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Pharmaceutical/Medical Cases

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Abstract
Particularly in the last decade there have been many foreign plaintiffs who have brought actions against American drug manufacturers alleging negligent marketing, sale and distribution of drugs, intra-uterine devices and even more recently heart valves, as well as alleging failure to warn consumers adequately of the possible risks involved in use of the products. In most cases the American manufacturer has a complex corporate structure and international network, with the product being sold in many countries through a series of local subsidiaries. The question here becomes this: at what stage does the American parent company cease to be liable for defective products and the foreign subsidiary take over?

Keywords
Corporate law, liability, negligent marketing, drug manufacturers

PHARMACEUTICAL/MEDICAL CASES*

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Particularly in the last decade there have been many foreign plaintiffs who have brought actions against American drug manufacturers alleging negligent marketing, sale and distribution of drugs, intra-uterine devices and even more recently heart valves, as well as alleging failure to warn consumers adequately of the possible risks involved in use of the products. In most cases the American manufacturer has a complex corporate structure and international network, with the product being sold in many countries through a series of local subsidiaries. The question here becomes this: at what stage does the American parent company cease to be liable for defective products and the foreign subsidiary take over?

Theories: When is the American Parent Company Liable

There have been a number of theories advanced to answer this question. Stein[1] suggests that the decisive fact, both with the courts that declined jurisdiction and with those that retained it, was the perceived importance of the forum's interest in regulating the conduct of American defendants abroad and extending the protection of American law to foreign plaintiffs.[2] The theory advanced by Birnbaum and Wrubel[3] in prescription drug cases is that whether or not the balance tips in favour of the plaintiffs choice or in favour of the foreign forum depends on:

1. the extent of the American manufacturers' active participation in the design, development, testing, labelling and marketing of the allegedly defective product, and[4]
2. the court's view of whether the chosen forum's interest in product safety and regulating manufacturer's conduct within its borders properly extends to transactions and events occurring beyond its borders.[5]

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* This is the second article in two-part series.
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1 Stein, 133 UPaLR 781.
2 Ibid p836.
3 Birnbaum & Wrubel, 'Foreign Plaintiffs and the American Manufacturer: Is a Court in the United States a Forum Non Conveniens?' (1984) 20 Forum 59.
4 Ibid p65.
5 Ibid p65.

Hartman's[6] suggestion is that two further public interest factors should be added to the *Gulf Oil*[7] analysis to help determine the issue, namely:

1. the existence of a pervasive foreign regulatory scheme over the alleged tortious conduct;[8] and
2. the degree of operational independence enjoyed by foreign subsidiaries of American corporations.[9]

For the former proposition Hartman goes on to explain that when a defendant can show that the foreign plaintiff's home forum pervasively regulates the product in question, the foreign government's interest in conducting the litigation in its own courts may override the existence of a different American regulatory system. For the latter point Hartman suggests that where the defendant can show that the foreign subsidiary corporation acts independently from the American parent company in manufacturing, marketing and distributing a product, or controls a major portion of the production process, then policy dictates that the forum non conveniens inquiry should focus on the subsidiary rather than the parent company.[10]

It is suggested that the degree of independence of the foreign subsidiary company plays the major role in the forum non conveniens enquiry. Where the American manufacturer has little contact with the development and marketing of the product, then forum non conveniens dismissal may be appropriate. However, if the American parent company has maintained primary control over the product and the foreign corporation is merely the distributor of it, then dismissal may be refused.

Introduction: Where does an Australian Plaintiff Stand

As always, it is a question of degree and each case will turn on its own facts. But if a value judgment must be made for the benefit of prospective Australian plaintiffs wishing to sue in the American forum, it is suggested that after examining the case law the balance would tip towards a dismissal of their action on forum non conveniens grounds.

That is certainly the case in the United States federal courts where, it is submitted, most foreign plaintiffs would bring their action. Moreover, even in the Californian state courts the exceptional and contrasting approach taken in *Holmes v Syntex Laboratories*[11] and *Corrigan v Bjork Shiley Corp*[12] would now appear to be stopped in its tracks since the 1988 decision in *Shiley Inc v Superior Court.*[13] In the two former cases the *Reyno*[14] principles were rejected on the perceived basis that California law was not consistent with its federal counterpart. However, in August 1988 the California Court of Appeals disagreed with that line of appellate

6 Hartman, GeoLJ 1258.
7 330 US 501 (1947).
8 Hartman, GeoLU 1278.
9 Ibid p1280.
10 Ibid p1280.
11 202 CalRptr 773 (1984) (*Holmes* case).
12 227 CalRptr 247 (1986) (*Corrigan* case).
13 250 CalRptr 793 (1988) (*Shiley* case).
14 454 US 235 (1981).

authority and re-embraced the *Reyno* principles stating that California's adherence to a national forum non conveniens policy under the sound leadership of the United States Supreme Court was a far preferable course.[15] These three cases will be dealt with in detail later in this paper, but by way of introduction it can be said that the *Shiley*[16] decision is not good news for prospective Australian plaintiffs wishing to sue in the United States. Californian courts are no longer welcoming foreign plaintiffs with open arms.

In actions involving United Kingdom based product liability claims against American pharmaceutical companies, it has been claimed[17] that a factual background including a majority of the following points, ought to ensure a forum non conveniens dismissal:

1. the plaintiff is a United Kingdom resident;
2. the prescribing doctor is a United Kingdom resident;
3. the treating hospital/health authority is in the United Kingdom;
4. the development and testing of the drug took place in the United Kingdom;
5. the application for a product license was made by and granted to a United Kingdom company;
6. the drug was marketed in the United Kingdom;
7. there are already similar cases pending in the United Kingdom courts;
8. the doctor, health authority and even the Department of Health and Social Security (as licensing authority) are possible co-defendants with the manufacturer;
9. the doctor, health authority and Department of Health and Social Security cannot be made subject to the jurisdiction of the United States court because of lack of *in personam* jurisdiction over them, or because they do not need to protect any asset exposure in the United States;
10. although the doctor's and health authority's evidence may be obtained by way of Letters Rogatory, the proceedings require an application by the American courts to the English courts for an order requiring non parties to the American proceedings to give their evidence on commission in the United Kingdom; the evidence on commission in the United Kingdom; the evidence of the Department of Health and Social Security (because it is covered by Crown privilege) is not compellable unless it is made party to the litigation in the United Kingdom.[18]

This background has existed to a varying degree in the number of recent cases in which foreign (mainly United Kingdom) plaintiffs have brought suits in the United States against American companies for alleged injuries from pharmaceuticals manufactured or sold in the plaintiffs'

15 250 CalRptr 793, 797 (1988).
16 Ibid p793.
17 McIntosh, 'Litigation Against Pharmacetical Companies in the UK—Part 2' (1986) 8 PLJ, 1.
18 Ibid p3.

nations by subsidiaries of the American companies. Almost every court which has confronted facts as set out above has dismissed the action and returned it to the foreign nation. An analysis of these cases will support the view that an Australian plaintiff suing in the United States would, on balance, have their actions dismissed on forum non conveniens grounds.

An Examination of the Case Law

One example of where an American parent manufacturer had little contact with the development and marketing of a product was *McCraken v Eli Lilly & Co.*[19] In that case four hundred British citizens allegedly injured through consumption of the drug Benoxprofen, filed suit in the State Court of Indiana against Eli Lilly & Co. It was found that the drug was discovered, patented and developed in England by scientists working for Lilly's English subsidiary and further, that British government agencies had regulated the development, manufacture and distribution of the drug, including its uses, dosages, side-effects and reported adverse reactions. The only connection cited to the court linking the forum to the controversy was the plaintiffs assertion that Indianapolis, Indiana was Lillys principal place of business, and that the allegedly tortious conduct occurred in Indianapolis. The court had no hesitation in finding that the balance of private interest factors strongly favoured trial in England. In giving the public interest factors very little weight, the court apparently viewed the private interest factors as dispositive of the issue.

In *Dowling v Richardson-Merrell, Inc*[20] the Federal District Court in Ohio relied principally on a consideration of public interest factors in a forum non conveniens argument. Again the plaintiffs were all residents of the United Kingdom. They sought recovery from the defendant for damages allegedly resulting from their mothers ingestion of the drug Debendox during pregnancy. The drug was commonly prescribed to reduce morning sickness. The drug was originally developed and tested by the defendant in the United States, however, it was manufactured and distributed in the United Kingdom by a wholly owned British subsidiary which was not named as a defendant in the law suit. The drug was similar if not identical to Bendectin, which the defendant manufactured and sold in the United States, and was currently involved in one hundred law suits arising out of its sale in America. The defendant was originally sued in New York where its international division is located, but the case was later transferred to a Federal District court in Ohio.

The District Court found private interest factors existed which favoured both forums, but concluded that on balance they preferred a British forum. On appeal the Sixth Circuit Court of Appeals said that the decision was not even close with respect to the public interest factors and quoted the District Court:

> This action involves the safety of drugs manufactured in the United Kingdom and sold to its citizens pursuant to licenses issued by that government. The

19 No 34, 463 (Ind, Cir, Ct 5 June 1984) cited in Birnbaum & Wrubel, 20 Forum 59, 65.

20 727 F 2d 608 (6th Cir 1984).

> interest of the United Kingdom is overwhelmingly apparent. New York, and Ohio for that matter, have a minimal interest in the safety of products which are manufactured, regulated and sold abroad by foreign entities, even though the development or testing occurred in this country.[21]

The District Court dismissed the action on forum non conveniens grounds provided the following conditions were met:

1. that the defendant consented to suit and acceptance of process in the United Kingdom;
2. that the defendant agreed to make available documents or witnesses within its control;
3. that the defendant agreed to waive any Statute of Limitation defence;
4. that the defendant consented to pay any judgment awarded against it.

It should be noted that the Court of Appeals did not consider significant the fact that more than one hundred cases against the defendant for alleged injuries from Bendectin were pending for multi-district pre-trial discovery in the United States when the 'twelve alien' cases were discussed. Nor did the court consider it important that a trial involving some two hundred Bendectin cases was scheduled for 1984. The court held that those cases involved claims by American plaintiffs and the 'twelve alien cases' would require the District Court to apply foreign law. The court applied the *Reyno*[22] principle that foreign plaintiffs were entitled to less deference in their choice of forum. Perhaps that result may have been different had American citizens been involved. The court showed an obvious reluctance to apply foreign law and reiterated the *Reyno* proposition that the possibility of the law of the foreign forum being less favourable is not sufficient to bar dismissal.

Great emphasis was also placed by the court on the fact that the industry concerned was regulated by a foreign country:

> When a regulated industry, such as pharmaceuticals in this case and passenger aircraft operations in *Piper Aircraft*, is involved, the country where the injury occurs has a particularly strong interest in the product liability litigation. This interest is highlighted in the present cases by the plaintiff's charge that the defendant concealed adverse test results from the national authorities in Great Britain.[23]

Therefore the court seems to have taken into account Hartmans pervasive foreign regulatory scheme approach to the question of forum non conveniens.

Another case quoted by Hartman in this context is *Harrison v Wyeth Laboratories.*[24] In this case a number of British complainants brought suit against the defendant which maintained its principal place of residence in Pennsylvania. The plaintiffs filed suit for damages for injuries allegedly caused by the taking of oral contraceptives which were manufactured,

21 Ibid p615.
22 454 US 235 (1981).
23 727 F 2d 608, 616 (6th Cir 1984).
24 510 F Supp 1 (EDPa 1980).

packaged and labelled in England by a wholly owned subsidiary of the American company.

The defendant moved for dismissal of the action on forum non conveniens grounds, arguing that the contraceptives were produced and distributed in Britain pursuant to licenses issued under British law authorising distribution and marketing of the drugs, and therefore marketing decisions were made in light of the British regulations and law.

The plaintiffs on the other hand contended (which the defendant disputed) that the marketing decisions, development of the formula for the contraceptives, withholding of adequate warning despite knowledge of the risks involved, and distribution of the contraceptives were done by Wyeth Laboratories in Pennsylvania.

In granting the defendant's motion to dismiss, the court based its decision on Pennsylvania's interest in the safety standards of drug manufacturers being limited to conduct within Pennsylvania's borders:

> Even assuming arguendo that all production and marketing decisions were made by the defendant in Pennsylvania and not by the wholly owned subsidiary . . . in the United Kingdom, Pennsylvania's interest in the regulation of the *conduct* of drug manufacturers and the safety of drugs produced and distributed *within* its borders does not extend so far as to include such regulation of conduct on drugs produced or distributed in foreign countries. *Questions as to the safety of drugs marketed in a foreign country are properly the concern of the country; the courts of the United States are ill-equipped to set a standard of product safety for drugs sold in other countries.*[25]

The court then went on to emphasise that other countries have the duty to set their own standards and regulations for the safety of products distributed or marketed within their country, and Americans should not impose their 'big brother' standards on other countries.

> Each country has its own legitimate concerns and its own unique needs which must be factored into its process of weighing the drug's merits, and which will tip the balance for it one way or the other. The United States should not impose its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country when those same drugs are sold in that country.[26]

Moreover, the court reasoned that fairness required that a defendant be judged by the standards set by the community affected by the allegedly negligent conduct and not by American standards which may impose a far higher standard of care.

A case with similar facts and a nearly indistinguishable cause of action, but with a totally contrasting decision is the California Court of Appeals decision in the *Holmes*[27] case. However, this line of appellate authority has been subsequently disapproved by the California Court of Appeals decision in the *Shiley*[28] case in 1988. Therefore, it is submitted that the

25 Ibid p4 (emphasis added).
26 Ibid p4.
27 202 CalRptr 773 (1984).
28 250 CalRptr 793 (1988).

current approach is still that taken in the *Harrison*[29] case—one that is non paternalistic and which forces foreign plaintiffs to sue in their own countries.

Although not a pharmaceutical or drug case, the recent forum non conveniens dismissal in *In Re Union Carbide*[30] should be discussed at this point because of the marked similarity of approach taken by that court to that taken in the *Harrison*[31] case. Neither decision augers well for the prospects of an Australian plaintiff trying to sue in the American forum. In fact it has been noted by one commentator[32] that the importance of the litigation which arose out of the Bhopal disaster is that it highlights a problem of increasing concern to the federal judiciary—the glut of litigation by foreign plaintiffs in American courts—and shows the important role that forum non conveniens plays in reducing litigation by foreign plaintiffs.

In its consideration of the balance of public interest factors the New York District Court in the *Union Carbide case*[33] added a new entry to the *Gulf Oil*[34] list of factors, namely the interests of India and the United States.[35]

The plaintiff argued that the American courts should provide justice to the Bhopal disaster victims just as they would to potential American victims of industrial accidents,[36] and contended that a dismissal would promote a double standard of liability for multi-national corporations. However, the court rejected this argument and granted conditional dismissal.[37]

The court analysed in detail the interests of America and India in the litigation and what emerged was 'the immense interest of various Indian governmental agencies in the creation, operation, licensing and regulation and investigation of the plant'.[38] The court concluded that 'no American interest in the outcome of this litigation outweighs the interest of India in applying Indian law and Indian values to the task of resolving this case'.[39]

Further, the court appeared convinced that in applying its law to the disaster it may be altruistic and high minded in design but imperialistic in result:

> It would be sadly paternalistic, if not misguided, of this Court to attempt to evaluate the regulations and standards imposed in a foreign country . . . to retain the litigation in this forum, as Plaintiffs request, would be yet another

29 510 F Supp 1 (EDPa 1980).
30 634, F supp 842 (SDNY 1986).
31 510 F Supp 1 (EDPa 1980).
32 Boyce 64 TexLR 193, 195.
33 634 F Supp 842 (SDNY 1986).
34 330 US 501 (1947).
35 634 F Supp 842, 862 (SDNY 1986).
36 Ibid.
37 A number of conditions were imposed, but most notably that Union Carbide submit to discovery governed by rules and procedures contained in the Federal Rules of civil procedure.
38 634 F Supp 863-864 (SDNY 1986).
39 Ibid p867.

example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation.[40]

Undoubtedly therefore it has been shown that the forum non conveniens hurdle is a most difficult one for an Australian plaintiff to overcome. However, there is one line of cases in the pharmaceutical/medical area, which does give some hope to an Australian plaintiff. These are the Dalkon Shield cases. But it is only a faint hope.

The Dalkon Shield Cases

The Dalkon Shield is an intra uterine device (IUD) that was designed to prevent pregnancy and was represented as a 'safe' contraceptive. A H Robins Inc purchased the device from an independent inventor in the early 1970s and began manufacturing it. It has been alleged that the shield is faulty in both design and composition.[41] By 1974 doctors had reported a high incidence of pelvic inflammatory disease and septic abortion in women who used this IUD. In June 1974 A H Robins Company ceased marketing the shield in the United States, and by 1975 it was withdrawn from the Australian market.

In *Hodson v A H Robins Company*[42] the District Court considered a claim by a British citizen as lead case for thirty-two pending cases involving foreign nationals including Australian plaintiffs. The court considered the *Gulf Oil*[43] private and public interest factors and then refused to dismiss on forum non conveniens grounds. The Fourth Circuit Court of Appeals affirmed that decision. They said although the shield was manufactured in Virginia by the defendant, marketing in England was carried out by an affiliated English company. A number of considerations in the eyes of the District Court had favoured trial in England, for example the conceded fact that the substantive rights and liabilities of the parties would be controlled by English law. However, other factors favoured trial in Virginia.

The Court of Appeals stated that although they may have thought London to be a more convenient forum, their role was to determine whether the District Court had acted arbitrarily or unreasonably so as to abuse its exercise of discretion. The court found the trial judge had carefully weighed all the factors and therefore no fault would be found with the decision. Interestingly the Court of Appeals said that if the trial judge had decided London to be the more appropriate forum they would have had to affirm that decision also. This substantiates the argument already outlined that subjective discretionary power in the trial judge's hands can lead to inconsistent decision making in borderline fact situations which are not subject to effective appellate scrutiny.

40 Ibid p864, 867. It was reported in the *Courier Mail* newspaper, 15 February 1989, that Union Carbide had agreed to pay $529 million compensation to victims of India's Bhophal gas disaster.

41 Tick, 'Beyond the Dalkon Shield: Proving causation against IUD Manufacturers for PID related injury' (1983) 13 GoldenGateULR 639, 642 n 21.

42 528 F Supp 809 (EDVa 1981) aff'd 715 F 2d 142 (4th Cir 1983) (*Hodson* case).

43 330 US 510 (1947).

In *Re Dalkon Shield Litigation*[44] the District Court of Maryland stated that the court's first inclination was to dismiss the cases as it would be more appropriate to have them determined by their home forum: witnesses, physicians, hospital records and other forms of proof would be more readily available in Australia. Moreover it was highly probable that conflict of law rules would direct a Maryland court to apply the law of the place of injury (Australia). Nevertheless, the court said it was not clear whether Australia in fact provided an alternative forum. A letter had been provided stating an Australian court may have jurisdiction over the action, but the defendant who has the burden of proving an alternative forum exists, had not made it clear that either Robins or Davis was amenable to suit in Australia. Even if the defendant provided various waivers and consents it was too burdensome administratively to have one defendant and not the other consenting in some cases, and not others, and so on. Thus the court stated they would retain jurisdiction over the Australian plaintiffs, as did the *Hodson*[45] court.

Choice of Law

Thus forum non conveniens did not prove to be a great difficulty for Australian plaintiffs in the Dalkon Shield cases. However, this may be a hollow victory because choice of law principles probably provide for the application of Australian law to the Australian plaintiff cases anyway, just as the District Court in *Hodson* conceded that English law would probably be applied there even if the trial were held in Virginia. However, even if Australian law is ultimately applied (which means the cause of actions can only be negligence, not strict liability in tort) there is still an advantage in having the case heard in an American court, namely the United States juries tend to award damages far in excess of the amount that might be expected from an Australian court. However, these decisions highlight the fact that prospective Australian plaintiffs must not only overcome the forum non conveniens hurdle when attempting to litigate in America, but must also choose a forum which will apply conflict to law rules favourable to them.[46]

Conclusion

To conclude, the Dalkon Shield cases provide an interesting example of the degree of access Australian plaintiffs may gain to the benefits of American product liability law in pharmaceutical/medical type cases. These are some of the rare cases where the case has not been ousted under the forum non conveniens rules. However, the law to be applied may well prove to be Australian anyway. Therefore initial success in

44 581 F Supp 135 (DMd 1983).

45 828 F Supp 809 (EDVa 1981) aff'd 715 F 2d 142 (4th Cir 1983) (*Hodson* case).

46 It was reported in the Courier Mail newspaper on 18 August 1988 that the Sydney lawyer acting for 2,700 Australian women in the Dalkon Shield litigation, was waiting to see if anyone appealed against a settlement plan approved by the American courts. If an approval was not lodged by 25 August, claims by the women for damages would begin being processed in the United States by the end of 1988. In fact no appeal was lodged and it was reported in the Courier Mail newspaper on 21 February 1989 that the first compensation payment was made to an Australian woman the previous day.

achieving jurisdiction in a United States forum may prove somewhat disappointing when the choice of forum and law decisions are made.

Moreover, apart from these exceptional cases the bulk of the case law in this area suggests that American courts would dismiss an Australian plaintiffs claim on forum non conveniens grounds.

Recent Developments in California Law: A Look at (1) *Holmes v Syntex Laboratories,*[47] *Corrigan v Bjork Shiley Corp*[48] *and Shiley Inc v Superior Court.*[49]

The cause of action in the *Holmes*[50] case was nearly indistinguishable from that in the *Harrison*[51] case (previously discussed) and yet in May 1984 the California Court of Appeals in *Holmes*[52] announced a significant departure from the federal rule in California forum non conveniens law. Indeed the commentator Litman has stated that the '*Holmes* court in fact provides the sole discordant voice in a chorus of contrary holdings'. A further development occurred in *Corrigan's*[53] case in 1986, but in August 1988 the California Court of Appeals Fourth District, in dealing with facts virtually indistinguishable from those in *Corrigan*, reverted back to the *Reyno*[54] principles and disagreed with the approach and decisions in *Holmes*[55] and *Corrigan.*[56] The current approach in California therefore does not auger well for Australian plaintiffs.

The Holmes Case: An Analysis

The plaintiffs in this case were British citizens who filed suit against the defendant, a Delaware corporation with its principal place of business in California. The plaintiff, allegedly injured as a consequence of taking Norinal, an oral contraceptive, contended that the defendant caused and allowed Norinal to be distributed and marketed in the United Kingdom without adequate warning as to possible side-effects. The cause of action was framed in strict liability, breach of warranty, fraud and misrepresentation. As the contraceptive had apparently been manufactured, marketed and distributed in England by an independent subsidiary of Syntex not named in the complaint, the defendant moved for dismissal on the basis of forum non conveniens as all relevant events and evidence concerning the product at issue were in England. On the other hand the plaintiff argued that the defendant had performed all pre-marketing research, chemical studies, animal studies and clinical studies for Norinal in California. The trial relied on *Piper v Reyno*[57] and granted the motions.

47 202 CalRptr 773 (1984).
48 227 CalRptr 247 (1986).
49 250 CalRptr 793 (1988).
50 202 CalRptr 733 (1984).
51 510 F Supp 1 (EDPa 1980).
52 202 CalRptr 773 (1984).
53 227 CalRptr 247 (1986).
54 454 US 235 (1981).
55 202 CalRptr 773 (1984).
56 227 CalRptr 247 (1986).
57 454 US 235 (1981).

The Court of Appeals, however, found an abuse of discretion in the trial court's dismissal. Right at the outset the Court of Appeals held that *Reyno*, a federal case, did not represent the law of forum non conveniens in California state courts. This statement in itself is significant because it poses the question of 'which articulation of forum non conveniens law should be applied by a California federal court sitting in diversity jurisdiction'. The Supreme Court in a number of cases, for example *Reyno* and *Gulf Oil,*[59] simply avoided the issue by assuming state and federal doctrine were identical,[60] therefore the United States Supreme Court has never directly considered whether a federal court sitting in diversity should apply state or federal forum non conveniens doctrine. Therefore *Holme's*[61] declaration of the divergence between federal and Californian forum non conveniens doctrines revived this unresolved issue.[62]

The Court of Appeals held California law differed in two important respects from the federal situation as stated in *Reyno,*[63] namely:

1. The rule of substantial deference to the plaintiffs choice of forum has much greater importance in California . . . law even when the plaintiff is a foreigner[64], and
2. California attaches far greater significance to the possibility of an unfavourable change in applicable law resulting from a forum non conveniens dismissal.[65]

The plaintiff's choice of forum and the possibility of an unfavourable change in the law were therefore highlighted as the most important factors in the Californian calculation. The court thus proceeded on the basis that the plaintiff's choice of forum would not be disturbed unless the balance of the relevant private and public interest factors weighed heavily in the defendants favour. The *Gulf Oil*[66] factors considered by the court were: the existence of a suitable alternative forum, the defendant's place of incorporation, the parties respective relationships to California, the burden on Californian courts, and the relative convenience to the parties.

Regarding the threshold enquiry as to the availability of a suitable alternative forum, the court concluded it must not only be suitable but also adequate:

> If the present litigation occurs in Britain, appellants will simply lose their cause of action for strict liability, they will be forced to litigate under a system the

59 330 US 501 (1947).
60 The Shiley court would agree.
61 202 CalRptr 773 (1984).
62 Even the commentators cannot seem to agree. Litman says *Erie RR v Tompkins* 304 US 64 (1938) requires that a federal court sitting in diversity apply the substantive law of the state in which it is located. However, Boyce says the prevailing view among the lower federal courts appears to be that state forum non conveniens does not bind a federal court in a diversity action, quoting *Sibaja v Dow Chemical Co* 757 F 2d 1215, 1219 (11th Cir) which held Erie does not require a federal court to apply the states forum non conveniens law.
63 454 US 235 (1981).
64 202 CalRptr 773, 778 (1984).
65 Ibid.
66 330 US 501 (1947).

> British themselves have condemned as inadequate in the field of defective products. The resulting disadvantage to appellants is a factor that constitutes denial of 'suitable' alternative forum under Californian law (though not as required under Federal law, a denial of any remedy under *Piper*) and weighs heavily against forum non conveniens dismissal.[67]

As to the question of fairness the court did not consider it unfair to require a defendant to defend an action in the forum in which it had its principal place of business. Moreover, the courts perceived interest in regulating the conduct of corporations whose principal place of business was California was held to outweigh any burden to the trial court in retaining jurisdiction:

> The burden imposed on the trial court, while substantial, would not be unfair, inequitable or disproportionate in view of the defendant's relationship to an alleged conduct in this state and the state's interest in regulating the foreign marketing of defective products developed here. While we are sensitive to concerns of creating or adding to trial court backlogs, *California courts have a responsibility to provide a forum for litigation against corporations utilising this state as their principal place of business for torts committed in California.*[68]

Thus *Holmes*[69] demonstrates this paternalistic attitude of regulating and controlling Californian based manufacturers regardless of whether the conduct complained of occurs intrastate, interstate or elsewhere in the world. The decision was good news for an Australian plaintiff. The other noteworthy feature of the decision was the determination that California forum non conveniens was different from the federal *Reyno*[70] approach. But the court did not rest this finding on any prior authority. Indeed it can be agreed that 'any clear split between federal and California forum non conveniens law is a product of the *Holmes* decision itself'.[71]

The question thereafter became what was the precedential value of *Holmes.*[72] The decision was considered by the California Court of Appeal in *Rehm v Aero Engines,*[73] but the court managed conveniently to decline a straight forward appraisal of *Holmes*[74] by distinguishing its facts from those of the case before it. The court held that 'although we are tempted to explore some of the interesting questions raised by *Holmes*, and its diversions from *Piper*, we are not required to do so to resolve the case at bar'.[75]

The *Corrigan*[76] case involved a fact situation virtually indistinguishable from that in the 1988 *Shiley*[77] case, except that the plaintiffs in the former were Australian and those in the latter Norwegian and Swedish. The differing approaches, however, taken by the Courts of Appeal in those

67 220 CalRptr 773, 782 (1984).
68 Ibid p785 (emphasis added).
69 Ibid p773.
70 454 US 235 (1981).
71 Litman 74 CalLR 565, 581.
72 202 CalRptr 773 (1984).
73 210 CalRptr 594 (1985).
74 202 CalRptr 773 (1984).
75 210 CalRptr 594, 597 (1985).
76 227 CalRptr 247 (1986).
77 250 CalRptr 793 (1988).

two cases are best exemplified by the analysis of *Corrigan*[78] and *Holmes*[79] that was made by the court in *Shiley's*[80] case. Therefore the *Shiley* case and this analysis will be examined in detail.

Shiley Inc v Superior Court: An Analysis

Shiley and Pfizer are Californian corporations involved in the manufacture of heart valves for worldwide distribution. Two such valves were sold by Shiley's Scandinavian marketing arm and implanted in Scandinavian patients, one Norwegian and the other Swedish. The patients were only treated in their home countries and both died there in 1986. Heirs of the descendents filed wrongful death actions, alleging the valves were defective, and sought damages based on negligence, strict liability, breach of warranty, fraud and loss of consortium. The defendants responded by filing motions to dismiss or stay the suits on forum non conveniens grounds, arguing the matter should be pursued in Norway and Sweden where the plaintiffs reside, the valves were marketed, descendent's medical care was provided and alleged fraudulent misrepresentations by Scandinavian medical personnel were made.

The Superior Court Judge, Taylor J, found the defendants' arguments were persuasive but he felt compelled to deny the motions because of the precedent in *Corrigan's*[81] case. His Honour said 'it can't be the role of this court to look at the *Corrigan* case or to look at the federal rule and say which one seems like the best rule'.[82] His Honour then said if he had had to decide *Corrigan* he might likely have decided it just the opposite of how it was decided, but he correctly concluded he was without that option in light of the *Corrigan* precedent.

The Court of Appeals, however, were not so inhibited and concluded that both *Corrigan* and *Holmes 'represent an unwarranted digression from sound principles of the law of forum non conveniens'*.[83]

In effect the court is saying that California forum non conveniens doctrine is exactly the same as the federal doctrine as exemplified by *Reyno*.[84] The court held that '*Piper* represents a thoughtful attempt to strike a balance between conflicting policy interests of various jurisdictions and the need to fairly apportion limited judicial resources'.[85] They recognised that the courts in *Corrigan*[86] and *Holmes*[87] had rejected *Reyno*[88] but nevertheless concluded:

> *We believe those decisions invite forum shopping*, needlessly burdening Californian taxpayers and litigants, and may encourage the flight of high technology manufacturers to friendlier jurisdictions. *In our view Californias adherence to*

78 227 CalRptr 247 (1986).
79 202 CalRptr 773 (1984).
80 250 CalRptr 793 (1988).
81 227 CalRptr 247 (1986).
82 250 CalRptr 793, 794 (1988).
83 Ibid p795 (emphasis added).
84 454 US 235 (1981).
85 250 CalRptr 793, 796 (1988).
86 227 CalRptr 247 (1986).
87 202 CalRptr 773 (1984).
88 454 US 235 (1981).

a national forum non conveniens policy under the sound leadership of the United States Supreme Court is a far preferable course.[89]

The Court of Appeals held that one part of the analysis in *Corrigan*[90]—as to whether the plaintiff had a suitable alternative forum—did not now need to be considered at length, because as of 22 September 1986, only months after *Corrigan* appeared, the Legislature amended Code of Civil Procedure 410.30 to add 'The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action'.[91] The *Shiley*[92] court concluded therefore that a defendants choice to incorporate or do business in California, without more, is no longer a significant factor in the balancing process, and the application of the forum non conveniens doctrine should not turn solely on a consideration of the residence of the parties.[93] The court disagreed with the *Corrigan* court's placement of heavy reliance on the deterrence factor and on California's policy to regulate products manufactured in the state by means of the strict liability doctrine.[94] The court said they preferred *Reynos*[95] incremental deterrence analysis, although they did concede that California's public policy may be determinative in some circumstances, for example, where products such as LSD or letter bombs were marketed in direct violation of California's substantive law.[96] However, those extreme circumstances were not present in this case.

The court did concur with the statement in *Corrigan*[97] that:

California's choice of law doctrine reveals a respect for the law of foreign jurisdictions which does not seek to weigh the worth of the social policy reflected in the laws of the respective forums, but instead focuses on which forums governmental interest will be the more impaired if its law is not applied.[98]

However, although the *Shiley*[99] court agreed with the import of those words it did not agree with *Corrigan's*[100] application of them to the facts, saying the *Corrigan* court then proceeded to march off in the opposite direction, and virtually affirmed the notion that the alternative forums failure to recognise a particular remedy or element of damage (as is Australias failure to recognise strict liability in tort) is the equivalent of the denial of a suitable forum.[101] In fact the Shiley[102] court held, referring to the Corrigan decision, that:

. . . in language displaying the very parochialism the court had earlier decried, Californias tort system was praised as one providing 'full compensation' via strict liability whilst that of Australia was described as 'circumscribed'.[103]

89 250 CalRptr 793, 798 (1988).
90 227 CalRptr 247 (1986).
91 250 CalRptr 793, 798 (1988).
92 Ibid p793.
93 Ibid p798.
94 Ibid p799.
95 454 US 235 (1981).
96 250 CalRptr 793, 799 (1988).
97 227 CalRptr 247 (1986).
98 250 CalRptr 793, 799 (1988).
99 Ibid p793.
100 227 CalRptr 247 (1986).
101 250 CalRptr 793, 799 (1988).
102 Ibid p793.
103 Ibid p799.

The *Shiley* court concluded that in *Corrigan*[104] the court had paid too much homage to the choice of law question, and in a statement that would give no comfort to prospective Australian litigants stated:

> Modern litigation in this state features burgeoning public expense, inadequate and crowded facilities, an over worked judiciary, and in our larger counties, routine five year delays in bringing most tort actions to trial. *Encouragement of the importation of foreign causes of action unfairly burdens taxpayers and other litigants.* It may also threaten to involuntarily exile some of our leading businesses and high technology manufacturers to jurisdictions where they will not generally be required to defend lawsuits involving extra-territorial injuries.[105]

The decision therefore has two major features:

1. a complete turn about from the paternalistic *Holmes*[106] approach which determined that California should control products manufactured in that state, and
2. a finding that both *Holmes* and *Corrigan*[107] unnecessarily departed from the Supreme Courts *Reyno*[108] analysis.

With respect to the second feature, it is submitted that while the Supreme Court in *Reyno* and *Gulf Oil*[109] assumed that federal and state forum non conveniens doctrines were the same, the *Shiley*[110] court is overtly saying they are the same, or at least should be the same.

In applying their refound *Reyno*[111] analysis to the facts before them, the court in the *Shiley*[112] case held that the defendants' home countries had the strongest interest in entertaining the present litigation, as the devices were sold, implanted and allegedly malfunctioned in Scandinavia, and everyone involved in those activities was Scandinavian.[113] This was their finding despite their recognition of the fact that there probably were advantages for the plaintiffs in bringing suit in California, and notwithstanding California's regulatory interest in the efficacy of sophisticated medical devices manufactured in the state. They held that California's interest paled by comparison with that of Scandinavia and therefore directed peremptory writs be issued directing the trial court to grant the motions for a stay of all proceedings on appropriate terms and conditions.[114]

Conclusion: California Law

The *Holmes*[115] and *Corrigan*[116] open handed invitations to foreign plaintiffs to partake of the Californian court structure and better tort system have been shortlived. *Shiley*[117] reverted back to the approach taken in cases

104 227 CalRptr 247 (1986).
105 250 CalRptr 793, 800 (1988).
106 202 CalRptr 773 (1984).
107 227 CalRptr 247 (1986).
108 454 US 235 (1981).
109 330 US 501 (1947).
110 250 CalRptr 793 (1988).
111 454 US 235 (1981).
112 250 CalRptr 793 (1988).
113 Ibid p801.
114 Ibid p802.
115 202 CalRptr 773 (1984).
116 227 CalRptr 247 (1986).
117 250 CalRptr 793 (1988).

such as *Harrison v Wyeth Laboratories*[118] where the forum non conveniens doctrine has proved an effective weapon in stemming the flood of foreign litigants.

Conclusion

If recent history provides an accurate indicator, the doctrine of forum non conveniens will be increasingly relied upon to determine the right to court access and to stem the glut of litigation brought by foreign plaintiffs in the United States courts. However, the decision by the United States Supreme Court in *Piper Aircraft Co v Reyno*[119] has not had the anticipated extreme result of that doctrine defeating all foreign claims brought against American defendants in product liability cases. The *Tokio Marine*[120] case is but one example of a post *Reyno* decision where the court, while acknowledging the *Reyno* principles, was able to distinguish that case on the facts and bar dismissal.

But at the heart of this whole issue is the fact that the decision whether or not to retain jurisdiction is at the discretion of the trial judge—a discretion that can only be overturned where a clear abuse of its exercise is evident, and consequently is only therefore open to 'cursory appellate review'.[121] There are many borderline factual situations which could result in two different judges arriving at opposite conclusions, and yet because each judge has attempted a balancing of *Gulf Oil*[122] factors and there is no abuse of discretion, an appellate court would not vary either determination. Obviously therefore there will be inconsistencies in the application of this doctrine. This cannot be avoided.

However it is submitted that the preponderance of post *Reyno* caselaw in actions initiated by foreign plaintiffs against American defendants has resulted in those actions being dismissed on forum non conveniens grounds. This has been exemplified by the majority of aircraft collision and pharmaceutical cases. Certainly there are examples of where the American courts have barred dismissal, but this has been the exception rather than the rule; and in many of those cases the American court's choice of law determination has resulted in the foreign law being applied to the suit anyway, thus limiting the benefits accruing to the foreign plaintiff. Therefore, while the prospective Australian plaintiff can always place reliance on the oft-repeated fact that each case turns on its own facts, it will not be sufficient just to show the defective product was manufactured in America. Other distinguishing factors will need to be brought forth in evidence.

It seems the recognition by the American judiciary of inadequate and overcrowded facilities, high public expense and their own voluminous workload has resulted in an attempt to deter foreign plaintiffs rather than embrace them. The scale is therefore tipped against the Australian plaintiff being able to maintain his action in the United States forum.

118 510 F Supp 1 (EDPa 1980).
119 454 US 235 (1981).
120 17 Avi 17 321 (1982) 509.
121 Stein 113 UPaLR 781, 840.
122 330 US 501 (1947).