction was issued to prevent the "oppressive consequences" of extensive discovery in such circumstances.

33. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984); *Ahmed v. Boeing Co.*, 720 F.2d 224 (1st Cir. 1983). But see *De Shane v. Deere & Co.*, 726 F.2d 443, 444 (8th Cir. 1984) (reversing dismissal where trial court failed to consider such factors as unavailability of contingency fees in foreign forum, although defective product was marketed not by American defendant but by wholly-owned foreign subsidiary); *Macedo v. Boeing Co.*, 693 F.2d 683, 690 (7th Cir. 1982) (reversing dismissal where trial court failed to consider, *inter alia*, requirement of substantial filing fees and unavailability of contingency fees at foreign forum); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 609-10 (D.C. Cir. 1983) ("Operation Babylift") (affirming denial of motion given strong American political interest in resolution of controversy, despite contrary position of Justice Department, and despite difficulty of proving foreign damages).

34. See, *eg.*, *Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A.*, 712 F.2d 11 (2d Cir. 1983) (sustaining dismissal; contract contained clause selecting foreign forum); *Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983) (sustaining dismissal although alternative forum would impose substantial filing fees); *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147 (2d Cir.) (en banc), *cert. denied*, 449 U.S. 890 (1980); *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). But see *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339 (8th Cir. 1983) (reversing dismissal); *Nalls v. RollsRoyce Ltd.*, 702 F.2d 255 (D.C. Cir.), *cert. denied*, 103 S. Ct. 2444 (1983) (refusing to review denial of motion forum non conveniens);

enacted legislation denying access to our tribunals to certain alien claimants.³⁵ In 1981, the Supreme Court in *Piper Aircraft Co. v. Reyno*³⁶ held that it was not an abuse of discretion for a trial court to have dismissed a case on facts having a superficial similarity to the Bhopal litigation, even though the alternative foreign forum would have applied less favorable law. In *Reyno*, as here, the action was brought against a United States company by foreign death claimants, and the accident giving rise to the case, as here, occurred abroad.³⁷ (1985) **Tex. Int'l L.J.** 314

In *Reyno*, the Supreme Court seemed to assume that the alternative forum in Scotland was adequate. Here, the weight of opinion seems to be that a dismissal would, as a practical matter, put an end to the Bhopal cases.³⁸ For reasons given by Professors Dhavan³⁹ and Galanter,⁴⁰ Indian courts are not a realistic alternative. Indeed, both the Chief Justice of the Indian Supreme Court and the Attorney General of India have said as much.⁴¹

For all that, the Bhopal plaintiffs may find themselves confronting a certain new judicial insensitivity in the United States to the practical burden of litigating elsewhere. Only last term, in a case on personal jurisdiction,

Macedo v. Boeing Co., 693 F.2d 683 (7th Cir. 1982) (reversing dismissal); *In re Air Crash Near Bombay, India* on January 1, 1978, 531 F. Supp. 1175 (W.D. Wash. 1982) (retaining jurisdiction but choosing Indian law).

35. See, e.g., Pub. L. No. 97-389, § 503(a)(2), 96 Stat. 1955 (1983) (amending Jones Act, 46 U.S.C. § 688 (1982) to exclude actions of foreign oil workers under United States maritime law for personal injuries or death occurring in foreign waters, unless no other remedy is available).

In addition, Congress has recently amended the Sherman Act and the Federal Trade Commission Act to require very direct and foreseeable effects on commerce in the United States before those laws will apply to foreign events or persons. See Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, tit. IV (codified, as amended, at 15 U.S.C. §§ 7, 45(a)(3) (1982)).

36. 454 U.S. 235 (1981).

37. See *Ahmed v. Boeing Co.*, 720 F.2d 224, 225 (1st Cir. 1983) (affirming dismissal while noting resemblance of case to *Reyno*). But see *Macedo v. Boeing*, 693 F.2d 683 (7th Cir. 1982).

It was left open in *Reyno* whether federal or state standards govern the maintainability of *Reyno*-like actions in state courts. *Reyno*, 454 U.S. at 235, 248, n.13. In *Holmes v. Syntex Laboratories, Inc.*, 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984), the state intermediate appellate court held itself free to apply state law in reviewing a dismissal forum non conveniens in an action by British citizens against a United States drug manufacturer, and reversed. It is a separate question whether, if state forum non conveniens standards do survive, state or federal standards govern in cases brought under state law in federal courts sitting in diversity.

38. See Robertson, *supra* note 4.

39. See Dhavan, For Whom? And For What? Reflections on the Legal Aftermath of Bhopal, 20 TEX. INT'L L.J. 295 (1985).

40. See Galanter, *supra* note 3. The impermissibility of contingency fee agreements in India would seem conclusive, even apart from the problems of filing fees and docket congestion.

41. See Stewart, *Legal Liability: Why Lawsuits for Damages Are Very Rare in India*, Wall St. J., Jan. 23, 1985, at 1, col. 1. As this goes to press, the Government of India has entered the litigation as party plaintiff, see Lewin, *Carbide is Sued in U.S. by India in Gas Disaster*, N.Y. Times, Apr. 9, 1985, at 1, col. 5.

Helicopteros Nacionales de Colombia, S.A. v Hall,⁴² the Supreme Court remitted United States widows and orphans to some derisory remedy⁴³ in Peru or Colombia for the deaths of their breadwinners. That was done in the interest of “fairness” for a sophisticated multinational corporation transacting business in this country.⁴⁴

Nevertheless, it is important not to over-read the *Reyno* case on the facts before us. At the heart of *Reyno* was the Court’s perception that to insist on access for the Scottish plaintiffs would create only some “incremental deterrence.”⁴⁵ *Reyno* was only one more products liability suit. But, of course, the Bhopal suits are a very different matter. Bhopal is thought to be the greatest industrial disaster in history. Far from some “incremental deterrence,” these suits touch on national policy concerns that arise in face of a shock of some magnitude to our foreign trade relations.

I do not say it would be an abuse of discretion to dismiss these cases. But (1985) *Tex. Int’l L.J.* 315 certainly it would not be an abuse of discretion to hang on to them.⁴⁶ It lieth not in a defendant’s mouth to argue that it is vexatious, harrassing, and inconvenient to be sued at home.⁴⁷ What happened in Bhopal cannot pin liability on the United States parent; only what happened here, in the United States parent’s own offices, can do that. Trial of damages presents a more complex problem, but not an insurmountable one.⁴⁸ Federal judges can create appropriate mechanisms for administration of damages claims and of

42. 104 S. Ct. 1868 (1984).

43. See Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 36 S.C.L. REV. (Summer 1985) (forthcoming).

44. In *Helicopteros*, the defendant was making regular purchases of helicopters in Texas, and negotiating in Texas, Oklahoma, and other states to obtain transportation contracts. 104 S. Ct. at 1870. The Supreme Court held that mere purchases at the forum were insufficient to ground the general jurisdiction of a state court over an alien defendant. 104 S. Ct. at 1874. The Court has recently granted review to consider the effect on this ruling of a distinction between “active” and “passive” purchasing activity. *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 77 (1984).

45. 454 U.S. at 260.

46. See, e.g., *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 609-10 (D.C. Cir. 1983) (“Operation Babylift”) (sustaining denial of motion; identifying United States political interest in resolution of the dispute in this country despite Justice Department position to the contrary); *Hodson v. A.H. Robins Co.*, 715 F.2d 142 (4th Cir. 1983) (affirming denial of motion in suit by British subject against Virginia corporation, despite availability of English forum).

47. See, e.g., *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312 (4th Cir. 1984) (affirming denial of motion forum non conveniens in diversity suit in Maryland by nonresidents of Maryland against Maryland manufacturer, on ground that defendant did not meet burden of showing various alternative forums were preferable).

48. See, e.g., *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 607, 608 (D.C. Cir. 1983) (“Operation Babylift”) (holding that ease of proof of liability is a more important factor than ease of proof of damages, although each infant’s injuries would have to be evaluated by Vietnamese doctors able to measure the handicaps against Vietnamese culture and although the infants’ testimony would have to be received in Vietnamese).

disbursements.⁴⁹ Whatever information there may be in foreign files and among foreign witnesses, much of it will have to be brought to the United States in any event, simply because there will be related litigation here. I do not refer to the shareholder suits claiming nondisclosure now being filed.⁵⁰ But there may be litigation in the United States against a third party.⁵¹ Disputes with insurers do not seem improbable.⁵² Of course, in the event of bankruptcy, foreign personal injuries claims will inevitably be drawn into federal bankruptcy court.⁵³ **(1985) Tex. Int'l L.J. 316**

There is another difficulty which I believe should not affect the maintainability of this litigation: the problem of the "empty chair." Most of us who have followed the press reports probably suspect that substantial responsibility for the tragedy at Bhopal rests with local Indian authorities, who, it appears, were not only lax in enforcement of local law, but also did not act while the elements of the tragedy were being prepared: the clustering of slum dwellings around the plant, the decreasing competence and vigilance of plant employees, the increasing incidence of accidents. The Indian subsidiary and local plant management also appear to bear some responsibility for the disaster. The "empty chair" will of course complicate adjudication in this country of the suits against the United States company. If under state law there is joint and several liability, the United States parent may wind up with a bill for all damages and without any meaningful action for contribution against sovereign, or judgment-proof, Indian authorities or Indian entities unamenable to process. On the other hand, if under state law damages are to be apportioned, the trier will have to deal with the "empty chair" in whatever fashion state law does deal with it.⁵⁴ The important

49. See, e.g., Blumenthal, *Awards Proposed in Agent Orange Suit*, N.Y. Times, Feb. 28, 1985, at 14, col. 1 (proposed claims procedure would dispense with proof of fault; only total disability and death would warrant cash payments; proof of exposure in Vietnam to chemical would be matched against military service records; veterans' committee would administer claims and disburse payments). Indeed, as this goes to press, the New York transferee court hearing the Bhopal cases has arranged interim relief in the sum of \$5 million. See Lewin, *Judge Asks Carbide for Aid in India*, N.Y. Times, Apr. 17, 1985, at 28, col. 3.

50. See King, Powells & Glaberson, *Early Steps to a Carbide Settlement*, Bus. WK., Jan. 28, 1985, at 48.

51. Reportedly, Enserch Corporation of Dallas, Texas, is a successor to the British engineering corporation that was the prime contractor in construction of the Bhopal plant. See *Carbide's Contractor in Bhopal*, BUS. WK., Jan. 28, 1985, at 48; *Mystery of who designed Bhopal's plant*, NEW SCIENTIST, Dec. 27, 1984, at 7.

52. That, of course, is the unhappy teaching of the Johns-Manville asbestos tragedy, see *Product Liability: The New Morass*, N.Y. Times, Mar. 10, 1985, §3, at 1, col. 2; similar litigation arose in the wake of the Hyatt Regency skywalk collapse, see *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 n.12 (8th Cir. 1982).

53. Personal injuries and death claims against the bankrupt are triable in the district court in which a bankruptcy case is pending. 28 U.S.C. § 157(b)(5), as amended, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 346 (1984). There is a right to trial by jury. 28 U.S.C. § 1411, as amended, Pub. L. No. 98-353, § 102(a), 98 Stat. 334 (1984). Notice to potential foreign personal injuries claimants will be given as the court directs under FED. R. CIV. P. 4(i).

54. See, e.g., Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903 (1984) (comparing Indiana, Kentucky, and Wisconsin approaches).

thing is that the “empty chair” does not mean that an American forum is inconvenient. That is especially so since, as to some parties, the chair may well be empty in both countries.

So in the end it seems to me that the public and private interests, which, under *Reyno*, our trial courts need to take into account in ruling on forum non conveniens,⁵⁵ do support the maintainability of the victims’ actions in the United States.

Finally, there is the question of the role of American lawyers in the Bhopal litigation. Much of the feeling one senses in the press reports, a kind of outrage directed at the lawsuits and at American litigiousness in general, seems to spring from resentment of the conduct of American attorneys. Apart from the personal style of one or two of them,⁵⁶ it is hard to see why this should be so. There seems a willingness everywhere to castigate lawyers for seeking to make a living advocating the interests of the injured and aggrieved.

It is strange that no wrath is directed at the lawyers earning their living by advocating the interests of the United States corporate defendant. It is not considered unethical in any country for them to do so; it is considered, correctly, that as members of a learned profession, their duty is, to do what they **(1985) Tex. Int’l L.J. 317** can for their clients. Somehow, our learned profession seems to have devised some ethics rules that, as a practical matter, would exclude from our guild those who want to earn their living representing the injured rather than the injurers. But the existence of such rules should not be conclusive on the merits of the conduct they intend to discourage. The United States Supreme Court has afforded some of that conduct the protection of the First Amendment.⁵⁷

The press suggests that the Bhopal plaintiffs’ lawyers are motivated by greed.⁵⁸ But of course everyone has to earn a living. Sainthood and martyrdom ought not to be required. The press tells us that all the world is shocked by contingency fees, which are considered unethical everywhere. But they are not unethical in the United States. We understand that the contingency fee device gives access to justice to those who almost everywhere else,⁵⁹ including India, could not afford their day in court.

I do not know whether any American doctors flew to Bhopal to offer their services. If they did, they are to be commended for their generosity. They were volunteers. The Bhopal victims are too poor to pay American doctors’ fees; and the American medical system, unlike the American legal system, has not developed any way of creating a financial incentive for its doctors to remedy

55. *Reyno*, 454 U.S. at 257 (requiring substantial deference to discretion of trial court when it has considered all relevant public and private interest factors and balanced them reasonably).

56. See Enter Justice in Alligator Boots and Polka-Dot Tie, London Times, Dec. 11, 1984, at 1.

57. See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In re Primus*, 436 U.S.- 412 (1978). *But see* *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978); *Office of Disciplinary Counsel v. Zauderer*, 10 Ohio St. 3d 44, 461 N.E.2d 883, prob. *juris. noted*, 105 S. Ct. 76 (1984).

58. See, e.g., Cohen, U.S. *Negligence Lawyers Invade India-On the Wings of Greed*, Capital Times, Dec. 19, 1984, at 16.

59. See R. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 342-46 (4th ed. 1980).

harms to foreign or other uninsured victims. This failure, it seems to me, is to be regretted, not held up as an example.

The press has reported that attorneys' fees will be excessive, running from one third to one half of the Bhopal victims' recoveries.⁶⁰ But whatever one's view of the standard contingency fee, in this instance attorneys' fees will not be standard. At least in the consolidated federal cases, settlement or judgment will be in a lump sum and fees will be awarded by the court.⁶¹ In the capably handled Agent Orange litigation, for example, attorneys' fees, **(1985) Tex. Int'l L.J. 318** although substantial, amounted to less than ten percent of the original settlement fund.⁶²

The press has complained about alleged solicitation of the cases.⁶³ Of course solicitation has an undignified look to it. But why all this outrage? We are told that the lawyers were overreaching, that there was pressure, that as a result victims were not fully informed, that they did not understand the existence, or amount, or method of calculation of the fees.⁶⁴ But is it not transparent that the victims were being offered, at no risk to themselves, their best, probably their only, chance?

Commentators have simply failed to grasp that they are looking at a new sort of litigation. The mass disaster, the mass "toxic tort," joins other public interest litigation—class litigation, fee-shifted litigation—in creating new opportunities in—and, to be sure, new challenges to⁶⁵—the administration of justice. This is group litigation in the public interest. The only substantial difference between such suits and other public interest litigation is that the members of the group have suffered personal injuries. But that simply adds compensatory purposes to the deterrent purposes of public interest litigation. Of

60. An award of punitive damages, however, would significantly decrease the percentage of the victims' compensatory damages allocable to fees.

61. See Lewin, *Business and the Law: Faster Settling of Mass Claims*, N.Y. Times, Aug. 7, 1984, at 32, col. 1. ("It seems clear that, even without new laws, the trend toward handling mass claims through lump-sum settlement funds instead of individual lawsuits is already well under way" [referring to the Agent Orange and Bendectin cases, as well as the Beverly Hills Supper Club and MGM Grand Hotel cases]); Margolick, *Burger Assails Lawyers' Ads and Contingent Fees*, N.Y. Times, Aug. 6, 1984, at A11, col. 1, 4 (quoting a former chairman of the American Bar Association's Litigation Section to the effect that trial judges already scrutinize contingent fees: "As is often the case, the Chief Justice does not understand what happens on the trial level . . .").

62. See Press, *supra* note 1, at 80, col. 1.

63. See, e.g., Capital Times, Dec. 19, 1984, at 16 (cartoon by Auth, "Horrible—sniff—American multinationals taking advantage of—sob—poor third world countries, killing and maiming the innocent—sniff—sign here, little buddy"); Riley, *US Lawyers Court Disaster in Bhopal*, Nat'l L.J., Dec. 31, 1984, at 3, col. 2.

64. See *Bhopal Gas Leak- The Legal Damage*, INDIA TODAY, Jan. 15, 1985, at 60; cf. *Bhopal Residents Warned to Avoid Foreign Lawyers*, Milwaukee J., Dec. 31, 1984, at 1 (reporting warning by Indian Government authorities).

65. See, e.g., Coffee, *Rescuing the Private Attorney General.- Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215 (1983); Underwood, *Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses*, 71 KY. L.J. 787 (1982-83).

course, entrepreneur counsel⁶⁶ will, indeed must, mount these litigations. We have to come to terms with that. Of course, counsel will become real parties in interest in these litigations; that is why the litigations are mounted. Even the current Supreme Court, distrustful of public interest litigation as from time to time it has revealed itself,⁶⁷ has understood certain of these of its features.⁶⁸ Some may see in the American lawyer at work for the Bhopal plaintiffs only the flashy predator portrayed in the popular press.⁶⁹ Others **(1985) Tex. Int'l L.J. 319** will recognize a far more dignified figure: the private attorney general.⁷⁰

To the extent our codes of professional conduct continue to condemn such advocacy, they fail to reflect modern priorities and new realities. Even more seriously, they become vulnerable to the charge that in this they no longer conform to the public interest.

66. See Weinberg, *A New Judicial Federalism?*, 107 DAEDALUS 129, 132-33 (Winter 1978).

67. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (holding federal courts lack power absent statutory authorization to award attorneys' fees on "private attorney general" theory).

68. See, e.g., *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980) (holding in case mooted on merits that art. III requirement of case or controversy can be satisfied by lawyer's continuing interest in fee, in reviewing a denial of class certification, where class recovery would fund fee award. "In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client." *Id.* at 424 (Powell, J., dissenting)).

69. See *supra* note 56.

70. See, e.g., *Associated Indus. of New York State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964); *Newman v. Piggie Park Enter.*, 390 U.S. 400, 402 (1968).