

INTERNATIONAL MASS TORT LITIGATION: FORUM  
 NON CONVENIENS AND THE ADEQUATE  
 ALTERNATIVE FORUM IN LIGHT OF THE BHOPAL  
 DISASTER

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## I. INTRODUCTION

During the early morning hours of December 3, 1984, a poisonous chemical<sup>1</sup> escaped from the Union Carbide<sup>2</sup> plant in Bhopal,<sup>3</sup> India, causing the deaths of at least 1,700 Indian citizens and injuring over 200,000 others.<sup>4</sup> Many of these victims lived in shanty towns just outside the gates of the Bhopal plant.<sup>5</sup> The victims paid little attention to the sound of the plant's emergency siren on the morning of the leak because the plant used this same siren regularly to signal changes in work shifts.<sup>6</sup> As the siren sounded aimlessly in the night, a cloud of suffering and death enveloped the unsuspecting victims.

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<sup>1</sup> The chemical was methyl isocyanate (MIC), used by Union Carbide to manufacture pesticides. *Bhopal: City of Death*, INDIA TODAY, Dec. 31, 1984, at 6, col. 2. Humans exposed to the chemical may suffer eye irritations, shortness of breath, wheezing and coughing, and other respiratory difficulties. When breathed in large amounts, MIC can be fatal. Kramer, *For Bhopal Survivors, Recovery is Agonizing, Illnesses are Insidious*, Wall St. J., Apr. 1, 1985, at 14, col. 2.

<sup>2</sup> Union Carbide is a multinational corporation headquartered in Danbury, Connecticut. *Bhopal: City of Death*, *supra* note 1, at 10. Union Carbide, primarily a producer of batteries, photoengraving equipment, and marine products, opened its Bhopal subsidiary in 1969 for the production of pesticides. The Indian Government encouraged Union Carbide to locate the plant in Bhopal because technology in the Indian pesticide industry remained underdeveloped, and the nation sought to become self-sufficient in food production. *Pesticide Plant Started as a Showpiece but Ran into Troubles*, N.Y. Times, Feb. 3, 1985, at 8, col. 1 [hereinafter cited as *Pesticide Plant*]. For further discussion on the beginning of the Union Carbide plant in Bhopal, see *infra* notes 23-30 and accompanying text.

<sup>3</sup> "Bhopal is the capital of Madhya Pradesh, the largest and one of the most economically depressed of India's 22 states." *Pesticide Plant*, *supra* note 2, at 8, col. 1.

<sup>4</sup> Lewin, *Carbide is Sued in U.S. by India in Gas Disaster*, N.Y. Times, Apr. 9, 1985, at D2, col. 2. The earliest unofficial reports stated that as many as 2,000 deaths had occurred. Bhopal officials so far have confirmed only 1,700 deaths, but have indicated that efforts are being continued to investigate other possible gas-related deaths. *Id.* In addition, recent surveys from Bhopal indicate that 500 to 1,000 others have died in the last year as a result of the accident. These additional deaths have been caused by general failing health related to exposure to the leaking gas, as well as by infections such as pneumonia. Diamond, *Lasting Health Damage Laid to Chemical Leaked in India*, N.Y. Times, Dec. 1, 1985, at 1, col. 2. Officials have also estimated that 200,000 people have been injured by the gas, many of them permanently. Kramer, *supra* note 1, at 1, col. 1.

Some Bhopal officials, however, refute that only 1,700 deaths resulted from the accident. Raj Kumar Bisarya, mayor of Bhopal at the time of the disaster, estimates the total number dead at 3,000. H.S. Billa, superintendent of the Bhopal police station, says the toll was "about 7,000 minimum, 10,000 maximum." Kramer, *supra* note 1, at 14, col. 1.

<sup>5</sup> Reinhold, *Disaster in Bhopal: Where Does Blame Lie?*, N.Y. Times, Jan. 31, 1985, at A8, col. 2.

<sup>6</sup> *Slum Dwellers Unaware of Danger*, N.Y. Times, Jan. 31, 1985, at A8, col.

The Bhopal disaster is the most significant recent example of United States industry injuring foreign victims.<sup>7</sup> The accident involved Indian citizens and a local subsidiary of a large manufacturer based in the United States.<sup>8</sup> The case, therefore, raises many issues that must be resolved when foreign plaintiffs attempt to bring mass tort claims in courts of the United States.

Among the most important issues in the case is whether a foreign sovereign may sue in the United States as the sole representative of its victims under the doctrine of *parens patriae*,<sup>9</sup> and whether a parent company based in the United States will be held responsible for actions of its foreign subsidiary.<sup>10</sup> Other issues include whether a United States court accepting jurisdiction should apply United States law or the law of the country in which the accident occurred,<sup>11</sup> and whether foreign plaintiffs will be properly compensated if the American-based corporation files for bankruptcy.<sup>12</sup>

Although these questions are important in the Bhopal case, the

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1. One shantytown resident said, "[w]e used to hear sirens often. We thought it was routine." *Id.*

<sup>7</sup> Other examples include the Dalkon Shield which A.H. Robins produced and sold worldwide, *Robins Runs for Shelter*, TIME, Sept. 2, 1985, at 32, col. 1, and Oraflex, a medicine produced for arthritis, manufactured by American-based Eli Lilly, and marketed since 1980 in Great Britain and eight other countries. *Side Effects for a Pain Killer*, TIME, Sept. 2, 1985, at 33. Oraflex was a factor in the deaths of over 70 people outside of the United States. *Id.*

<sup>8</sup> The Danbury, Connecticut-based parent company owns 50.9% of its Indian subsidiary's equity, and has veto power over many of its policies and practices. *Bhopal: City of Death*, *supra* note 1, at 10, col. 2. Union Carbide India Limited (UCIL), which operates the Bhopal plant as well as plants in eight other Indian cities, is among the top 20 of India's most profitable companies. *Id.* at 17, col. 1. The Bhopal compound has remained closed since the accident, and Union Carbide officials have barred outsiders from the site. Weisman, *Bhopal Factory a Year Later: Silence and Weeds*, N.Y. Times, Dec. 2, 1985, at A10, col. 1.

<sup>9</sup> For a brief discussion of the Indian Government's actions which led to its self-appointment as sole representative of the victims, see *infra* notes 53-56 and accompanying text. See also, Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 TEX. INT'L L.J. 321, 330 (1985).

<sup>10</sup> See Westbrook, *supra* note 9, at 321.

<sup>11</sup> The choice of law question in the Bhopal litigation is discussed briefly in *infra* notes 177-94 and accompanying text. For a discussion of the choice of law in transnational events, see generally Hadari, *Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises*, 1974 DUKE L.J. 1; Park, *International Products Liability Litigation: Choosing the Applicable Law*, 12 INT'L LAW. 845 (1978); Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 VAND. L. REV. 717 (1980).

<sup>12</sup> See generally Westbrook, *supra* note 9, at 328-29 (discussing the possibility that Union Carbide India might file for bankruptcy in the United States).

court will not consider any question prior to resolving the critically significant venue issue. This threshold issue concerns whether a United States court lacks jurisdiction over any case arising from the gas leak accident based on the doctrine of forum non conveniens.<sup>13</sup> This common law doctrine allows a United States court to dismiss a case when the defendant can show great inconvenience in the present forum and the availability of an adequate alternative forum.<sup>14</sup>

Thus, to argue the doctrine of forum non conveniens successfully, Union Carbide must show great inconvenience in having the Bhopal claims litigated in the United States, and must further show that India represents an adequate alternative forum for the claims.<sup>15</sup>

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<sup>13</sup> In 1984, Congress enacted the statutory counterpart to the common law doctrine of forum non conveniens. This statute, 28 U.S.C. § 1404(a), allows a district court to transfer a civil action to another district court or division where the case could have originally been brought. The statute states that a court may transfer "[f]or the convenience of parties and witnesses, [or] in the interest of justice." 28 U.S.C. § 1404(a) (1982). Beginning with the enactment of this statute, courts have limited the doctrine of forum non conveniens to situations in which the defendant seeks to transfer a case to a foreign court, or seeks removal from a state court to a federal court. C. WRIGHT, *THE LAW OF FEDERAL COURTS*, § 44, at 259-60 (4th ed. 1983). In the Bhopal case, the defendant seeks to have the case dismissed, which would require re-filing the case in India. In this instance, forum non conveniens, not § 1404(a), applies because the case involves removal to a foreign forum. Two main differences between forum non conveniens and a § 1404(a) transfer exist: first, in a forum non conveniens motion, the court will completely dismiss a case, whereas under § 1404(a), the case will be transferred to another court; second, if the court grants a forum non conveniens motion, the new forum will apply its own law, while under § 1404(a), the transferee court will apply the law of the transferor court. *Id.* at 261. Because of the severity of dismissing a case under forum non conveniens, as opposed to transfer under § 1404(a), the Supreme Court has stated that a lower court can order a § 1404(a) transfer based on a lesser showing of inconvenience than would justify dismissal under forum non conveniens. *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955).

<sup>14</sup> C. WRIGHT, *supra* note 13, § 44, at 259. For further discussion of the application of forum non conveniens in cases involving foreign citizens, see generally Development, *Forum Non Conveniens: Limiting Access to Federal Courts for Transnational Disputes*, 10 DEN. J. INT'L L. & POL'Y 379 (1981); Note, *Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT'L L. 755 (1977); Note, *Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno*, 6 FORDHAM INT'L L.J. 577 (1983); 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>15</sup> If the court grants the forum non conveniens motion, all suits in the United States will be dismissed and will most likely be moved to India. If the claims are not filed again in India, they will never be heard. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 233, 235-37 (1981). If the court denies the motion, however, Union Carbide will probably attempt to convince the district court judge to certify the

The forum non conveniens issue is critical because the Indian victims are very likely to receive a substantially lower damage award if an Indian, rather than a United States, court hears the case.<sup>16</sup> Indian courts do not award punitive damages, and Indian judges have consistently given small damage awards in personal injury and wrongful death cases.<sup>17</sup> In addition, Indian courts base damage awards on the Indian standard of living, which is substantially lower than in the United States.<sup>18</sup>

This Note supports the proposition, however, that although damage awards for the victims would be higher if a United States court heard the claims, India has the greatest interest in the case<sup>19</sup> and represents a fully adequate forum for the Bhopal litigation. The Note proposes that liability for the accident can sufficiently be established under India's existing body of tort law,<sup>20</sup> and, additionally, that India's procedural law is capable of providing each victim a fair and just trial.<sup>21</sup> The Note shows that because differences between United States

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issue for immediate appellate review. Under the Interlocutory Appeals Act of 1958, a trial judge may state in writing that an order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b) (1982). A forum non conveniens motion may be certified for interlocutory review under § 1292(b). The appellate court may then agree or decline to hear the case the district court has certified under § 1292(b). C. WRIGHT, *supra* note 13, § 102, at 713-15.

<sup>16</sup> Although no one can be certain what amount an Indian or an American court would award, cases in both jurisdictions indicate that a United States jury would grant far greater damage awards than an Indian judge. For example, punitive damages do not exist in India, *see infra* notes 145-47 and accompanying text. Any award of punitive damages in an American court would significantly increase the total award. In addition, American courts base damages on a standard of living much higher than the standard of living in many foreign jurisdictions. *See Brice, Forum Shopping in International Air Accident Litigation: Disturbing the Plaintiff's Choice of an American Forum*, 7 B.C. INT'L & COMP. L. REV. 31, 39-40 (1984) [hereinafter cited as *Forum Shopping*].

<sup>17</sup> The pattern of damage awards given in India is discussed in *infra* notes 137-57 and accompanying text.

<sup>18</sup> *See generally Forum Shopping, supra* note 16, at 40, n.86.

<sup>19</sup> For a discussion of the overwhelming Indian interests in the Bhopal litigation, *see infra* notes 309-14 and accompanying text.

<sup>20</sup> The substantive tort law of India, as applied to the Bhopal case, is discussed in *infra* notes 79-136 and accompanying text.

<sup>21</sup> This is especially true since the Indian Government has waived the usual court fees for any claims arising out of the accident, *see infra* notes 196-203 and accompanying text, and considering the possibility that a special tribunal of judges solely responsible for the Bhopal claims could be established if the claims were heard in India. *See infra* note 222 and accompanying text.

and Indian law are largely cultural and sociological, a United States court should not recognize these differences as an adequate basis for jurisdiction. The Note concludes, therefore, that the Indian plaintiffs do not need the paternalistic protection of a United States court when an Indian court can equitably award these plaintiffs according to cultural standards of their homeland.

The Note begins in Section II, which discusses the background of the disaster and the legal actions taken thus far in the case. Section III compares the Indian and American forums according to substantive tort law, patterns of damage awards, and certain procedural distinctions. Section IV considers the forum non conveniens issue, along with Indian and American interests in the case. The Note concludes by projecting that the substantial Indian interests in the case, combined with the adequacy of the Indian forum, mandates dismissal of those claims brought by Indian plaintiffs in the United States.

## II. THE BHOPAL CASE

The Union Carbide Corporation is the thirty-seventh largest company in the United States; world-wide the company is the seventh largest in the chemical industry.<sup>22</sup> In 1969, Union Carbide purchased a five-mile tract of land in the northeastern quarter of Bhopal, India to house the Union Carbide India Limited (UCIL) pesticide plant.<sup>23</sup> Housing units quickly were developed around the new plant,<sup>24</sup> and by 1981 the city had doubled in size to 700,000.<sup>25</sup>

Initially, the UCIL plant imported pure sevin, a pesticide, and diluted and packaged it for sale. Gradually the company began to add pilot factories to produce pesticides.<sup>26</sup> The first project, begun

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<sup>22</sup> *Bhopal: City of Death*, *supra* note 1, at 21. As a conglomerate, the Union Carbide Corporation has \$10 billion in assets which a judgment against the corporation would expose. Diamond, *Pleas on Bhopal Trial Heard*, N.Y. Times, Jan. 4, 1986, at 41, col. 6.

<sup>23</sup> *Pesticide Plant*, *supra* note 2, at 8, col. 1. The original five-mile tract quickly grew to include 80 acres. *Id.* Bhopal was an attractive sight for several reasons: (1) Bhopal is in the center of India and is a good base for transporting products to India's large cities; (2) the upper lake provided an ample supply of water to use in producing chemicals at the plant; and (3) Bhopal was one of the few areas in India without an electricity shortage. *Id.* at 8, col. 2.

<sup>24</sup> Reinhold, *supra* note 5, at A8, col. 2. Both government-sanctioned housing and unauthorized slums were constructed. *Id.*

<sup>25</sup> *Pesticide Plant*, *supra* note 2, at 8, col. 1.

<sup>26</sup> *Id.* at 8, col. 3. "Initially the plant was chiefly a finishing, or formulation, plant for raw pesticides imported from other areas, [and] there was no methyl isocyanate." *Id.* at 8, cols. 2-3.

in 1971, was designed to produce alphanaphthol, a chemical related to mothballs, and mix it with imported MIC to make sevin.<sup>27</sup> In 1977, UCIL began construction on a \$2.5 million plant designed to produce alphanaphthol in Bhopal.<sup>28</sup> The Union Carbide parent company approved the plans and design for the new plant.<sup>29</sup> After closing once for modifications, the MIC plant began production in 1980.<sup>30</sup>

The MIC leak which caused the 1984 disaster probably began as the result of a runaway reaction of the MIC with water.<sup>31</sup> Pressure in the MIC tank forced open its safety valve; each of the five other safety systems designed to prevent such a leak failed.<sup>32</sup> When MIC escaped from the plant and settled over Bhopal and outlying areas, it destroyed the lung tissue of persons inhaling large amounts, killing them in minutes. For others, the chemical resulted in eye irritations, nausea, vomiting, chest pains, and breathing difficulties.<sup>33</sup> Many victims still experienced asthma-like symptoms months after the accident.<sup>34</sup> The long-term effects of the leak, which may surface in months to come, include fibrosis, a fatal form of bronchitis, and mental retardation in young babies yet unborn at the time of the accident.<sup>35</sup>

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<sup>27</sup> *Id.* at 8, col. 3.

<sup>28</sup> *Id.* at 8, col. 4.

<sup>29</sup> Union Carbide supplied the Indian affiliate with the overall design for the plant, and one Carbide engineer stated in an affidavit that he had approved the design by tracing "every line, every valve, every instrument" when the plant began operations. Diamond, *Discrepancies Are Seen In Bhopal Court Papers*, N.Y. Times, Jan. 3, 1986, at D3, col. 2. The plaintiffs have argued that not only did Union Carbide exercise control over the Bhopal plant by providing designs for the plant, but also that Union Carbide defectively designed the plant, and the company is therefore liable for the design defects regardless of what happened in India. Adler, *Carbide Plays 'Hardball*, AM. LAW. 27, 58 (Nov. 1985).

<sup>30</sup> *Pesticide Plant*, *supra* note 2, at 8, cols. 4-5.

<sup>31</sup> According to several employees, the leak started when a supervisor ordered an unqualified worker to wash out a pipe that had not been properly sealed. The water from this process was the likely contaminant of the MIC. Even after discovering the leak, the supervisor "decided to deal with it only after the next tea break." Diamond, *The Bhopal Disaster: How it Happened*, N.Y. Times, Jan. 28, 1985, at A1, col 3; see also *Bhopal: City of Death*, *supra* note 1, at 7-8. *But see Hypothesis on the Cause*, N.Y. Times, Jan. 28, 1985, at A6, col. 1.

<sup>32</sup> For an explanation of the safety systems not working at the time of the accident, see *Bhopal: City of Death*, *supra* note 1, at 8-10.

<sup>33</sup> *Bhopal: City of Death*, *supra* note 1, at 15.

<sup>34</sup> One study suggests that lung inflammation caused by the inhalation of MIC may not subside for at least two or three years. The study also concluded that some victims may have permanently scarred lung tissue which would hamper breathing for life. Diamond, *supra* note 4, at 18, col. 3.

<sup>35</sup> Kramer, *supra* note 1, at 14, col. 2. Since the MIC leak, 366 pregnant women who inhaled the gas have experienced spontaneous abortions. According to Dr.

American lawyers began arriving in Bhopal within a week of the accident.<sup>36</sup> These lawyers used retainer forms to enlist thousands of "clients"<sup>37</sup> injured by the MIC leak.<sup>38</sup> Although the exodus by many American lawyers to Bhopal angered some,<sup>39</sup> others felt the disaster would have gone unnoticed without the influence of these lawyers.<sup>40</sup>

One problem the retainer forms present is the possibility of multiplicity of representation. In all likelihood, the same victims signed many forms, and many members of a household signed on behalf

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Ramalingaswami, the spontaneous abortion figure among victims represents a 400% increase over the normal rate. Diamond, *supra* note 4, at 18, col. 3.

<sup>36</sup> The first American lawyer team arrived in Bhopal only four days after the leak occurred. This team consisted of John Coale, Arthur Lowy, and Ted Dickinson. Coale and Lowy represented 12 of the Americans held hostage in Iran in 1979. Dickinson, an investigator, is part of Coale and Lowy's Washington team. A second team, consisting of Jay Gould, Frederico Sayre, and Ralph Fertig, from a law firm in California, arrived less than a week later. The firm employing Gould, Sayre, and Fertig has been involved in a suit against A.H. Robins, maker of the Dalkon Shield. Stevens, *U.S. Lawyers are Arriving to Prepare Big Damage Suits*, N.Y. Times, Dec. 12, 1984, at 10, col. 1.

<sup>37</sup> John Coale claims to have enlisted 68,000 victims. He also claims to have 30,000 retainer forms in his Washington office. Houston's Benton Musslewhite is claiming more than 2,000 clients. Mahandra Mehta, an attorney in Chicago, says he has over 60,000 clients with more to follow, and Benjamin Harvard of Houston claims he has collected at least 10,000 retainers. Many of the retainers were drafted in English and signed by illiterate victims. Adler, *Bhopal Journal: Only the Victims Lack a Strategy*, AM. LAW. 128, 134-35 (Apr. 1985) [hereinafter cited as *Victims*]. The retainer forms authorize an attorney to represent the signee in any legal action taken on behalf of the signee.

<sup>38</sup> At its midyear convention in January 1985, the governing board of the Association of Trial Lawyers of America rejected a resolution viewed as a condemnation of lawyers who rushed to Bhopal shortly after the gas leak disaster. Commenting on the proposed condemnation of those lawyers involved in the Bhopal uproar, ATLA President Scott Baldwin said of the board of governors, "[w]e don't have the facts to do that, and we're not the body to do that." Galante, *ATLA Board Rejects Bhopal Censure*, Nat'l L.J., Jan. 28, 1985, at 3, cols. 1-3. Of the 75 board members present, only two voted for the condemnation resolution. *Id.* at 10, col. 3.

<sup>39</sup> One writer in the New York Times stated that "[t]he rush of American lawyers who descended on Bhopal last week was both insulting and inappropriate." Stein, *Paying Bhopal Victims*, N.Y. Times, Dec. 18, 1984, at A31, col. 3.

<sup>40</sup> See Galanter, *Legal Torpor: Why so Little has Happened in India After the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273, 292 (1985). One Bombay and Delhi lawyer stated that "[b]ut for the American lawyers, there wouldn't be any litigation against Union Carbide. I say God bless them. They deserve to be thanked by the Indian nation." Stewart, *Why Suits for Damages Such as Bhopal Claims are Very Rare in India*, Wall St. J., Jan. 23, 1985, at 28, col. 2. Robert Sullivan, a plaintiff's lawyer from the firm Lipsig, Sullivan & Liapakis P.C., in New York was quoted as saying "without us . . . these victims wouldn't get squat." Riley, *Suprise Move Cancels First Bhopal Hearing*, Nat'l L.J., Mar. 18, 1985, at 1, col. 3.



of a single family member who had been injured or killed.<sup>41</sup> Another problem concerns the actual validity of such retainer forms. Both the American<sup>42</sup> and Indian legal systems prohibit solicitation of clients.<sup>43</sup>

Following the chemical leak in Bhopal,<sup>44</sup> the Indian state government established public legal offices throughout the city. These offices provided free advice and assistance regarding filing claims against Union Carbide. As a result, many claims were filed in Bhopal.<sup>45</sup> In response to the filing of claims by Indian victims,<sup>46</sup> Union Carbide assembled a team of Indian lawyers<sup>47</sup> to protest each claim<sup>48</sup> filed in

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<sup>41</sup> J.D. Simhal, the Bhopal bar association president, states that many victims probably signed several retainer forms. Simhal stated, "[t]he people of the most suffering area are poor and illiterate. Whoever goes to them, they think that only that man can help him . . . There was repetition of claims over and over." *Victims*, *supra* note 37, at 134.

<sup>42</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (Proposed Final Draft 1984), which states that a lawyer is not to solicit employment from a prospective client with whom he has no prior relationship when pecuniary gain is a strong motive behind the solicitation; see also Figa, *Lawyer Solicitation Today and Under the Proposed Model Rules of Professional Conduct*, 52 U. COLO. L. REV. 393 (1981).

<sup>43</sup> See Galanter, *supra* note 40, at 278. For a general discussion of the legal profession in India, see Galanter, *The Study of the Indian Legal Profession*, 3 LAW & SOC'Y REV. 201 (1968).

<sup>44</sup> Three days after the accident, Bhopal police seized the records from the Bhopal plant, shut down and sealed off the factory, and detained five senior Indian plant managers at the factory site for questioning. Hazarika, *India Police Seize Factory Records of Union Carbide*, N.Y. Times, Dec. 7, 1984, at A1, col. 3, A10, col. 2.

<sup>45</sup> Galanter, *supra* note 40, at 290. Free legal aid is relatively new in India. *Id.* at 288. The state of Madhya Pradesh, home of the Bhopal plant, has initiated a state-wide legal aid program to aid the poor in obtaining access to courts of law. This program was started soon after free legal aid became an Indian constitutional right in 1976. Shrimal, *Justice to the Poor: The Relevance of Legal Activism*, 8 ACAD. L. REV. 165, 167 (1984).

After the accident the Madhya Pradesh Government established "legal aid and guidance camps" to assist victims in filing their complaints. The legal aid societies have filed over 2,000 separate claims for damages. Galanter, *supra* note 40, at 283-84. In addition, these state-funded societies have collected medical data on 36,000 other individuals whose claims have not yet been filed. *Victims*, *supra* note 37, at 130.

<sup>46</sup> All claims filed against Union Carbide in India were assigned to the single chief district judge, Virenda Singh Yadan. Judge Yadan handles each claim individually, and he expects a total of 50,000 when all have been filed. *Victims*, *supra* note 37, at 130.

<sup>47</sup> Vijay Kumar Gupta, Union Carbide's chief outside counsel in Bhopal, is leading a team of twelve lawyers to contest the complaints. *Id.* In all claims brought in Bhopal, the Union Carbide parent company is denying it has any connection with the Bhopal plant. *Id.*

<sup>48</sup> All claims brought in India as a result of the Bhopal disaster have been stayed as a result of the ordinance making India the sole representative of the victims. Galanter, *supra* note 40, at 290. For an explanation of the ordinance and the Indian

Bhopal's district court.<sup>49</sup>

As Indian lawyers were busy suing Union Carbide in India, American lawyers filed suits on behalf of victims in United States courts.<sup>50</sup> Lawyers in both India and the United States argued that courts in their respective countries had jurisdiction over the cases.<sup>51</sup> Indian courts began to act on many of the claims filed, although the awards were quite small compared to American damage awards.<sup>52</sup>

In the midst of the rush to the courthouse in both countries, the Indian Government passed an ordinance<sup>53</sup> providing that all claims arising from the chemical would be combined, and that the Indian Government would be the sole representative<sup>54</sup> of the victims in a

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Government's representation of the victims, see *infra* notes 53-56 and accompanying text.

<sup>49</sup> In Bhopal's district court, a single judge listens to many lawyers talking at once; often the judge will hear three different cases at one time. The practice seems to be common in India's district court system. Stewart, *supra* note 40, at 1, col. 1. The backlog in the district courts and Indian high courts could run as high as one million cases. *Id.* One reason for the backlog is the huge amount of matrimonial litigation. Another reason is the over-used weapon of interlocutory relief. Dhavan, *For Whom? And For What? Reflections on the Legal Aftermath of Bhopal*, 20 TEX. INT'L L.J. 295, 297 (1985).

<sup>50</sup> Jay Gould and Frederico Sayre of Santa Monica, California filed a \$20 billion class-action suit in a federal court in New York on behalf of four Bhopal victims. Melvin Belli also filed a \$15 billion class-action suit on behalf of two victims in Charleston, West Virginia. Stevens, *supra* note 36, at 10, col. 1.

<sup>51</sup> Jurisdiction in India is based on the fact that the UCIL plant was the site of the accident. Furthermore, all the prospective plaintiffs reside in India. Jurisdiction in the United States is allegedly based on the idea that the parent company is headquartered in the United States and is in control of its subsidiary in Bhopal. See Westbrook, *supra* note 9, for insight on Union Carbide's relationship to the UCIL plant and the disaster; see also *infra* notes 120-36 and accompanying text.

<sup>52</sup> As of April 1, 1985, close to half of the 1,900 claims brought for death payments had been awarded by the Bhopal court. The awards, however, were for 10,000 rupees each, only \$794 in United States currency. Kramer, *supra* note 1, at 1, col. 1. By late November, 1,400 death payments had been granted. Weisman, *Bhopal is in Midst of Grim Recovery a Year After Leak*, N.Y. Times, Dec. 1, 1985, at 18, col. 5. Although provided by relief payments from various public and private donors, the awards are being distributed by the Indian Government. Adler, *supra* note 29, at 57-58. In addition to the payments for death claims, the government has made 24,000 payments of \$125 to poor families in gas-affected neighborhoods. Weisman, *supra* note 52, at 18, col. 5. There have been stories of fraud in the distribution of the award money. In one instance a woman demanded payments for each of three dead family members. A local news organization supporting the cause of this claimant discovered that two of the family members were alive and the third never existed. *Id.* at 18, col. 4.

<sup>53</sup> Bhopal Gas Leak Disaster Ordinance, No. 1 of 1985, Feb. 20, 1985.

<sup>54</sup> The Indian Government is represented by Robins, Zelle, Larson & Kaplan, a Minneapolis law firm specializing in products liability and mass disaster cases.

single action against the American-based parent company.<sup>55</sup> The purpose behind the ordinance was for the Indian Government to win a large award in a United States court, and then to disburse the compensation to the victims.<sup>56</sup>

The next step for the Indian Government was to find legal representation in the United States. India sent its Attorney General to the United States,<sup>57</sup> who retained a Minneapolis firm specializing in mass disaster cases.<sup>58</sup> The Indian Government then filed suit against Union Carbide in New York's Southern District Court on behalf of the disaster victims.<sup>59</sup> The suit sought both compensatory and punitive damages in an unspecified amount,<sup>60</sup> and was filed only three days after Prime Minister Gandhi rejected a Union Carbide settlement offer of \$200 million.<sup>61</sup>

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Barnett, Smith, Shapiro, Simon & Armstrong of New York acts as local counsel for the Indian Government. Lewin, *supra* note 4, at D2, col. 4.

<sup>55</sup> Riley, *New Bhopal Law May Affect Future Role of U.S. Lawyers*, Nat'l L.J., Mar. 11, 1985, at 4, col. 1. The ordinance provides a plan for collecting and dispersing compensation to victims, and allows any victim, at his or her own expense, to hire a lawyer "of his choice to be associated in the conduct of any suit." *Id.* at 4, col. 2.

<sup>56</sup> *Id.* Although the ordinance was passed with the idea that litigation would arise, it also authorizes the Indian Government to settle the suit before trial. *Id.*

<sup>57</sup> According to a government announcement, the mission of Attorney General K. Parasaran was to consult lawyers in the United States about the jurisdiction of American courts to hear claims filed on behalf of the gas tragedy victims. The true purpose of the trip was to come to a decision about retaining an American law firm. Galanter, *supra* note 40, at 284.

<sup>58</sup> Robins, Zelle, Larson & Kaplan has represented plaintiffs in some of the worst tragedies of the last decade: the MGM Grand Hotel fire in Las Vegas, the collapsed skywalks at the Kansas City Hyatt Regency Hotel, and the collapse of Idaho's Teton Dam in 1976. *Kings of Catastrophe*, TIME, Apr. 22, 1985, at 80.

<sup>59</sup> The April 8, 1985 lawsuit against Union Carbide outlined six separate theories of liability: absolute liability, strict liability, negligence, breach of warranty, misrepresentation, and the multinational enterprise liability theory. Riley, *Bhopal: The Legal Escalation Begins in Earnest*, Nat'l L.J., Apr. 22, 1985, at 8, col. 1.

<sup>60</sup> Galanter, *supra* note 40, at 286. The complaint stated that the punitive damage award should be "in an amount sufficient to deter Union Carbide and any other multinational corporation from the willful, malicious and wanton disregard of the rights and safety of the citizens of those countries in which they do business." Lewin, *supra* note 4, at 1, col. 5.

<sup>61</sup> Galanter, *supra* note 40, at 285. This figure of \$200 million matches the amount of insurance coverage carried by Union Carbide. *Id.* Other reports state that the Indian Government declined to accept an offer of \$840,000 from Carbide India, but accepted an offer of \$1 million from the American parent company for general relief. The \$1 million in relief equals about \$5 for each of the 200,000 victims injured. *Victims*, *supra* note 37, at 131. Under this type of relief arrangement, no money would be provided for those claiming compensation for deceased relatives. At least 1,700 victims were killed in the accident. See Lewin, *supra* note 4, at D2,

The Indian Government suit, however, was not the last to be filed in the line of litigation arising from the disaster. The Indian Government's action in the case was not favored by many American lawyers representing Bhopal victims.<sup>62</sup> Two leading American lawyers in the Bhopal litigation filed suit in India<sup>63</sup> to block the Government's consolidated representation effort. They argued that the sole representation ordinance passed by the Indian Government violated the right of citizens under the Indian Constitution to choose their own counsel.<sup>64</sup> The suit also maintained that the Indian Government could not represent the Bhopal victims because the government may itself have shared in the responsibility for the accident.<sup>65</sup>

All the suits brought in the United States as a result of the disaster<sup>66</sup> have been consolidated before federal court Judge John F. Keenan in New York's Southern District.<sup>67</sup> These cases remain consolidated

col. 1. Another government source said that Union Carbide offered to settle for \$500 million over 30 years, but this offer was also rejected. *Kings of Catastrophe*, *supra* note 58, at 80.

<sup>62</sup> Riley, *supra* note 59, at 8, cols. 2-4.

<sup>63</sup> The two lawyers are Jerry S. Cohen of the Washington, D.C. firm Kohn, Milstein, Cohen, & Hausfeld, and Stanley M. Chesley of the Cincinnati firm Waite, Schneider, Bayless & Chesley Co. L.P.A. These two men represent a 29-member group of lawyers filing claims in the United States, and they currently seek to manage the Bhopal litigation now pending before Judge Keenan. *Id.* at 8, col. 3.

<sup>64</sup> Article 14 of India's Constitution reads as follows: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." INDIA CONST. art. XIV. The rule applies to equality of substantive rights as well as equality of procedural rights. This broad scope of protection grants to all litigants the same procedural rights for relief and defense without discrimination. Under these procedural rights falls the right to choose one's own counsel. *See* D. SEN, A COMPARATIVE STUDY OF THE INDIAN CONSTITUTION 200-10 (1966).

<sup>65</sup> According to the American lawyers' complaint, the Indian Government may have been at fault by failing to enforce safety regulations at the Bhopal plant. The lawyers maintain that if the Indian Government did share in the responsibility for the accident, taking over the victims' claims would present a conflict of interest. Lewin, *supra* note 4, at D2, col. 4.

<sup>66</sup> More than \$100 billion in claims have been filed against Union Carbide in the United States. Diamond, *India Wants U.S. Courts to Handle Bhopal Cases*, N.Y. Times, Dec. 7, 1985, at 43, col. 5.

<sup>67</sup> *In re* Union Carbide Corporation, MDL 626 (S.D.N.Y.). The Judicial Panel on Multidistrict Litigation has consolidated all 64 competing lawsuits in the Southern District of New York and assigned the case to Judge John F. Keenan. Cates, *100 Lawyers Start the Legal Cleanup*, Nat'l L.J., Apr. 29, 1985, at 13, col. 1. Congress established the Judicial Panel in 1968 to deal with related cases that were filed in different federal district courts. 28 U.S.C. § 1407 (1982). The Panel consists of seven federal circuit and district court judges chosen by the Supreme Court. 28 U.S.C. § 1407(d). The Panel is to transfer the cases for pre-trial proceedings when these proceedings "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a).

for discovery purposes only.<sup>68</sup> Judge Keenan laid down early guidelines for the case,<sup>69</sup> the most notable of which was the establishment of a three-member committee to lead the litigation.<sup>70</sup>

On July 31, 1985, Bud G. Holman of the New York law firm Kelley, Drye & Warren, filed Union Carbide's motion for forum non conveniens<sup>71</sup> in the New York District Court. The plaintiffs filed two

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<sup>68</sup> See 28 U.S.C. § 1407(a) (1982). At the conclusion of discovery proceedings, all the actions transferred will be remanded by the Panel to the district from which they came. *Id.*

Carbide has tried to limit discovery on the forum non conveniens question to the pleadings, brief, and affidavits of the parties. On August 14, 1985, however, Judge Keenan ordered that discovery be permitted on the issue of forum non conveniens, and the door soon opened for broader discovery than Carbide had wanted. Michael Dolinger, Magistrate in charge of discovery, ruled on September 19, 1985, that Carbide must answer questions revealing its evidence on possible sabotage of the plant. Carbide had previously refused to answer such questions. In addition, Carbide must answer questions on how much control it exerted over operation of the Bhopal plant; further, plaintiffs were permitted to depose three Carbide officials. Adler, *supra* note 29, at 60-61.

<sup>69</sup> The hearings on the Bhopal litigation were scheduled to begin on March 12, 1985, just 99 days after the accident. Less than a week before the first hearing, however, Judge Keenan notified the scores of lawyers involved that the case was being adjourned until April 16, 1985. Riley, *supra* note 40, at 24, col. 1. Before the first hearing, the plaintiffs' lawyers were primarily led by a 29-member steering committee with two co-chairmen, Stanley Chesley of Cincinnati's Waite, Schneider, Bayless, & Chesley Co. L.P.A., and Jerry Cohen of Washington, D.C.'s Kohn, Milstein, Cohen & Hausfeld. *Id.* at 24-25. At the April 16 hearing, Judge Keenan urged Union Carbide to provide \$5-10 million in immediate aid to be credited against any future settlement or judgment. Judge Keenan also urged that an interim relief plan be developed for the Bhopal victims. Cates, *supra* note 67, at 13, col. 2.

<sup>70</sup> Judge Keenan told the large group of plaintiffs' lawyers in the first pre-trial hearing that "[t]hey had one week to choose two from their number to serve on an executive committee with a representative of the Indian Government." Cates, *supra* note 67, at 13, col. 1. The purpose of the committee was to establish leadership in the pre-trial proceedings of the litigation. The many lawyers are divided over three problems in the case: (a) whether the suit should be pursued as a class action; (b) whether attorneys should push for litigation or settlement; and (c) how much cooperation there should be with the Indian Government. *Id.* at 13, cols. 1-2.

The plaintiffs' committee, led by Stanley Chesley and F. Lee Bailey, has opened a Bhopal litigation office in New York. The committee assessed a tax of \$3,000 on each of the more than 100 firms that have collected Bhopal clients and wish to remain involved with these clients. Adler, *supra* note 29, at 28. According to Bud Holman, attorney for Union Carbide, a number of lawyers who are not part of the plaintiffs' executive committee have approached him in recent months in an effort to negotiate separate deals to settle their own cases. *Id.* at 62.

<sup>71</sup> *Id.* at 27, 58. The strongest argument in the 65-page memorandum is that virtually all of the plaintiffs, relevant witnesses, and key documents are in India, and the cost of transporting everyone involved to the United States for trial would be prohibitive. The memorandum also states that Indian law will probably be applied in the case, and that Indian courts are far more competent to apply Indian law

briefs in opposition to the motion on December 6, 1985,<sup>72</sup> asserting that India does not provide an adequate alternative forum,<sup>73</sup> and that Union Carbide's control over the Bhopal plant was so significant<sup>74</sup> that a United States court is justified in accepting jurisdiction over the case.<sup>75</sup> Lawyers on both sides argued the forum non conveniens

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than are American courts. In addition, other potential defendants such as subcontractors, suppliers, and UCIL itself are in India and are not subject to jurisdiction in the United States. Holman is so firmly committed to the forum non conveniens argument that when answering questions on other areas involved in the suit, he invariably refers back to the doctrine. His references to the doctrine became so numerous that at one pre-trial hearing Judge Keenan called him "Johnny one-note." *Id.* at 58, cols. 1-3.

If the forum non conveniens motion is granted, Union Carbide will argue in India that the UCIL plant is an independent company over which the parent has no control. If this argument is successful, damage awards will be limited to \$70 million, the total assets of UCIL. *Id.* at 62, col. 1.

<sup>72</sup> Riley, *Will Bhopal Plaintiffs Beat Some Big Odds?*, Nat'l L.J., Dec. 23, 1985, at 3, col. 1. Lawyers for the Indian Government joined in drafting the Bhopal Plaintiffs' Executive Committee brief and guided United States lawyers in forming the argument that the Indian judicial system is wholly unable to handle the number of claims arising out of the accident. *Id.* at 11, col. 1.

<sup>73</sup> The briefs set forth a very unusual contention. The Indian Government stated that victims seeking compensation could not get a fair trial in India's own courts. Diamond, *supra* note 66, at 33, col. 1. Commenting on this argument, Seymour J. Rubin, former executive director of the American Society of International Law, stated, "I have never heard of a country saying that its own courts could not afford its citizens an adequate remedy. Inevitably, if India prevails, a lot more cases will be filed by other poor countries against the head officers of transnational companies, whether it is the United States, Canada, France or Germany." *Id.* at 43, col. 5.

<sup>74</sup> Plaintiffs argue that a United States court has an interest in hearing the case based on the idea that Carbide exercised active control over the UCIL plant. Adler, *supra* note 29, at 58. To support this argument, the plaintiffs introduced several documents demonstrating a connection between Union Carbide India and its American-based parent. *Id.* at 61. The documents included statements from Carbide officials that "it is the general policy of the corporation to secure and maintain effective management control of an affiliate" to "assure that corporate policies and procedures on safety are observed." Diamond, *supra* note 66, at 43, col. 6. Carbide also provided designs for the plant, trained several of its workers, and helped initiate the operation. *Id.*

In addition to these controls, the documents revealed that in May 1984, Union Carbide officials discussed a sale or lease of part of the plant because of unprofitability. Officials also discussed the possibility of dismantling the Bhopal plant and shipping parts of it to Brazil or Indonesia. Riley, *supra* note 72, at 11, col. 2. Union Carbide received a report on the costs of dismantling the plant just five days before the accident. Meier, *Carbide Review on Closing Bhopal Plant was Under Way Shortly Before Disaster*, Wall St. J., Sept. 27, 1985, at 6, cols. 5-6.

<sup>75</sup> In addition to arguing control by the parent company and inadequacy of an Indian forum, plaintiffs argued that the Bhopal litigation could be handled through a single trial on liability and punitive damages issues, followed by representative damage trials which could provide guidance on the settlement value of the cases.

motion orally before Judge Keenan on January 3, 1986.<sup>76</sup> As of this writing, no decision has been handed down on the forum non conveniens issue.

### III. INDIAN AND AMERICAN FORUMS COMPARED

The importance of the forum non conveniens issue in the Bhopal litigation is based on the fact that the outcome of the case would be vastly different if the case were tried in India rather than in the United States. Legal scholars and others maintain that the United States is the better forum for at least two reasons:<sup>77</sup> better administration of the cases, and higher damage awards for victims.<sup>78</sup> This section briefly compares and contrasts the differences between the Indian and American forums in three important areas: (a) theories of liability; (b) compensation awards; and (c) procedural differences between the two jurisdictions.

#### A. *Three Theories of Liability*

Regardless of which forum ultimately tries the Bhopal litigation, the plaintiffs will probably assert at least three theories of liability:

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Riley, *supra* note 72, at 11, col. 2. Counsel for Union Carbide, however, has stated that Carbide may not agree to representative damage trials and has further suggested that every claimant seeking relief may have to appear in court. This "litigate to the bitter end approach" could mean as many as 200,000 separate damage trials. Adler, *supra* note 29, at 62.

<sup>76</sup> Judge Keenan listened to hours of arguments by attorneys on the quality of the American and Indian systems of justice, and on whether the parent company controlled operation of the Indian subsidiary plant. Diamond, *supra* note 22, at 41, col. 4. Keenan's decision, which is expected in early 1986, will likely have a profound effect on future settlement talks. *Bhopal Venue Arguments Set Today*, Atlanta Const., Jan. 3, 1986, at D8, col. 1. For a thorough bibliography focusing on the background of the Bhopal disaster, and the problems, regulations and litigation involving transnational corporations engaged in the production of hazardous technologies, see McFadden, *A Selected Bibliography on Hazardous Activities, Technology and the Law: Bhopal and Beyond*, 19 INT'L LAW. 1459 (1985).

<sup>77</sup> Legal scholars who have written on this subject agree with many Indian officials that the Indian legal system is incapable of handling the Bhopal litigation and properly compensating the victims. See Galanter, *supra* note 40; Weinberg, *Insights and Ironies: The American Bhopal Cases*, 20 TEX. INT'L L.J. 307 (1985); McGarity, *Bhopal and the Expert of Hazardous Technologies*, 20 TEX. INT'L L.J. 333 (1985).

The chief justice of the Indian Supreme Court firmly believes that the only hope of compensation for the victims can be found in an American court. Stewart, *supra* note 40, at 1, col. 1. One prominent lawyer in Bhopal has stated that "[t]here are numerous cases in Bhopal, but we think we will get nothing because there's no remedy." *Victims*, *supra* note 37, at 132.

<sup>78</sup> For a discussion of the differences in the compensation of tort victims in Indian and American forums, see *infra* notes 137-57 and accompanying text.

absolute or strict liability, negligence, and multinational enterprise liability.<sup>79</sup> Strict and absolute liability are well-established theories of liability in the United States which have not yet been applied in India.<sup>80</sup> Even though Indian courts have yet to adopt the theories of

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<sup>79</sup> Two additional theories, breach of warranty and misrepresentation, could be raised under United States tort law; however, breach of warranty and misrepresentation are not found in Indian tort law. Instead, these doctrines are used defensively in Indian contract law to justify the nonpayment of insurance benefits to a claimant. See, e.g., *Kamla Wanti v. L.I.C. of India*, 1981 A.I.R. 366 (All.) (life insurance company did not succeed on a theory of misrepresentation alleging the deceased had concealed his diabetes and carbuncle); *V. Srinivasa Pillai v. L.I.C. of India*, 1977 A.I.R. 381 (Mad.) (the same life insurance company was successful on a theory of misrepresentation proving a pregnant woman had concealed this fact on her policy).

If the claims are tried in India, the court probably will not apply the breach of warranty or misrepresentation theories because there was no contract between Union Carbide and the citizens of Bhopal. One possible way in which the Indian court could apply these theories would be through a breach of contract claim concerning the technology-transfer agreement which existed between Union Carbide and the UCIL plant. Westbrook, *supra* note 9, at 328. The agreement specified that Union Carbide would gradually transfer to the UCIL plant the ability to produce pesticides. *Pesticide Plant*, *supra* note 2, at 8, col. 1. See also *Relationship of the Companies*, N.Y. Times, Jan. 28, 1985, at A1, col. 1. The technology-transfer agreement, however, will be important only if an Indian court finds UCIL solely responsible for the accident, and UCIL later attempts to sue the parent company for contribution and indemnity. UCIL could then claim that the parent company breached an implied warranty in the agreement to keep technology updated and to provide proper training. See Westbrook, *supra* note 9, at 328. For a discussion of technology transfer to developing countries, see generally Bryne, *Transfer of Technology to Developing Nations*, 129 NEW L.J. 309 (1979); Goldscheider, *The Technology Transfer Process: A Vehicle for Continuity and Change*, 14 VAND. J. TRANSNAT'L L. 255 (1981).

Misrepresentation and breach of warranty in United States tort law occur as separate grounds for liability in product liability cases, as well as other tort actions. In a broad sense, misrepresentation occurs when a defendant misleads the plaintiff, whether intentionally or unintentionally, and the plaintiff is injured as a result of the defendant's deceptive statements or conduct. See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS, § 105, at 726 (5th ed. 1984) [hereinafter cited as PROSSER]. Breach of warranty occurs when a defendant sells a product to the plaintiff and the product fails to perform the way in which the defendant either expressed or implied that it would. UNIFORM COMMERCIAL CODE § 2-318 (1978). In breach of warranty cases, the defendant can be held strictly liable for injuries caused by the product on the basis of an express or implied warranty of safety that passes with the product upon sale. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). Alternatives A, B, and C in § 2-318 of the Uniform Commercial Code define the potential scope of liability in breach of warranty cases. U.C.C. § 2-318 (Alternatives A, B, C). The problem with the breach of warranty and misrepresentation theories in the Bhopal case is that there was never a sale on which to base a breach of warranty, and there was no representation to the citizens of Bhopal as to the design or safety of the plant upon which they could bring a claim for misrepresentation.

<sup>80</sup> For a discussion of strict and absolute liability in United States tort law, see *infra* notes 103-09 and accompanying text.



strict and absolute liability, sufficient precedent exists for an Indian court to apply these theories in the Bhopal litigation.<sup>81</sup> The theory of negligence is firmly recognized in both Indian and United States tort law,<sup>82</sup> while the multinational enterprise liability theory is a novel theory which has neither been accepted nor rejected in India or the United States.<sup>83</sup>

Tort law is the one major area of law which remains largely uncodified in India.<sup>84</sup> This result is partially due to the fact that in India a wrong committed against another is often dealt with through criminal charges rather than through civil suits;<sup>85</sup> therefore, few tort cases are filed in India.<sup>86</sup> When a tort suit does arise, Indian courts often rely on English common law to resolve the dispute.<sup>87</sup> Although Indian courts are not forced to rely on English common law, they are required to act in "equity and good conscience" in the absence of specified statutory law;<sup>88</sup> however, an Indian court acting in equity and good conscience may only apply a principle of English common law if the "principle does not depend upon any technicality of English law," and the principle is applicable to the case before the court.<sup>89</sup>

### 1. *Absolute or Strict Liability*

Both absolute liability and strict liability denote a type of liability

<sup>81</sup> See *infra* notes 94-102 and accompanying text.

<sup>82</sup> For a discussion of the doctrine of negligence as applied in the Indian and American forums, see *infra* notes 110-19 and accompanying text.

<sup>83</sup> The multinational enterprise liability theory is discussed *infra* notes 120-36 and accompanying text.

<sup>84</sup> Galanter, *supra* note 40, at 275. When the British systemized the Indian legal system in the 19th century, complete codes of all fields of criminal, commercial, and procedural law were adopted. *Id.* One significant reason that tort law was never codified in India is that the legislative branch, responsible for codification of such law, felt that a large part of tort law was better handled by the criminal justice system which had been codified. *Id.* at 276 n.13. For a discussion of the development of the modern Indian legal system, see Galanter, *The Displacement of Traditional Law in Modern India*, 24 J. Soc. ISSUES 65 (1968).

<sup>85</sup> Criminal complaints are preferred over civil suits because a large payment must be made in advance before one may file a civil complaint. Galanter, *supra* note 40, at 275 n.10. Compensation for the victim often comes in the form of specific relief. *Id.* at 275. For an explanation of the large filing fees in India for civil suits, see *infra* notes 195-205 and accompanying text.

<sup>86</sup> *Id.* at 275-76.

<sup>87</sup> *Id.* at 276. See also D. THAKORE & M. VAKIL, *THE ENGLISH AND INDIAN LAW OF TORTS* 1 (19th ed. 1965). However, as more tort suits are heard, precedent in Indian case law grows.

<sup>88</sup> *Id.* at 1. See also *Baboo Thakur Dhobi v. Mst. Subanshi*, (1942) 25 Nag. L.J. 199.

<sup>89</sup> *Eastern M.C. Ltd. v. Premier Auto Ltd.*, (1962) 65 Bom. L.R. 183.

without fault and are therefore considered together in this section.<sup>90</sup> The early English case, *Fletcher v. Rylands*,<sup>91</sup> first enunciated the rule of strict liability. The basic concept behind strict liability is that in certain cases a person may be held liable for any injury which he has caused, even though he has committed no moral wrongdoing nor departed in any way from a reasonable standard of care.<sup>92</sup> Under this theory, liability is often found for an injury caused by the defendant's unusual and abnormal activities in the community.<sup>93</sup> Moreover, strict liability could be applied in an Indian as well as in a United States court.

#### a. Indian Courts

No Indian court has had occasion to apply strict liability in a mass tort suit such as the Bhopal case; however, the Indian Supreme Court did briefly consider the doctrine in *Manjushri v. B. L. Gupta*.<sup>94</sup> The *Manjushri* case involved an automobile accident under the Motor Vehicles Act (1939). Although it held that strict liability could not be applied under the Act, the Court emphasized the need to establish a theory of no-fault liability in Indian tort law.<sup>95</sup>

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<sup>90</sup> A technical distinction would be to apply strict liability in cases where injuries were caused by defective products and absolute liability in cases where injuries were caused by a substance escaping its usual bounds. See Lewin, *The Big Lawsuits: Will They be Tried in U.S.*, N.Y. Times, Dec. 14, 1984, at 10, col. 5. Today in United States tort literature, however, the general term used is "strict liability," and the doctrine of strict products liability is applied in defective product cases. There is no difference, however, in the scope of liability for strict and absolute liability. Both allow for liability without fault. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*, § 14.1, at 787 (1956).

<sup>91</sup> 1 L.R.-Ex. 265 (1866). The rule of absolute liability, as laid down by Judge Blackburn in the Exchequer Chamber and later approved by the House of Lords, is as follows:

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

*Id.* at 279.

<sup>92</sup> PROSSER, *supra* note 79, § 75, at 536.

<sup>93</sup> *Id.* § 75, at 537.

<sup>94</sup> 1977 A.I.R. 1158 (S.C.).

<sup>95</sup> The court stated in *Manjushri*:

The time is ripe for serious consideration of creating no-fault liability. Having regard to the directive principles of State policy, . . . the nationalisation of general insurance companies and the expanding trend towards nationalisation of bus transport, the law of torts based on no-fault needs reform.

*Id.* at 1159. The willingness of the Supreme Court of India to consider the doctrine

The Indian Supreme Court is not the only court in India which has considered strict liability. At least one state supreme court in India has applied the principle of no-fault liability under the Motor Vehicles Act.<sup>96</sup> The Indian Supreme Court, however, overruled the decision of the state supreme court, holding that the Motor Vehicles Act provided for liability only upon a showing of fault.<sup>97</sup> Although the Indian Supreme Court has refused to apply strict liability in automobile accident cases, sufficient precedent exists to allow the Indian judicial system to recognize the doctrine in mass tort suits and thus to apply strict liability in the Bhopal litigation.

Although a dearth of Indian cases apply strict liability, an Indian court could adopt the principles of this doctrine directly from English common law.<sup>98</sup> English courts have applied the theory of strict liability to what may be described as "dangerous things."<sup>99</sup> Persons who deal with electricity in bulk,<sup>100</sup> herbicides in crop-dusting,<sup>101</sup> and those who collect large quantities of noxious and inherently dangerous sewage<sup>102</sup> have all been held to the strict liability standard of *Rylands*. Arguably, persons who use dangerous chemicals in the manufacture of pesticides could also be placed in the class of those involved in dangerous operations. As a result, an Indian court could, through analogy, find that the UCIL plant was involved in an activity in-

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of strict liability indicates that the doctrine could be applied successfully in the Bhopal case.

<sup>96</sup> In the case of *Marine and General Ins. Co., Ltd. v. Balkrishna*, 1977 A.I.R. 53 (Bom.), the High Court of Bombay applied the doctrine of absolute liability for injuries caused in an automobile accident. The High Court stated:

The Tribunal has power to determine what is "just" compensation irrespective of whether the defendant was at fault or was negligent or careless or not. When a person is injured by use of a vehicle, that itself is an infringement of a right. That person must, therefore, have a remedy of recovering compensation from the person whose vehicles has caused injury.

*Id.* at 65.

<sup>97</sup> The view of the Bombay High Court was rejected by the Supreme Court of India in *Minu B. Mehta v. Balkrishna*, 1977 A.I.R. 1248 (S.C.). The Supreme Court stated in *Minu B. Mehta* that the principles of no-fault liability could not be found in the provisions of the Motor Vehicles Act, upon which the Bombay court had based its decision. *Id.* at 1259.

<sup>98</sup> See *supra* notes 87-89 and accompanying text. If no Indian case precedent exists, the Indian court acting in equity and good conscience is free to look to the case precedent of English common law.

<sup>99</sup> R. HEUSTON, *SALMOND ON THE LAW OF TORTS* 323 (17th ed. 1977). Strict liability is also imposed when injury results from the defendant's non-natural use of the land. *Id.* at 312.

<sup>100</sup> See, e.g., *N.W. Utilities v. London Guarantee Co.*, 1936 A.C. 108.

<sup>101</sup> See, e.g., *Michalchuk v. Ratke* (1966) 57 D.L.R.(2d) 269.

<sup>102</sup> See, e.g., *Smeaton v. Ilford Corp.* [1954] 1 Ch. 450, 472.

herently dangerous to citizens of Bhopal, and that strict liability should necessarily apply to such operations. Adoption of this analysis would render the Union Carbide Corporation strictly responsible for the Bhopal disaster without any showing of negligence.

*b. United States Courts*

The doctrine of strict liability could also be used as a basis for recovery in a United States court.<sup>103</sup> A majority of United States jurisdictions apply the rule of *Rylands*.<sup>104</sup> By imposing strict liability, several courts have emphasized that a hazardous activity causes great likelihood of risk to others because of the locality in which it was performed.<sup>105</sup> Some United States courts, however, have applied strict liability even when an activity is performed in its natural surroundings.<sup>106</sup>

Under a theory of strict liability, the defendant can be held liable even though not negligent in proximately causing the harm.<sup>107</sup> The

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<sup>103</sup> The most recent rule of strict liability in United States tort law, according to at least one legal scholar, is as follows:

If an enterpriser deliberately and consciously engages in an activity that is highly dangerous even when reasonable care is exercised and if the activity is one that is not the kind commonly engaged in such as automobile driving, then such intentional exposure of another to great danger, however socially desirable the activity, can generally be regarded as a sound basis on which to allocate the risk of loss to the person or entity engaging in that ultra-hazardous and abnormally dangerous activity.

PROSSER, *supra* note 79, § 78, at 556. See generally Sachs, *Negligence or Strict Product Liability: Is There Really a Difference in Law or Economics?*, 8 GA. J. INT'L & COMP. L. 259 (1978) (concluding that accident and safety levels have not been significantly improved because of the adoption of strict liability).

<sup>104</sup> PROSSER, *supra* note 79, § 78, at 549. The principle found in *Rylands* is rejected by name in only seven United States jurisdictions: Maine, New Hampshire, New York, Oklahoma, Rhode Island, Texas, and Wyoming. *Id.* But even in these jurisdictions, the principle of *Rylands* has been applied under various other theories. *Id.* § 78, at 552.

<sup>105</sup> *Id.* § 78, at 551; see also *Exner v. Sherman Power Constr. Co.*, 54 F.2d 510 (2d Cir. 1931) (dynamite stored in a hut which was located close to a thickly settled town); *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969) (storage of large quantities of gasoline immediately adjacent to a private residence); *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948) (using hydrocyanic acid for the purposes of fumigating a commercial building in which there was a great many tenants considered to be an "ultra-hazardous activity").

<sup>106</sup> See, e.g., *Siegler v. Kuhlman*, 81 Wash.2d 448, 502 P.2d 1181 (1973) (truck driver held strictly liable when the decedent drove into and ignited a pool of gasoline which had spilled onto the highway after defendant's trailer, fully loaded with gasoline, broke loose from the cab and overturned).

<sup>107</sup> PROSSER, *supra* note 79, § 78, at 559. To apply strict liability, the defendant must be aware of the abnormally dangerous activity. Once it has been established

doctrine is usually applied when the defendant injures another by participating in an unduly dangerous activity which is inappropriate to the place where it is being performed.<sup>108</sup> If the Bhopal case were decided in the United States, the court would almost certainly apply the doctrine of strict liability and find the defendant strictly liable for participating in an activity unduly dangerous in its surroundings.<sup>109</sup>

## 2. *Negligence*

In addition to the doctrine of strict liability, an Indian court may hold Union Carbide responsible for the disaster under the theory of negligence. The classic definition of negligence was laid down in the early English case of *Blythe v. Birmingham Water Works*.<sup>110</sup> In *Blythe* the court defined negligence as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do."<sup>111</sup> Both Indian courts and United States courts have used the rule of *Blythe* as a foundation for the theory of negligence; therefore, the principles for applying negligence are similar in both forums.

Negligence is proved in both Indian and United States courts by

the defendant was aware of the activity and nevertheless permitted it to occur, the defendant is said to be acting "at his peril." *Id.*

<sup>108</sup> *Id.* § 78, at 547-48. The Second Restatement of Torts, however, applies a balancing test. If the court finds an activity to be "abnormally dangerous" after weighing certain factors, § 519 requires the court to apply strict liability. RESTATEMENT (SECOND) OF TORTS § 519 (1976). Section 520 sets forth six criteria that act as the balancing test when a court is determining whether an activity is abnormally dangerous. These criteria include: (1) the existence of a high degree of risk of some harm to the person, land, or chattels of others; (2) a likelihood that the harm that results from the activity will be great; (3) an inability to eliminate the risk by the exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to the place where it is carried on; and (6) the extent to which the activity's value to the community is outweighed by its dangerous attributes. *Id.* § 520. All six factors are weighed to determine whether a danger is abnormal, but "[a]ny one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability." *Id.* § 520 comment f (1976). On the other hand, it is not necessary that each factor be present if others will weigh heavily in the factual context of the case. *Id.*

<sup>109</sup> One slum area with a population of approximately 3,000 people was spread out directly in front of the main gate of the factory. Reinhold, *supra* note 5, at A8, col. 2. Under a proposed law in India, a factory producing dangerous chemicals must be situated at least 15 miles from populated areas. Hazarika, *supra* note 44, at A10, col. 4.

<sup>110</sup> 11 L.R.-Ex. 781 (1886).

<sup>111</sup> *Id.* at 784.

showing that the defendant breached a legal duty of reasonable care<sup>112</sup> owed to the plaintiff.<sup>113</sup> The theory is based on an objective standard of conduct to which all members of society are expected to conform.<sup>114</sup> In addition, the burden of proof in both jurisdictions rests with the plaintiff. The plaintiff must prove the existence of a duty, the defendant's breach of this duty, and the harm resulting from this breach.<sup>115</sup>

<sup>112</sup> See R. ANAND & L. SASTRI, *THE LAW OF TORTS* 645 (3rd ed. 1967) for a discussion of the duty of care in Indian law. See PROSSER, *supra* note 79, § 53, at 356-59 for a discussion on the duty of care in United States tort law.

<sup>113</sup> See R. ANAND & L. SASTRI, *supra* note 112, at 644. In United States tort law, both actual and proximate cause must be shown in a negligence action. Actual cause refers to "cause in fact" which includes everything which contributed to the result, and without which the result would not have occurred. PROSSER, *supra* note 79, § 41, at 265. The familiar "but for" test is often applied to prove cause in fact. *Id.* § 41, at 265-68.

Proximate cause, which also must be proved, can be used to limit liability where cause in fact has already been established. Although several tests have been proposed to apply proximate cause, the basic premise underlying all these tests is "whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred." *Id.* § 42, at 273, 276. Thus, in a certain case, a court could find that although an injury would not have occurred "but for" the defendant's actions, his actions were not the proximate cause of the plaintiff's injury. In this case, the defendant would not be liable. *Id.* § 42, at 273; see, e.g., *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928) (employees of defendant dislodged a package of explosives from a passenger's arms causing an explosion which overturned some scales several feet away and subsequently caused injury to the plaintiff. The New York Court of Appeals concluded that but for the explosion the plaintiff would not have been injured; however, the court refused to hold the defendants negligent because they could not have foreseen the possibility of harm to the plaintiff); cf. Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocations of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1 (Professor Thode argues that a duty-risk analysis should replace the proximate cause analysis in negligence cases. Thode states that the duty-risk analysis is exclusively devoted to the issue of whether there was a factual connection between the defendant's conduct and the plaintiff's injury and cites the decision in *Palsgraf* as a form of the duty-risk analysis).

<sup>114</sup> For a discussion of the standard of conduct under Indian law, see R. ANAND & L. SASTRI, *supra* note 112, at 648. Under United States tort law, a failure to conform to the objective standard of conduct results in liability even though the injury was caused solely by stupidity, forgetfulness, or sheer ignorance. PROSSER, *supra* note 79, § 31, at 169.

The "reasonable man" standard was established in *Blythe*, but at least one author believes "the man of ordinary prudence" standard was first established in the English case, *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837). PROSSER, *supra* note 79, § 82, at 592. In *Vaughan* the defendant owned a hayrick which was set near other buildings on his land. When the hayrick spontaneously ignited, the fire spread to the defendant's buildings as well as to cottages owned by the plaintiff. The court found the defendant negligent because he failed to meet the standard of ordinary prudence of a reasonable man under the same circumstances. *Vaughan*, 132 Eng. Rep. at 492.

<sup>115</sup> For an explanation of the burden of proof in Indian negligence actions, see R. ANAND & L. SASTRI, *supra* note 112, at 651-52. In United States negligence

One difference between the two forums is that if the case is heard in India, Union Carbide may not be the only defendant in the case. An Indian court may find the state and central governments in India also liable<sup>116</sup> for failure to exercise reasonable care in monitoring the plant, and for failure to enforce worker safety and environmental regulations at the plant.<sup>117</sup> In a United States forum, however, these

actions, the jury must only be persuaded that the preponderance of the evidence supports the party carrying the burden of proof. PROSSER, *supra* note 79, § 38, at 239.

<sup>116</sup> See generally Bakshi, *Law of Torts*, 16 A.S.I.L. 339, 344 (1980) (in deciding whether a government entity is liable for an act, an Indian court must distinguish "sovereign" and "non-sovereign" activities. If the activity falls within the sphere of "sovereign functions," the court will not hold the entity liable for the act). For a general discussion of Indian Government liability, see Jacob, *Vicarious Liability of Government in Torts*, 7 J. INDIAN L. INST. 247 (1965). The ruling authority in India on sovereign immunity is the Indian Supreme Court case, *Shyam Sunder v. State of Rajasthan*, 1974 A.I.R. 890 (S.C.).

<sup>117</sup> Cf. *Kasturi Lal v. State of U.P.*, 1965 A.I.R. 1039 (S.C.) (the Indian Supreme Court stated that a government entity can be held liable for the tortious act of a public servant unless that act is committed in the exercise of a delegated sovereign function). Government liability is also recognized in the United States. United States courts traditionally accepted the doctrine of governmental immunity, the law being that unless the government consents to suit, it enjoys complete immunity. PROSSER, *supra* note 79, § 131, at 1033. However, the doctrine of sovereign immunity has steadily declined in the 20th century as evidenced by a Florida Supreme Court decision, *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957), in which the court held that a municipal corporation was not immune from liability for the torts of its police officers. *Id.* at 133; see also Olson, *Governmental Immunity from Tort Liability Two Decades of Decline: 1959-79*, 31 BAYLOR L. REV. 485, 489 (1979). At least 30 states have abrogated state sovereign immunity in a substantial or general way. PROSSER, *supra* note 79, § 131, at 1045.

The immunity of the United States Federal Government was restricted by enactment of the Federal Tort Claims Act in 1946. 28 U.S.C. § 2672 (1982). Theoretically, the Act provides a prospective plaintiff with an appropriate legal basis for seeking redress from the Federal Government for injuries caused by a negligent or wrongful act or omission of any employee of the Federal Government acting within the scope of his employment. *Id.* § 1346(b). The Indian Government, however, would not be subject to the Federal Tort Claims Act in a United States court because the Act is restricted to those actions brought against the United States. For a further discussion of United States Government liability under the Federal Tort Claims Act for failure to inspect, see Basanta, *Federal Tort Liability for Negligent Mine Safety Inspections*, 85 W. VA. L. REV. 519 (1983); Note, *The Federal Seal of Approval: Government Liability for Negligent Inspection*, 62 GEO. L.J. 937 (1974).

The Federal Tort Claims Act imposes certain substantive and procedural limits for any claim brought against the United States Government: (1) jurisdiction is vested exclusively in federal district courts; (2) all suits against the United States, except those involving tax claims, are tried without a jury; (3) a two-year statute of limitations is in force on all damage claims, which must also be in writing and directed to the responsible administrative agency; if the agency denies the claim, the action must be filed within six months; and (4) strict liability cannot be applied under the statute. PROSSER, *supra* note 79, § 131, at 1035-36. In addition, the Federal Government

governments would be immune from suit.<sup>118</sup>

Nevertheless, the circumstances of the Bhopal disaster indicate that a strong case for negligence could be brought against the Union Carbide Corporation in either an Indian or a United States court. First, Union Carbide owed a duty to the citizens of Bhopal to act reasonably in maintaining the plant. Second, a court could find Union Carbide breached this duty by failing to maintain properly machinery and safety devices at the plant. Specifically, many of the gauges were unreliable, the plant was not equipped with a computer system used in other Carbide plants designed to alert the staff to leaks quickly, and the plant had no effective public warning system.<sup>119</sup> Third, the

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retains immunity for all government conduct that involves discretionary functions or duties. *Id.* at 1039. Following the Supreme Court case *Dalehite v. United States*, 346 U.S. 15 (1953), many courts have interpreted this discretionary function to allow the immunity if the government's action occurred at the planning level of a decision or activity. PROSSER, *supra* note 79, § 131, at 1040. Once the activity reaches the operational level, however, the immunity disappears and the activity must be carried out with reasonable care. *See Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (the Court held that the United States could be held liable under the Federal Tort Claims Act if the Coast Guard's failure to operate and maintain a lighthouse with due care caused harm to the petitioners). Furthermore, a court may refuse to apply the discretionary test where the government's activity is affirmative, specific, and in violation of a statute, regulation, or constitutional provision which imposes a duty upon the government. Within the area of statutory duty, liability often arises in food and drug as well as aviation inspections. *But see Hatfield, The Nonliability of the Government for Certification of Aircraft*, 17 FORUM 602 (1982) (arguing that claims of negligent inspection are barred by the discretionary function exception to the Federal Tort Claims Act). For a discussion of potential government liability in the area of prescription drugs, see Stetler, *Responsibility of the Food and Drug Administration Under Federal Tort Claims Act*, 72 DICK. L. REV. 580 (1968). For a discussion of the government's scope of liability in constitutional violations, see Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984), in which the authors argue that only tort claims against the government which involve recklessness, motive, disproportion, and control deserve constitutional protection.

<sup>118</sup> Under the Foreign Sovereign Immunities Act of 1976, a United States court would be barred from exerting jurisdiction over any Indian Government entity unless the entity falls under an enumerated exception in the Act. 28 U.S.C. §§ 1602-11 (1982). The exceptions are set forth in § 1605; however, the only exception applicable to an Indian Government entity in the Bhopal case would be if the foreign government has implicitly or explicitly waived its immunity to suit. *Id.* § 1605(a)(1). *See also Note, Foreign States Sued for Their Acts Abroad: A Uniform Analysis Under the Foreign Sovereign Immunities Act*, 34 RUTGERS L. REV. 538 (1982). *See generally Note, Minimum Contacts Jurisdiction Under the Foreign Sovereign Immunities Act*, 12 GA. J. INT'L & COMP. L. 209 (1982) (discussing the minimum contacts standard applied to the "commercial activity" exception of the Foreign Sovereign Immunities Act).

<sup>119</sup> Diamond, *supra* note 31, at A6, col. 1.



court could find that the failure to maintain the machinery caused the injuries resulting from the leak.

### 3. *Multinational Enterprise Liability Theory*

Finally, an Indian court may decide to apply the multinational enterprise liability theory to the Bhopal case. This theory asserts that a parent company can be held liable for tortious actions of its subsidiaries, regardless of the degree of control the parent company exercises.<sup>120</sup> This theory has been formally considered in neither a United States nor an Indian court. Although in-depth consideration of the multinational enterprise liability theory is beyond the scope of this Note, a few observations are set forth which apply in both the Indian and United States forums.

First, the doctrine of vicarious liability is present in both Indian<sup>121</sup> and United States case law.<sup>122</sup> In both jurisdictions, the doctrine has stemmed from early English common law.<sup>123</sup> The basic premise of vicarious liability is that due to the relationship between two parties, the negligence of the first party can be charged against the second party even though the second party was not negligent.<sup>124</sup>

The respondeat superior concept behind vicarious liability is analogous to the multinational enterprise liability theory. This novel theory

<sup>120</sup> Lewin, *supra* note 4, at D2, cols. 3-4. For a general discussion on multinational corporations, see Fatouros, *The Computer and the Mud Hut: Notes on Multinational Enterprise in Developing Countries*, 10 COLUM. J. TRANSNAT'L L. 3225 (1971); LaPalombara & Blank, *Multinational Corporations and Developing Countries*, 34 J. INT'L AFF. 119 (1980); Rangarajan, *Structure of and Legal Control Over Multinational Corporations in a Mixed Economy*, 15 INDIAN J. INT'L L. 453 (1975); Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980).

<sup>121</sup> See Bakshi, *The Law of Torts*, 17 A.S.I.L. 1, 3-5 (1981). The principle governing the vicarious liability of the master was stated in *Sitaram v. Santanuprasad*, 1966 A.I.R. 1697 (S.C.) as follows:

A master is vicariously liable for the acts of his servant acting in the course of his employment . . . . [F]or the master's liability to arise, the act must be a wrongful act by the master or a wrongful and unauthorised [sic] mode of doing some act authorised by the master.

*Id.*

<sup>122</sup> PROSSER, *supra* note 79, § 69, at 499-501. The doctrine of vicarious liability has been the subject of many law review articles and scholarly works. See, e.g., Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916); Ferson, *Bases for Master's Liability and for Principal's Liability to Third Persons*, 4 VAND. L. REV. 260 (1951).

<sup>123</sup> The doctrine of vicarious liability began in England as early as 1708 in the case of *Hern v. Nichols*, 91 Eng. Rep. 256 (1708).

<sup>124</sup> The most familiar relationship in which vicarious liability arises is the liability of a master for the torts of his servant. PROSSER, *supra* note 79, § 69, at 499-500.

asserts that although the parent and subsidiary may be different corporations,<sup>125</sup> both are part of an aggregate of corporate entities interconnected by a system of central control;<sup>126</sup> therefore, since the two are connected in a single economic unit, liability can be shared.<sup>127</sup> The vicarious liability analogy is as follows: as the master controls the economic unit and is responsible for the acts of his servant, the centralized management of the multinational company controls the aggregate unit, and thus is responsible for the actions of the subsidiary, even though not in complete control of those actions.

Additionally, the acceptance of this doctrine in a United States court may have a chilling effect on American industry abroad.<sup>128</sup> Multinational corporations form subsidiaries in foreign countries to establish limited liability for the parent company.<sup>129</sup> If this limited

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<sup>125</sup> See generally C. WALLACE, *LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE* 1 (1982) (the author states that the entities which compose a multinational enterprise are individual corporations). The UCIL plant was incorporated under the laws of India, see Robertson, *Introduction to the Bhopal Symposium*, 20 *TEX. INT'L L.J.* 269, 269 (1985), and the employees at the plant were Indian citizens. See Diamond, *1982 Inspector Says Indian Plant Was Below U.S. Safety Standards*, *N.Y. Times*, Dec. 12, 1984, at A8, col. 4.

<sup>126</sup> See C. WALLACE, *supra* note 125, at 2.

<sup>127</sup> See generally N. LATTIN, *LATTIN ON CORPORATIONS* §§ 11-13, 65-71 (2d ed. 1971). The multinational enterprise liability theory is contrary to the fundamental purpose of establishing a corporation, that purpose being limited liability. The subsidiary is established as a separate legal unit, solely responsible for its employees' actions within the scope of their employment. *Id.* The multinational enterprise liability theory avoids the concept of "piercing the corporate veil" by establishing liability without a show of control by the parent company. See Westbrook, *supra* note 9, at 323-24. Traditionally, the only way that Union Carbide could be held responsible for the accident would be for the plaintiffs to show that Union Carbide was using the UCIL plant to further its own, rather than the Bhopal plant's interests, or that Union Carbide was abusing the corporate form simply to avoid any liability. See N. LATTIN, *supra*, §§ 14, 18, at 72, 86. This traditional theory of holding another party liable for the actions of the corporate entity is applied in both Indian and American law. Westbrook, *supra* note 9, at 323.

<sup>128</sup> Broad, *Gas Leak is Expected to Reduce Investment in Third World*, *N.Y. Times*, Dec. 12, 1984, at A8, cols. 1-2. American corporations may fear that liability for all foreign subsidiary plant accidents will be thrust on them as parent companies. To avoid potential liability, American corporations may decrease their industrial activity in foreign countries. *Id.* Kenneth Rush, a former president of the Union Carbide corporation and a former Deputy Secretary of State, has stated that the Bhopal disaster "will probably reduce investments by multinational corporations in the developing world." *Id.* at A8, col. 2.

<sup>129</sup> See generally N. LATTIN, *supra* note 127, § 11, at 65. For a discussion on the liability of a multinational corporation for its subsidiaries, see Aronofsky, *Piercing the Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis*, 10 *N.C.J. INT'L L. & COM. REG.* 31 (1985).

liability is stripped, United States-based multinationals may limit foreign investment. Developing countries, in turn, would suffer if American corporations decrease their international activities out of fear of liability for future accidents.<sup>130</sup> Conversely, a large American jury award in the Bhopal case may stimulate increased safety measures in United States industry abroad.<sup>131</sup> This same chilling effect on foreign investment, however, would not occur to the same degree if an Indian court adopted the theory.<sup>132</sup> In addition, because damage awards would probably be lower in India,<sup>133</sup> United States industry would be less concerned about future liability in foreign countries.

Finally, if the Union Carbide Corporation cannot be held liable for the accident at the UCIL plant under the multinational enterprise liability theory, or under a similar theory of vicarious liability,<sup>134</sup> many victims may be under-compensated or not compensated at all.<sup>135</sup>

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<sup>130</sup> The UCIL plant in Bhopal was built under a common agreement in which the multinational corporation shared ownership of the plant with the local government of the developing country. Broad, *supra* note 128, at A8, col. 4. Union Carbide was allowed to build its factory on government land at an annual rent of less than \$40 an acre, including taxes. Union Carbide's initial investment in 1969 of less than \$1 million in the UCIL plant grew to \$25 million over the next 15 years. *Pesticide Plant*, *supra* note 2, at 8, col. 1.

<sup>131</sup> Broad, *supra* note 128, at A8, col. 3. According to Kenneth Rush, the cost of doing business abroad is likely to increase as a result of the Bhopal disaster. The Federal Government will increase its focus on the foreign operations of United States corporations, which may in turn raise the costs these corporations spend on safety devices. *Id.*

<sup>132</sup> A decision by a United States court concerning minimum safety measures required for international subsidiary plants of American corporations, or a ruling on the level of control which would subject a parent company to liability for accidents occurring at affiliate plants abroad, would probably have more of an impact on United States corporations than would similar rulings coming from an Indian court.

<sup>133</sup> For a discussion on the damage award differences in United States and Indian tort law, see *infra* notes 137-74 and accompanying text.

<sup>134</sup> See generally Diamond, *supra* note 29, at D3, col. 1. Plaintiffs feel that because of the degree of control the parent company exercised over the UCIL plant, the parent company should be held responsible for the accident in Bhopal. This argument was strengthened by an affidavit of the former president of Carbide's agricultural chemicals division, which stated that the parent company had ordered the use of large MIC storage tanks over the objections of the Indian affiliate. The corporate safety manual states that smaller containers are safer since they limit the amount of MIC leakage. *Id.* For further discussion on Union Carbide's control over the UCIL plant, see *supra* note 74 and accompanying text.

<sup>135</sup> The UCIL plant has been losing money since 1981 when it broke even. The plant was equipped to produce 5,000 tons of pesticides a year. In 1982, however, the plant produced only 2,308 tons; in 1983, only 1,647 tons; and an all time low in 1984 of less than 1,000 tons. Company sources said the 1984 loss was close to \$4 million. *Pesticide Plant*, *supra* note 2, at 1, col. 5. The drop in sales resulted in a lower net worth for the UCIL plant, and due to the plant's unprofitability,

The UCIL plant does not carry assets sufficient to absorb a large judgment without relying on the deep pocket of its parent.<sup>136</sup> Such under-compensation, however, may not suffice in persuading a court to adopt a theory which would allow actions to be brought against the parent company every time an injury occurs at a foreign subsidiary's plant. Indeed, the promise of limited liability is the very reason why multinational corporations often use the parent-subsidary form.

The substantive body of tort law in India is fully adequate to handle the Bhopal litigation. An Indian court could apply each of the three theories of liability discussed above. Case precedent on the doctrine of negligence abounds in India. In addition, Indian courts could adopt the theories of strict and absolute liability, and follow English precedent in applying these theories. Furthermore, an Indian court could adopt the multinational enterprise liability theory to hold the parent company liable for the claims. Doctrinally, therefore, the American forum offers no significant advantage for Bhopal victims.

### *B. Damages*

A second important aspect of litigation which contrasts the Indian legal system with the legal system of the United States is the level of damages awarded in tort suits. Traditionally, compensation in Indian tort suits has been minimal compared to jury awards for plaintiffs involved in similar cases in the United States. Nevertheless, elements of recovery are in fact very similar in the two countries, although Indian courts do not offer punitive damages. Recognizing that the difference in the levels of awards should be explained in terms of contrasting social standards, rather than legal doctrine, is essential to an objective comparison of the forums.

#### *1. Indian Courts*

Damage awards in Indian tort suits are traditionally quite low by

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the parent company has considered dismantling it and selling the parts. Riley, *supra* note 72, at 11, col. 2. A lower net worth in turn results in less money available to satisfy any tort judgments.

<sup>136</sup> Westbrook, *supra* note 9, at 328. "[I]t is quite possible that Carbide India is or will be insolvent when its financial responsibility for the disaster has been determined." *Id.* Under the Companies Act, the Carbide India corporation could initiate a liquidation bankruptcy of the company under Indian law. The Companies Act (INDIA), 1956, pt. VII, reprinted in, 1 M. SETHNA, INDIAN COMPANY LAW 853 (7th ed. 1967). Indian liquidators could then file a petition under the United States Bankruptcy Code to complete the Indian bankruptcy proceeding. Unless a suit can then be filed against the Union Carbide Corporation, those victims who had not

United States standards.<sup>137</sup> One reason for the small awards is that Indian judges place little legal premium on injury and death.<sup>138</sup> Another reason is that Indian citizens generally do not expect legal remedies when agricultural and industrial accidents occur.<sup>139</sup> Instead, many Indians believe that disasters are "an incontrovertible part of their preordained fate."<sup>140</sup>

Following industrial accidents, the Indian Government often provides its citizens with public relief as an alternative mode of compensation to lawsuits.<sup>141</sup> A review of tort suits filed in personal accident cases reveals only meager awards;<sup>142</sup> therefore, Union Carbide's compensatory damage payments would no doubt be reduced substantially

been compensated would lose any claim against either the Union Carbide Corporation or the UCIL plant. Westbrook, *supra* note 9, at 328-29.

<sup>137</sup> See, e.g., Krishna Gounder v. Narasingam Pillai, 1962 A.I.R. 309 (Mad. H.C.) (award of 5,000 rupees, approximately \$400, given for loss of expectation of life); Marine and General Insurance Co., Ltd. v. Balkrishna, 1977 A.I.R. 53 (Bom.) (medical surgeon awarded the equivalent of \$17,925 after being seriously injured in a car accident caused by the negligence of the other driver).

<sup>138</sup> Dhavan, *supra* note 49, at 301.

<sup>139</sup> *Id.* at 302. In addition, the enormous court fees keep many citizens from bringing tort claims. Consequently, these citizens often do not rely on the legal system to redress wrongs. Galanter, *supra* note 40, at 274. Furthermore, there is a very low level of legal awareness among the general public of India. Bakshi, *supra* note 116, at 339. For example, no lawsuits were brought following the crash of an Air India 747 which killed hundreds, nor following the deaths of 365 persons upon drinking contaminated liquor in Bangalore in 1982. Galanter, *supra* note 40, at 280 n.33.

<sup>140</sup> Dhavan, *supra* note 49, at 302.

<sup>141</sup> *Id.* Government payments promote the idea that the accident was the result of fate. Disaster funds and rehabilitation plans are initiated while dignitaries visit the victims offering sympathy. *Id.* Under the Bhopal relief plan, a reported 75% of the population, over 700,000 people, are receiving free rations of wheat, rice, sugar, and cooking oil. In addition, the state government has established dozens of clinics and mobile hospitals to supplement existing medical facilities. Kramer, *supra* note 1, at 1, col. 1. See generally Galanter, *supra* note 40, at 280. Since the Bhopal disaster, the Indian Government has spent nearly \$40 million on relief efforts. Approximately half of this money has been spent in direct cash grants and food assistance, and the other half has been spent on job-training programs to teach those victims with breathing problems new skills such as television repairs and soap-making. Weisman, *supra* note 52, at 18, col. 1.

To avoid over-medication, the Indian Government divided Bhopal into seven districts, each with a central medication dispensary. All victims have been given a code number and yellow record card to use in obtaining medicine. Before implementation of this system, medical distribution was in a chaos as gas victims went from dispensary to dispensary to get relief, and no records were being kept. *Id.* at 18, col. 2.

<sup>142</sup> See, e.g., Bhanumati Vithaldas Gor v. Magabhai Dhulabhai, 1981 A.I.R. 182 (Guj.) (\$5,625 in compensation given to the widow of a 29-year old school teacher

if the Bhopal case is tried in India rather than in the United States.<sup>143</sup>

An Indian court will follow Indian case law to determine the level of compensation available to Bhopal victims.<sup>144</sup> One overriding policy in Indian tort law is the prohibition of punitive damage awards in personal injury or wrongful death cases.<sup>145</sup> By failing to adopt the policies behind punitive damages,<sup>146</sup> Indian courts have succeeded in keeping damage awards relatively low. Rather than using punitive damages in civil cases to deter wrongful conduct, the Indian justice system often brings criminal charges against those responsible for injuries and deaths.<sup>147</sup>

In the Bhopal litigation, however, awarding punitive damages to the Indian victims could establish a new precedent.<sup>148</sup> The Bhopal disaster justifies an award of punitive damages to deter wrongful conduct by large corporations operating in India. In addition, Indian

killed in an automobile accident); *Lachhman Singh v. Gurmit Kaur*, 1979 A.I.R. 50 (P. & H.) (parents, widow, and four minor children of the deceased were awarded \$1,875 as compensation, and the court refused to give further compensation based on love, affection, mental agony, or other such considerations). *Id.* at 50.

<sup>143</sup> *Victims*, *supra* note 37, at 133. "If Union Carbide succeeds in moving all the cases to India, its eventual liability will be minimal—certainly under \$75 million, by the most liberal calculation." *Id.*

<sup>144</sup> *Bhopal: City of Death*, *supra* note 1, at 18.

<sup>145</sup> *Id.* Courts in India do not award punitive damages in personal injury or wrongful death cases because the courts want to "avoid any windfall to claimants." Galanter, *supra* note 40, at 276. To ensure that the claimant will not benefit from the death, the court also considers the claimant's share of inheritance from the deceased. Dhavan, *supra* note 49, at 301; *see also Victims*, *supra* note 37, at 132 (citing a conversation the author had with Narasimha Swamy, a former Delhi University law professor); *cf.* Galanter, *supra* note 40, at 276. Galanter states that although punitive damages are referred to in India as exemplary damages, they are "almost unknown in practice." *Id.*

<sup>146</sup> For a brief discussion on the policies underlying punitive damages in United States tort law, *see infra* notes 163-64 and accompanying text; *see also* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982).

<sup>147</sup> *See supra* notes 85-86 and accompanying text for a discussion of the priority of criminal charges over civil claims in India. After the Bhopal disaster, Warren Anderson, President of Union Carbide, was arrested in Bhopal and held on charges of "negligence and corporate liability" in connection with the gas leak. Other employees of the UCIL plant have also been detained for questioning. Mr. Anderson has since been released. Hazarika, *supra* note 44, at 1, col. 3. Another leading lawyer feels that criminal charges could possibly be brought against UCIL employees relating to conspiracy and murder under §§ 120 and 302 of the Indian Penal Code. *Bhopal: City of Death*, *supra* note 1, at 18.

<sup>148</sup> Bhopal District Court Judge Yadan has stated that because an Indian court has never before tried a toxic tort suit, a different measure of damages could possibly be devised and disbursed to the victims. "We can grant any amount," stated Judge Yadan; however, one of his higher estimates was still less than \$40,000. *Victims*, *supra* note 37, at 132.

courts have never heard a toxic tort suit. Thus, the courts may decide that where serious accidents such as the MIC leak at Bhopal have potential for future occurrences, punitive damages are proper.<sup>149</sup>

Even so, an Indian court could still provide an adequate remedy for the plaintiffs without awarding punitive damages. At least four American states have refused to award punitive damages in tort cases,<sup>150</sup> yet plaintiffs in those states receive adequate remedies by way of compensation awards. Should Indian courts decline an award of punitive damages, victims can still be adequately compensated via the traditional method of awarding tort claimants in India.

This traditional manner of awarding compensatory damages is similar to the compensatory award system in the United States. In personal injury cases, damages are based on "the nature of the injury, the expenditure incurred in medical treatment, loss of earning capacity, and the pain suffered."<sup>151</sup> In the case of a fatal accident, Indian courts have based awards on both loss of consortium to a spouse<sup>152</sup> and on the loss of earning capacity over the projected working life of the deceased.<sup>153</sup> In addition, Indian courts recently

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<sup>149</sup> Section 908 of the Second Restatement of Torts states: "Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908(1) (1965). Most United States jurisdictions have doctrines allowing punitive damages in some form "to punish a defendant who commits an aggravated or outrageous act of misconduct against the plaintiff and to deter the defendant and others from similar misbehavior in the future." Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 7-8 (1982).

<sup>150</sup> United States courts which have specifically rejected punitive damages include the state courts of Louisiana, Massachusetts, Nebraska, and Wisconsin. PROSSER, *supra* note 79, § 2, at 9 n.20.

<sup>151</sup> *Bhopal: City of Death*, *supra* note 1, at 18; see also *Rehana v. Ahmedabad Mun. Transp. Serv.*, 1976 A.I.R. 37 (Guj.), where the court determined which categories of general damages could be awarded in a personal injury case. These categories included: (1) personal suffering and loss of enjoyment of life; (2) actual pecuniary loss resulting in any expenses reasonably incurred by the plaintiff; and (3) the probable future loss of income by reason of incapacity or diminished capacity for work. *Id.* at 46.

<sup>152</sup> See, for example, *K. Narayana v. P. Venugopala*, 1976 A.I.R. 184 (A.P.), where the High Court of Andhra Pradesh held that under the provisions of the Fatal Accidents Act, damages could be awarded for the loss of consortium in cases involving the death of the spouse in the accident. *Id.* at 191.

<sup>153</sup> See, e.g., *Jaimal Singh v. Jawala Devi*, 1976 A.I.R. 127 (Delhi) (High Court of Delhi gave compensation to the wife of the deceased based on the monthly income of the deceased, and applied the principle that damages are to be assessed on the basis of the plaintiff's loss at the date of the judgment); cf. *Victims*, *supra* note 37, at 132 (states that the spouse of a person is usually awarded only one-half of

have compensated disabled victims for the loss of enjoyment of life.<sup>154</sup>

Although the mechanics for awarding injured claimants in India is similar to the compensatory system in the United States, the actual awards are still smaller. One reason awards are smaller in Indian tort cases is that the earning capacity of the average Indian worker pales in comparison to the income of the average American.<sup>155</sup> A second reason stems from the cultural value Indian courts place on pain and suffering; Indian judges routinely reduce compensation for pain and suffering to insure that plaintiffs do not prosper by their claim.<sup>156</sup> But because the lower level of awards in India results from India's unique cultural standards, its existing damage award system can still compensate the Bhopal victims adequately.<sup>157</sup>

## 2. *United States Courts*

Most United States courts<sup>158</sup> can award both compensatory and punitive damages<sup>159</sup> in tort cases. Compensation awards include medical expenses, lost earnings, and pain and suffering. Some states allow

the victim's income as compensation, which is often further cut by 20% "to account for the possibility that the victim might have died early anyway"). *Id.*

<sup>154</sup> See, e.g., Mohamed Hanif Dallu v. Lunkaran Ganpatram Sharma, (1980) 21 G.L.R. 412.

<sup>155</sup> Most laborers in India make no more than 200 rupees a month, or about \$15. This figure represents an average yearly wage among Indian laborers of \$180. If each victim was awarded \$10,000, he or she would receive yearly wages for 30 years with an additional \$4,600 for pain and suffering. Many victims would not have to work for the rest of their lives. See *Victims*, *supra* note 37, at 132.

<sup>156</sup> Galanter, *supra* note 40, at 276.

<sup>157</sup> This view is adopted by the author. An Indian court could award victims for pain and suffering and, in death cases, for the projected earning capacity of the deceased according to the living standards of the victims in Bhopal. The average income in Bhopal is extremely low, and many of the victims were unemployed, or only intermittently employed. These victims should be compensated according to their own living standards. The purpose of the Bhopal litigation should not be to make "millionaires out of people who live in huts and tents," but rather the purpose should be to compensate fully the victims for each injury and fatality caused by the gas leak. Adler, *supra* note 29, at 28. Indian courts have adequately compensated tort claimants in the past, and the size and parties of the Bhopal litigation should not suddenly render the damage award system of India inadequate. The Indian victims are no less deserving of compensation than any other human being who is injured wrongfully; however, the system of compensating pain and injury deals with a monetary award, and the value of a monetary award is governed by the location of the individual. *Id.* at 57; see also *Non Causus Belli*, Wall St. J., Dec. 12, 1984, at 30, cols 1-2.

<sup>158</sup> See *supra* note 150 and accompanying text.

<sup>159</sup> PROSSER, *supra* note 79, § 2, at 14. Most American courts hold that punitive damages may be withheld at the discretion of the jury or trial judge. Punitive damages are generally seen as a type of windfall to the plaintiff, and not a matter of right.



additional compensation for mental distress accompanying immediate physical injury.<sup>160</sup> In wrongful death cases, compensation is awarded according to the pecuniary value the beneficiary could have expected to receive from the deceased, barring death.<sup>161</sup> This value includes speculation on such matters as life expectancy, income, habits and health of the deceased, past contributions to the family, and the probability of increased earnings and contributions in the future.<sup>162</sup> Punitive damages are usually available in cases where the defendant's actions have "been intentional and deliberate, and have the character of outrage frequently associated with crime."<sup>163</sup> Thus, the social policy behind punitive damages is to deter wrongful conduct and to punish the wrongdoer.<sup>164</sup>

Although punitive damages serve a useful purpose, the impact of such damages in mass tort suits may be counter-productive. For example, within the last three years, two large American corporations have filed for reorganization under the Bankruptcy Reform Act of 1978<sup>165</sup> as a result of punitive damages awarded in thousands of cases brought against them.<sup>166</sup> In these two situations, multiple punitive damages have produced negative results in at least two ways. First,

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<sup>160</sup> *Id.* § 54, at 363. The author reasons that "[w]ith a cause of action established by the physical harm, 'parasitic' damages are awarded, and it is considered that there is sufficient assurance that the mental injury is not feigned." *Id.*

<sup>161</sup> *Id.* § 127, at 953; see, e.g., *Hertz v. McDowell*, 358 Mo. 383, 214 S.W.2d 546 (1948); *American Barge Line Co. v. Leatherman's Adm'x*, 306 Ky. 284, 206 S.W.2d 955 (1947).

<sup>162</sup> PROSSER, *supra* note 79, § 127, at 953.

<sup>163</sup> *Id.* § 2, at 9.

<sup>164</sup> Owen, *Civil Punishment And The Public Good*, 56 S. CAL. L. REV. 103, 109 (1982). Professor Owen also argues that punitive damages are fair because they compensate the victim, including payment of the victim's costs of litigation; see also Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1295-97 (1976).

<sup>165</sup> Specifically these companies filed for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978. 11 U.S.C. §§ 1101-74 (1982).

<sup>166</sup> See Debtor's Petition Under Chapter 11B, *In re Johns-Manville Corp.*, No. 82B11656-116-76 (Bankr. S.D.N.Y. Aug. 26, 1982). Johns-Manville is the world's largest producer of asbestos with a solid history of profits; but more than 16,000 asbestos-damage suits put the giant corporation into bankruptcy court. Comment, *Manville Corporation and the "Good Faith" Standard for Reorganization Under the Bankruptcy Code*, 14 U. TOL. L. REV. 1467, 1468-69 (1983); see also Comment, *The Manville Corporation Bankruptcy: An Abuse of the Judicial Process?*, 11 PEPPERDINE L. REV. 151 (1983) [hereinafter cited as *Manville Bankruptcy*]. In late August of 1985, another large American corporation, A.H. Robins of Richmond, Virginia, manufacturer of the Dalkon Shield birth control device, filed a similar bankruptcy petition. See *Robins Runs for Shelter*, *supra* note 7, at 32.

without a reorganization plan,<sup>167</sup> future plaintiffs will be deprived of receiving any compensation from these companies.<sup>168</sup> In addition, the possibility of punitive damages reduces the number of policies which insurance companies are willing to write, and decreases the amount of coverage these companies are willing to offer.<sup>169</sup> If punitive damages are awarded in multiple cases arising from the Bhopal disaster,<sup>170</sup> Union Carbide may similarly find itself in bankruptcy court, or without insurance to cover future losses.

Damage awards would undoubtedly be higher if the Bhopal litigation is heard in the United States, in part because of the availability of punitive damages.<sup>171</sup> Additionally, even if the case were tried in the United States under Indian law,<sup>172</sup> an American jury would likely award more to the gas-leak victims than would an Indian judge.<sup>173</sup> Finally, Judge Keenan's decision as to whether an Indian court could provide adequate compensation to the victims if the traditionally low damage award standard is followed stands as a key factor in the *forum non conveniens* ruling.<sup>174</sup>

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<sup>167</sup> *Id.* Under the Johns-Manville reorganization plan developed in bankruptcy court, a \$2.5 billion fund was set aside for asbestos victims with the view that Johns-Manville would be able to emerge from bankruptcy within a year or two.

<sup>168</sup> See *Manville Bankruptcy*, *supra* note 166, at 164.

<sup>169</sup> See Pomerantz, *Products Liability Insurance in the New Industrial Revolution*, 686 INS. L.J. 129, 136-37 (1980). To cover their liability in mass-tort suits, insurance companies have been significantly increasing rates and directing the available capacity of insurance "to those lines of insurance most profitable." *Id.* at 136. This in turn causes manufacturers to raise prices to consumers, ultimately resulting in the average citizen paying for a corporation's insurance coverage. See also Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 U.M.K.C. L. REV. 1, 7 (1980). For a general discussion of the insurance issues connected with mass tort suits, see Epstein, *The Legal and Insurance Dynamics of Mass Tort Litigation*, 13 J. LEGAL STUD. 475 (1984); Mansfield, *Asbestos: The Cases and the Insurance Problem*, 15 FORUM 860 (1979).

<sup>170</sup> Although all the cases are consolidated in one court at present, they may be remanded to their respective courts after the pre-trial process, and more cases may then be filed. 28 U.S.C. § 1407(a) (1982).

<sup>171</sup> See *supra* notes 163-70 and accompanying text for a brief discussion of punitive damages in American tort law.

<sup>172</sup> For a discussion of the choice of law issue, and the possibility of the Bhopal case being tried under Indian law in an American court, see *infra* notes 177-94 and accompanying text.

<sup>173</sup> See *supra* notes 137-57 for a discussion of the low value of damage awards in Indian tort cases.

<sup>174</sup> For a discussion of the importance of the adequacy of compensation in a foreign court as it applies to the issue of *forum non conveniens*, see *infra* notes 248-52 and accompanying text.

### C. *Procedural Aspects*

In addition to differences in the nature of tort law and damage awards in Indian and United States forums, the administrative procedures of these two forums should also be contrasted. These procedural differences will be considered in the New York court's ruling on forum non conveniens.<sup>175</sup> If the procedural differences are important enough to render India an inadequate forum to hear the litigation, the forum non conveniens motion will be denied.<sup>176</sup>

#### 1. *Choice of Law*

If the Bhopal litigation is heard in India, the choice of law question presents little difficulty; the district court of Bhopal would apply Indian law. The Indian rules of civil procedure allow a suit to be brought against a corporation where that corporation carries on business.<sup>177</sup> Jurisdiction over the parent company would be based on agency notions. Thus, the American-based Union Carbide Corporation could be subject to suit in India if the Bhopal court determines that UCIL was acting as the agent of Union Carbide and that the cause of action arose from UCIL's activities.<sup>178</sup> Union Carbide would therefore be subjected to Indian law in Bhopal's district court.

If the Bhopal case is heard in the United States, however, choice of law becomes a more difficult question. Whether an American court would apply Indian law,<sup>179</sup> or the law of a particular American state, is debatable.<sup>180</sup> To resolve this dispute, it is important to consider

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<sup>175</sup> See text accompanying notes 246-47 for a discussion of the factors to be considered in Judge Keenan's ruling on the forum non conveniens motion. The choice of law question will be directly considered as a public interest factor in the case. In addition, interlocutory appeals, class actions, filing fees, and the absence of jury trials, will be considered in the overall decision as to whether India provides an adequate alternative forum.

<sup>176</sup> The court must find that an adequate alternative forum exists before it will grant a forum non conveniens motion. An adequate forum will allow the plaintiff to re-file his claim, offers a substantive theory under which the plaintiff can recover, and subjects the defendant to service of process. See *infra* notes 248-52 and accompanying text.

<sup>177</sup> T. AIYAR, 1 MULLA ON THE CODE OF CIVIL PROCEDURE (India) § 19, at 137 (1965) [hereinafter cited as MULLA]. This provision would apply to the Bhopal district court's jurisdiction over UCIL.

<sup>178</sup> *Id.* § 20, n.23; see also Swaminathan v. Somasundaram (1938) 61 Indian L.R. (Mad.) 1080; Neelakanda v. Kunju (1935) 68 Mad. L.J. 506.

<sup>179</sup> See *Non Causus Belli*, *supra* note 157, at 30, col. 1.

<sup>180</sup> See Weinberg, *supra* note 77, at 309. The author states that if the Bhopal cases were heard in the United States, the court would apply "the law of some state" and try the cases under United States law. *Id.* However, Weinberg concludes

the choice of law rules of the state in which the case is heard.<sup>181</sup> Assuming denial of the forum non conveniens motion, and assuming only a single case is tried in the United States,<sup>182</sup> New York is the likely forum.<sup>183</sup>

Any case or cases arising from the Bhopal disaster could be brought in a United States federal district court in which Union Carbide is subject to jurisdiction<sup>184</sup> based on diversity of citizenship.<sup>185</sup> In *Klaxon Co. v. Stentor Electric Manufacturing Co.*,<sup>186</sup> the Supreme Court held that when a federal court considers a choice of law question in a diversity case, it must follow the choice of law rules of the forum state.<sup>187</sup> Thus, if a single case is heard in New York's Southern District Court, New York choice of law rules would apply.<sup>188</sup>

If New York choice of law rules are used, then the federal court would apply the law of that place which is the "center of gravity" in the litigation.<sup>189</sup> The "center of gravity," or "grouping of contacts"

that liability could be determined under both Indian and United States law, and therefore the distinction is unimportant. *Id.*

<sup>181</sup> At least seven theories are used by various jurisdictions in deciding choice of law questions. These theories are discussed in Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983).

<sup>182</sup> The Indian Government seeks to sue in the United States as the victims' sole representative using the doctrine of *parens patriae*. If successful, the Indian Government's action against Union Carbide will be the only case tried. See generally Westbrook, *supra* note 9, at 330 (discussing the obstacles facing *parens patriae* representation in the United States).

<sup>183</sup> New York would seem to be the likely forum because the Indian Government filed its suit against Union Carbide in that state.

<sup>184</sup> 28 U.S.C. § 1332(c) (1982), provides that a corporation is subject to jurisdiction in any state in which it is incorporated or where it has its principal place of business. Union Carbide is incorporated in the state of New York and has its principal place of business in Connecticut. Recent Development, *Jurisdiction and Conflicts of Law — The Bhopal Litigation*, 26 HARV. INT'L L.J. 637, 644 (1985). Union Carbide may be subject to jurisdiction under the long-arm statutes of other states in which it carries on business. See generally J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 3.13 (1985).

<sup>185</sup> 28 U.S.C. § 1332(a)(2), (4) (1982). The federal court must then decide whether Union Carbide is subject to jurisdiction in the state in which the suit is brought. See *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>186</sup> 313 U.S. 487 (1941).

<sup>187</sup> *Id.* at 496. This holding was an extension of the famous Supreme Court case, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The *Erie* Court held that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Id.* at 78.

<sup>188</sup> If only one case was tried, that case would likely line up the Indian Government against Union Carbide. If Judge Keenan decides that each claim can be tried separately, all claims will be transferred back to their original forums. See *supra* notes 66-68 and accompanying text.

<sup>189</sup> Kay, *supra* note 181, at 525-26. The theory considers the acts of the parties

approach, was adopted by the New York Court of Appeals in 1954 in *Auten v. Auten*.<sup>190</sup> The purpose of the "center of gravity" approach is to give "the place having the most interest in the problem paramount control over the legal issues arising out of a particular factual context."<sup>191</sup> In *Auten* the court used English law to determine the rights of English citizens under a contract entered into in New York.

In 1963, the New York Court of Appeals extended the center of gravity approach to tort suits in the case of *Babcock v. Jackson*.<sup>192</sup> Following *Babcock* on the choice of law issue, the New York federal court would likely find that India is the center of gravity in the Bhopal case for several reasons. First, the disaster involved injuries to Indian citizens, and the families of those killed are in India. Second, employees of the plant were Indian citizens. Third, the site of the accident is in India. And finally, investigations of the disaster are being undertaken by Indian officials.<sup>193</sup> As a result, the federal court should apply Indian law to any case arising out of the Bhopal disaster.<sup>194</sup>

## 2. Filing Fees

A second procedural distinction between the Indian and American forums concerns filing fees.<sup>195</sup> To reduce the amount of litigation in

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involved in relation to the states or countries involved, and then applies the law of that state or country with which the facts are in most intimate contact. *Id.* at 526.

<sup>190</sup> 308 N.Y. 155, 124 N.E.2d 99 (1954).

<sup>191</sup> *Id.* at 161, 124 N.E.2d at 102.

<sup>192</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 473 (1963), *on remand*, 40 Misc.2d 757, 243 N.Y.S.2d 715 (1963). In tort cases involving the measure of recovery in wrongful death suits, charitable immunity, and contribution in interstate workers' compensation cases, New York courts still follow the center of gravity theory when a conflict of law arises. Kay, *supra* note 181, at 535.

<sup>193</sup> The *Auten* court considered similar factual patterns in concluding that it should invoke English law. *Auten* at 161-62, 124 N.E.2d at 102-03.

<sup>194</sup> The choice of law theories followed in other states may support application of United States tort law in the Bhopal litigation. For example, in *Hurtado v. Superior Court*, 11 Cal.3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974), the California Supreme Court adopted the governmental interest theory for conflict questions. This theory states that a forum "should investigate the foreign law only when asked to do so by the parties, and should apply that law only in cases in which the forum had no interest in applying its own law." Kay, *supra* note 181, at 539-40. Thus, a court following the governmental interest theory would probably apply American law in the Bhopal litigation. First, the plaintiffs would not request Indian law, and further, the court could find some state interest to support applying state law.

<sup>195</sup> See 28 U.S.C. § 1914 (1982). Filing fees are costs paid to a court in order to have a complaint filed and subsequently heard by the court.

India during the 1800's, the British passed the Indian Court Fees Act of 1870.<sup>196</sup> This act required a citizen to pay a fee to the court before a civil case would be heard.<sup>197</sup> In a suit for damages or compensation, the amount of the fee was determined by the amount claimed.<sup>198</sup> In general, the percentage of the award paid as court fees decreased as the amount of the award increased.<sup>199</sup> Presently, court fees for an award which exceeds 100,000 rupees, or \$8,000, is between five and six percent of the amount claimed.<sup>200</sup>

Under normal circumstances these court fees would prohibit most if not all of the Bhopal victims from filing a claim with the Bhopal district court.<sup>201</sup> The Madhya Pradesh Government, however, has waived the usual court fees for any claim arising out of the Bhopal case.<sup>202</sup> As a result, the Court Fees Act is no longer a deterrent to the Bhopal litigation taking place in India.<sup>203</sup>

Similarly, court fees would probably not deter Bhopal victims from filing suit in an American court. United States courts require only a nominal fee compared to the percentage-based filing fees in India.<sup>204</sup> Instead of paying a certain percentage of the award to the court, plaintiffs in the United States often disburse a percentage of the award to their lawyers in the form of contingency fees.<sup>205</sup> As a result of the waiving of court fees in India, and the low filing fees in the

<sup>196</sup> The Court Fees Act (VII of 1870), 6 INDIA A.I.R. MANUAL 1191 (3d ed. 1970).

<sup>197</sup> Galanter, *supra* note 40, at 274.

<sup>198</sup> M. BASU, THE COURT FEES ACT AND THE SUITS VALUATION ACT 76 (1965).

<sup>199</sup> See Galanter, *supra* note 40, at 274.

<sup>200</sup> *Id.* The Indian rupee is currently worth approximately \$0.08. *Id.* at n.7.

<sup>201</sup> Stewart, *supra* note 40, at 28, col. 1.

<sup>202</sup> *Victims*, *supra* note 37, at 130. The fees were officially waived by the state government in a notification dated December 20, 1984. Galanter, *supra* note 40, at 283.

<sup>203</sup> *Id.* No further claims have been filed, however, since the Indian Government passed the ordinance selecting itself as sole representative of the victims. See also *supra* notes 53-56 and accompanying text.

<sup>204</sup> For example, before filing any civil case or proceeding in a Georgia superior court, a deposit of \$20 must be paid. This deposit is the total amount owed to the court for bringing the suit. O.C.G.A. § 15-6-77 (1985). When instituting a civil action, suit, or proceeding in any United States district court, the plaintiff is required to pay a \$60 filing fee. 28 U.S.C. § 1914(a) (1982). Conversely, Indian courts require a nonrefundable filing fee of up to 5% of the total damages sought. Stewart, *supra* note 40, at 28, col. 1.

<sup>205</sup> Plaintiffs' lawyers in the Bhopal litigation are reportedly seeking anywhere from 20-50% contingency fees, although some have refused to set a figure this early. See *Victims*, *supra* note 37, at 134-35. If the cases remain consolidated, however, the court will award a mass lump sum with attorneys' fees included in that sum. In the recent Agent Orange litigation, attorneys' fees amounted to less than 10% of the original settlement figure. Weinberg, *supra* note 77, at 317-18.

United States, the Bhopal victims will not be deterred financially from entering complaints in either Indian or American forums.

### 3. *Jury Trials*

A third distinction between the two jurisdictions concerns the use of juries in civil cases. Indian law does not provide for juries in civil cases.<sup>206</sup> Instead, complaints and arguments are heard by a single judge who pronounces his verdict.<sup>207</sup> The judge also has the right to recall and examine the witnesses at trial.<sup>208</sup> These judges tend to keep tort damage awards low in an effort to avoid providing a windfall to claimants.<sup>209</sup>

Conversely, United States law guarantees the right to trial by jury.<sup>210</sup> The seventh amendment to the United States Constitution states that in all civil suits, "the right of trial by jury shall be preserved."<sup>211</sup> Recent cases show that juries in civil cases have been very willing to award extremely large punitive damages in cases involving large corporate defendants.<sup>212</sup> Thus, a jury in a United States court, using the weapon of punitive damages,<sup>213</sup> may compensate victims in far greater

<sup>206</sup> Galanter, *supra* note 40, at 276. Indian law follows English common law in allowing civil actions to be tried before a judge alone; however, England now recognizes a right to trial by jury in cases of fraud, libel, slander, malicious prosecution, false imprisonment, seduction and breach of a marriage promise. Although the court has discretion to allow trial by jury in other civil actions, there is no universal right to trial by jury in England. E. WADE & A. BRADLEY, *CONSTITUTIONAL LAW* 309 (8th ed. 1970).

<sup>207</sup> See MULLA, *supra* note 177, order 20, rule 1, at 913. Before enactment of the government's ordinance, the cases arising from the Bhopal disaster were being heard by Judge Virenda Singh Yadan. See *supra* note 46 and accompanying text. At the time, Judge Yadan was presiding over 2,000 separate claims. *Victims*, *supra* note 37, at 130.

<sup>208</sup> MULLA, *supra* note 177, order 18, rule 17, at 908.

<sup>209</sup> Galanter, *supra* note 40, at 276.

<sup>210</sup> In civil cases, however, the parties must affirmatively request a trial by jury or it is deemed waived. FED. R. CIV. P. 38(d).

<sup>211</sup> U.S. CONST. amend. VII.

<sup>212</sup> See, e.g., *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152 (10th Cir. 1981), *cert. denied*, — U.S. —, 104 S. Ct. 92 (1983) (punitive damage award of \$3 million in a fraud case reduced to \$1 million by the appeals court); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (original jury award of \$125 million in punitive damages ultimately reduced to \$3.5 million); *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 168 Cal. Rptr. 237 (1980), *appeal dismissed*, 450 U.S. 1051 (1981) (appellate court reduced \$10 million punitive damage award to \$2.5 million in contract fraud case); *Pennzoil Co. v. Texaco, Inc.*, No. 84-05905 (Harris County Civ. Ct. Nov. 19, 1985) (jury award of \$10.53 billion in a securities fraud case, \$3 billion representing punitive damages).

amounts than would an Indian judge working under a legal system which merely attempts to compensate victims for losses suffered.<sup>214</sup> For this reason, the procedural distinction of trial by jury could have substantial practical impact on the outcome of the Bhopal case.

#### 4. *Interlocutory Appeals*

Review of interlocutory appeals is a fourth procedural distinction between the United States and Indian forums. Interlocutory relief is extremely easy to obtain in India;<sup>215</sup> an unlimited number of issues may be appealed at almost any point during a proceeding<sup>216</sup> causing great backlog in India's high courts.<sup>217</sup> Because Indian lawyers so jealously guard this interlocutory procedure, the backlog increases each year.<sup>218</sup>

An interlocutory order is much more difficult to obtain in an American court. United States appeals courts have statutory jurisdiction over only four types of interlocutory orders.<sup>219</sup> Any other issue in which a party seeks interlocutory review must be certified by the district court judge hearing the case.<sup>220</sup> The judge should certify only those issues dealing with a controlling question of law, rather than any matter within the discretion of the district court.<sup>221</sup>

Although the interlocutory appeal is a matter of concern in the Bhopal litigation, the problem can be avoided by establishing a special panel of judges in India to hear only the accident claims.<sup>222</sup> This

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<sup>213</sup> American juries would only be able to award punitive damages if United States law is applied. See *supra* notes 163-64 and accompanying text.

<sup>214</sup> See generally Dhavan, *supra* note 49, at 300-02 (discussion of damages available under Indian law).

<sup>215</sup> *Id.* at 297.

<sup>216</sup> Stewart, *supra* note 40, at 28, col. 2. The interlocutory appeal is seen as an important due process right in Indian courts. *Id.*

<sup>217</sup> A case taken completely through the Indian legal system may take decades before final disposition. *Id.* at 28, col. 1.

<sup>218</sup> Indian lawyers have been known to go on strike when the High Court justices have tried to make interlocutory relief more difficult to obtain. Dhavan, *supra* note 49, at 297. The Indian Supreme Court is so burdened with the interlocutory appeals process that it spends half its time "admitting" cases for final hearing of an interlocutory appeal. *Id.*

<sup>219</sup> 28 U.S.C. § 1292(a), (c) (1982). The four situations in which a United States court of appeals has statutory jurisdiction include the following: (1) an interlocutory order pertaining to an injunction; (2) a judgment in a civil action for patent infringement; (3) interlocutory decrees determining the rights and liabilities of the parties to admiralty cases; and (4) interlocutory orders appointing receivers or refusing orders to wind up receiverships. *Id.*

<sup>220</sup> 28 U.S.C. § 1292(b) (1982).

<sup>221</sup> C. WRIGHT, *supra* note 13, § 102, at 714.

<sup>222</sup> See Diamond, *supra* note 66, at 43, col. 5.



panel could suspend the right to interlocutory review while the cases are being heard. Due process could be preserved by allowing a final appeal, but only after a complete disposition of all claims. Without a special tribunal, interlocutory appeals could pose significant delays in the adjudication of the Bhopal claims in India.

### 5. *Class Actions*

The final distinction to be drawn between the American and Indian legal systems deals with class actions. The class action is unknown in India and would probably be impossible to maintain in the Bhopal litigation.<sup>223</sup> In 1978, the scene was set in India for initiation of a class action when a plane crash killed hundreds of Indians near Bombay;<sup>224</sup> however, neither a class action nor any individual suit arose from the accident.<sup>225</sup>

To contrast, the class action is available in the United States. The class action consolidates the claims of persons injured under circumstances which give rise to similar litigation issues.<sup>226</sup> The purpose of the class action is to allow individuals with similar claims to resolve those claims in a single proceeding, thus saving the time, effort, and expense involved in duplicative litigation.<sup>227</sup>

Federal courts, however, are reluctant to certify class actions in the mass tort context.<sup>228</sup> One main reason for this reluctance is that class actions are inappropriate in mass tort suits since different damage and liability issues exist with respect to each individual plaintiff.<sup>229</sup> Although the liability issues would be the same for each Bhopal victim, the damage issues may differ significantly from victim to victim.<sup>230</sup> Reviewing the decisions of federal courts in this area leads

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<sup>223</sup> To date, no class actions have been reported in Indian case law.

<sup>224</sup> See Stewart, *supra* note 40, at 1, col. 1.

<sup>225</sup> *Id.*

<sup>226</sup> See FED. R. CIV. P. 23. This rule lists the requirements for certification, FED. R. CIV. P. 23(a), and the types of claims that can be certified for class action, FED. R. CIV. P. 23(b).

<sup>227</sup> Note, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALB. L. REV. 1180, 1180-81 (1983) [hereinafter cited as *Mass Tort Class Actions*].

<sup>228</sup> See *Id.* at 1183. For a discussion in favor of class actions in mass tort claims, see Note, *Class Actions in New York: Recovery for Personal Injury in Mass Tort Cases*, 30 SYRACUSE L. REV. 1187 (1979).

<sup>229</sup> *Mass Tort Class Actions*, *supra* note 227, at 1183-84. Two other reasons have been set forth to explain judicial hesitancy in certifying mass torts as class actions: (1) the notion that each individual is free to determine how to enforce his own rights; and (2) the possibility of being affected without being provided a day in court violates the traditional Anglo-American concept of justice. *Id.* at 1184.

<sup>230</sup> Union Carbide attorney Bud Holman insists that if the claims are tried in the United States and no settlement can be reached, every Indian plaintiff will be required

to a conclusion that the Bhopal case probably would not be certified for class action.<sup>231</sup> This procedural distinction would therefore have no impact in the Bhopal litigation.

Although certain procedural distinctions do exist between the Indian and the American legal systems, these distinctions would not prohibit an Indian court from processing the Bhopal claims fairly. A strong argument can be made that wherever the claims are brought, the same substantive law will be applied. In that vein, India would provide the preferable forum because Indian courts could apply their own law. In addition, waiving the Court Fees Act for all accident claims removed a large procedural obstacle in India.

The doctrinal propriety of an Indian forum is further seen in two additional procedural issues. First, a potential procedural advantage of the American forum, availability of the class action, would probably not be used since each damage claim would require a separate trial. In addition, the potential problem of interlocutory appeals and backlog in Indian courts could be avoided by establishing a special tribunal for the Bhopal litigation. Thus, India's forum is adequate on both substantive and procedural grounds, and is therefore capable of providing a proper remedy for each Bhopal claimant.

#### IV. FORUM NON CONVENIENS

Having recognized the substantive and procedural distinctions between the Indian and American legal systems, this Note now addresses the threshold issue in the Bhopal litigation, forum non conveniens. The federal court's ruling on this issue will not only decide the final forum for the accident claims,<sup>232</sup> but will also impact the damage

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to appear in court. Holman maintains that separate damage trials are a fundamental requirement of due process. Adler, *supra* note 29, at 62.

<sup>231</sup> In the following mass tort cases, district courts refused to certify for class action: *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980) (defoliant chemical); *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass. 1983) (DES); *Marchesi v. Eastern Airlines, Inc.*, 68 F.R.D. 500 (E.D.N.Y. 1975) (airplane disaster); *Yandle v. PPG Indus. Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (asbestos).

<sup>232</sup> The Bhopal litigation could be heard in one of three forums: India, the New York Southern District Court, or the original location of each claim. If the forum non conveniens motion is granted, Union Carbide could be subject to suit in the Bhopal district court or before a special Indian tribunal. *See infra* note 253 and accompanying text. If the motion is denied, however, Judge Keenan must decide whether to allow the Indian Government to bring a single suit as the sole representative of the victims, *see supra* notes 53-56 and accompanying text, or to remand the cases to their original forums pursuant to the rules on multidistrict litigation. 28 U.S.C. § 1407(a); *see also supra* notes 67-68 and accompanying text.

awards available to the victims.<sup>233</sup> In addition, the ruling may affect the way in which multinational corporations deal with foreign subsidiaries in the future.<sup>234</sup>

The federal court's ruling will probably not be based on any doctrinal standard involved in this case; as argued throughout this Note, the applicable substantive and procedural law is notably similar in the two forums. Rather, the true basis of the *forum non conveniens* ruling in the Bhopal litigation is whether diverse cultural and social standards in the two forums will justify a United States court in retaining jurisdiction of these claims. Absent a showing of some procedural or substantive unfairness to the Indian plaintiffs, the court should grant Union Carbide's *forum non conveniens* motion, which in turn would allow the victims to be adequately compensated according to the traditional cultural standards of their home country.

The doctrine of *forum non conveniens* allows a United States court to dismiss a case properly within its jurisdiction if trial in a foreign forum would be more appropriate.<sup>235</sup> To be successful on a *forum*

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<sup>233</sup> For a discussion of the damage award differences between the two countries, see *supra* notes 137-74 and accompanying text.

<sup>234</sup> See *supra* notes 128-30 and accompanying text for a discussion of the chilling effect on American investment abroad that could result if Union Carbide is held liable in the Bhopal litigation. See also Broad, *supra* note 128. At least two writers believe that if the *forum non conveniens* motion is denied and the Bhopal claims are heard in the United States, a torrent of claims would be unleashed against other United States multinationals. Besharov & Reuter, *Tort Laws Hobble U.S. Business Abroad*, Wall St. J., Oct. 28, 1985, at 22, col. 2. The writers allege that American business conducted outside the borders of the United States is at a disadvantage since foreign-based competition is not subject to the same expensive tort liabilities. According to this reasoning, because the United States cannot make its competitors assume these liabilities, American investment in overseas markets will decrease as tort judgments against United States multinationals increase. *Id.* As a result, the writers advocate legislation limiting the availability of punitive damages to the same degree that these damages would be available in the country where the injury occurred. *Id.* at 22, col. 4.

<sup>235</sup> RESTATEMENT (SECOND) OF THE CONFLICTS OF LAWS § 84 (1971). The doctrine of *forum non conveniens* probably began in Scotland in the 1830's. Case Note, *Piper v. Reyno: Change of Law and the Forum Non Conveniens Inquiry*, 36 ARK. L. REV. 273, 275 (1982) [hereinafter cited as *Change of Law*]. As early as 1885, the United States Supreme Court recognized a court's right to refuse jurisdiction over controversies between foreigners. *The Belgenland*, 114 U.S. 355 (1885). During the 1930's, the Supreme Court upheld application of the *forum non conveniens* doctrine in certain limited situations. *Change of Law, supra* at 277; see also *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932) (use of the doctrine by courts sitting in admiralty); *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933) (doctrine used to dismiss a suit involving the internal affairs of a foreign corporation); *Broderick v. Rosner*, 294 U.S. 629 (1935) (state court may apply the doctrine in appropriate circumstances). The landmark *forum non conveniens* case was decided

non conveniens motion, the defendant must show great inconvenience in the present forum<sup>236</sup> and the existence of a more appropriate forum for the trial.<sup>237</sup> Application of the doctrine is heavily dependant on the unique facts of the case. Whether jurisdiction should be retained or denied is in the sole discretion of the trial judge.<sup>238</sup>

When a forum non conveniens motion is considered in a federal court diversity action, there is some question as to whether state notions of forum non conveniens are binding on the court.<sup>239</sup> Although the Supreme Court has not yet ruled on this issue,<sup>240</sup> the weight of authority indicates that a federal court will not look to state court rulings, but instead will rely solely on federal precedent.<sup>241</sup>

by the Supreme Court in 1947. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The most recent statement by the Supreme Court on the doctrine is found in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). For a complete discussion of the history of the forum non conveniens doctrine, see Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947).

<sup>236</sup> RESTATEMENT (SECOND) OF THE CONFLICTS OF LAWS § 84 (1971); see also *Hoffman v. Goberman*, 420 F.2d 423 (3d Cir. 1970).

<sup>237</sup> 15 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3828 (1976) [hereinafter cited as FEDERAL PRACTICE]. The alternative forum must have jurisdiction over all parties. *Id.*; see also *Odita v. Elder Dempster Lines, Ltd.*, 286 F. Supp. 547 (S.D.N.Y. 1968).

<sup>238</sup> RESTATEMENT (SECOND) OF THE CONFLICTS OF LAWS § 84(b) (1971). The standard of appellate review for forum non conveniens cases was clearly enunciated by the Ninth Circuit Court of Appeals in *Paper Operations Consultants Int'l, Ltd. v. S.S. Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975). The court stated:

An appellate court may only reverse the decision of the district court [on a motion to dismiss on the ground of forum non conveniens] if it constitutes an abuse of discretion. It is not the role of the appellate court to determine how it would have exercised its jurisdiction had the facts been presented to it.

*Id.* at 670; see also *Gilbert*, 330 U.S. at 512 (applying a similar standard of whether the lower court had exceeded its power or the bounds of its discretion).

<sup>239</sup> FEDERAL PRACTICE, *supra* note 237, § 3828, at 181.

<sup>240</sup> The Supreme Court refused to address the question in *Koster v. Lumberman's Mut. Casualty Co.*, 330 U.S. 518 (1947), *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and in *Williams v. Green Bay & W. R. Co.*, 326 U.S. 549 (1946).

<sup>241</sup> See, e.g., *Poe v. Marquette Cement Mfg. Co.*, 376 F. Supp. 1054 (D.C. Md. 1974); see also Note, *Federal Procedure: Erie-Hanna Rule Held Not to Compel Federal Application of State Internal Affairs Doctrine*, 1966 DUKE L.J. 1113.

The likelihood that Union Carbide's motion for forum non conveniens will be granted by the New York federal court would be even stronger if the federal court looked to New York state law to decide the issue. New York courts generally deny jurisdiction unless a 'substantial nexus' between the case and the state exists. Note, *Islamic Republic of Iran v. Pahlavi: A Novel Application of Forum Non Conveniens*, 49 ALB. L. REV. 528, 546 (1985). New York courts consider not only the factors set forth in *Gilbert*, but also the relevance of the facts and legal issues of the case to the State of New York. *Id.* This application led the New York Court of Appeals

The landmark decision the New York federal court will follow in deciding the forum non conveniens issue is the Supreme Court case, *Piper Aircraft Co. v. Reyno*.<sup>242</sup> The *Piper* case involved a United States-made plane which had crashed in Scotland killing six Scottish citizens. The Supreme Court held that the case should be tried in Scotland even though Scotland offered a less favorable forum for the plaintiff's chance of recovery.<sup>243</sup>

The New York court will also look to the private interest factor test set forth in *Gulf Oil Corp. v. Gilbert*.<sup>244</sup> *Gilbert* established that federal courts have the discretion to dismiss a suit on forum non conveniens grounds,<sup>245</sup> and set forth various private and public interests which a court is to consider in a forum non conveniens ruling. The private interests include: the ease of access to sources of proof; availability of compulsory process for the attendance of unwilling witnesses; costs involved in the attendance of willing witnesses; a view of the premises; and the enforceability of a judgment if obtained.<sup>246</sup> The Court further noted that the following public interests should be considered in applying the doctrine: piling up of litigation in congested centers; burden of jury duty being placed on those with no relation to the litigation; deciding localized interests at home; and

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to dismiss a case brought by the Government of Iran even when no alternative forum existed in which the case could be heard. *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), cert. denied, \_\_\_ U.S. \_\_\_, 105 S. Ct. 783 (1985). The court noted that because the requirement of an alternative forum was stated only as dicta in *Gilbert*, the court was free to hold that availability of an alternative forum was not a prerequisite to a forum non conveniens application. *Id.* at 480-81, 467 N.E.2d at 248-49, 478 N.Y.S.2d at 600-01.

<sup>242</sup> *Piper*, 454 U.S. at 235.

<sup>243</sup> Scottish law was considered less favorable because courts in Scotland do not recognize strict liability, whereas American courts would have applied this doctrine in the *Piper* case, allowing the plaintiffs to recover without a showing of negligence; however, Scottish courts did recognize the doctrine of negligence. In addition, wrongful death actions in Scotland could be brought only by the decedent's relatives who could sue only for "loss of support and society." *Id.* at 240; see also *Change of Law*, *supra* note 235, at 273-74 n.9.

<sup>244</sup> *Gilbert*, 330 U.S. at 501.

<sup>245</sup> *Id.* at 512. Dismissal on the basis of forum non conveniens in the *Gilbert* case would be improper today because of the enactment of 28 U.S.C. § 1404(a) (1982). See FEDERAL PRACTICE, *supra* note 237, § 3828, at 178. Rule 1404(a) provides that a case may be transferred from one federal court to another. See *supra* note 13 and accompanying text. Thus, the doctrine of forum non conveniens no longer applies in the intra-federal court system. See C. WRIGHT, *supra* note 13, § 44, at 259-60.

<sup>246</sup> *Gilbert*, 330 U.S. at 508.

the possibility of applying foreign law in a United States court.<sup>247</sup> Taken together, these factors allow a court to determine whether a United States or a foreign forum is more convenient for the parties, the witnesses, and the court.

In addition to considering the *Gilbert* factors, the *Piper* Court stated that the alternative forum must offer a fair remedy.<sup>248</sup> The fair remedy requirement seems to supplement *Gilbert's* sole requirement that the defendant must be amenable to process in the alternative forum.<sup>249</sup> The *Piper* Court did not specifically state what composes a fair remedy, although it did hold that a showing of unfavorable law in the alternative forum will not preclude a court from dismissing the case on the basis of forum non conveniens;<sup>250</sup> however, for the alternative forum to offer a fair remedy, the plaintiff must be able to restate his claim in the second forum,<sup>251</sup> and the forum must offer a substantive theory under which the plaintiff can recover.<sup>252</sup>

Although a court may dismiss a case when an adequate alternative forum is available, the dismissal carries certain conditions. The defendant must agree to waive any statute of limitations that may have expired while the case was under consideration in the United States, to submit to the jurisdiction of the foreign tribunal, and to abide by any judgment rendered in the foreign tribunal.<sup>253</sup> Thus,

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<sup>247</sup> *Id.* at 508-09. For a discussion of the *Gilbert* factors as applied in international litigation, see Note, *The Emerging Doctrine of Forum Non Conveniens: A Comparison of the Scottish, English and United States Applications*, 18 VAND. J. TRANS-NAT'L L. 111 (1985).

<sup>248</sup> *Piper*, 454 U.S. at 254. The Court said, "[I]f the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice." *Id.* See also *In re Air Crash Disaster Near Bombay, India on January 1, 1978*, 531 F. Supp. 1175 (W.D. Wash. 1982), in which the federal court chose to retain jurisdiction of the case, thus denying the defendant's motion for forum non conveniens largely because experts testified that it would take Indian courts at least 10 years just to decide whether the Indian statute of limitations could be waived by consent of the parties. *Id.* at 1181.

<sup>250</sup> *Piper*, 454 U.S. at 247. The Court held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry" (italics in original). *Id.*

<sup>251</sup> *Id.* at 254 n.22.

<sup>252</sup> For an explanation of certain factors that enter into the decision of whether an alternative forum is adequate, see *Forum Shopping*, *supra* note 16, at 59-65.

<sup>253</sup> Robertson, *supra* note 125, at 271. One plaintiff's lawyer stated that Union Carbide may have been unwise in seeking an Indian forum because, although the American legal system is familiar to the defendants, Union Carbide is unaware of what procedures India will implement to handle the Bhopal litigation. This lawyer

certain factors which would render an alternative forum inadequate can be waived by the defendant upon dismissal from the United States court.

Union Carbide has filed its motion for forum non conveniens in the New York federal court based on the belief that India's cultural standards dictate that damage awards will be substantially lower in that country. The plaintiffs have opposed the motion alleging that the lower damage awards render India an inadequate forum. Recognizing that the forum non conveniens ruling will have an impact on the damage awards in the case, the public and private interest factors of *Gilbert* are now considered in light of their application to the facts of the Bhopal litigation.

#### A. *Private Interests*

The analysis of a forum non conveniens ruling should begin with the private interest factors set forth in *Gilbert*.<sup>254</sup> Private interests are those which address convenience of the parties before the court.<sup>255</sup> Although the plaintiff's choice of forum is given less weight when the plaintiff is foreign,<sup>256</sup> the standard of *Gilbert* remains that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."<sup>257</sup>

##### 1. *Access to Proof*

The Supreme Court found that access to sources of proof in the *Piper* case pointed to both forums.<sup>258</sup> The American forum provided

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was implying that India may grant even larger awards in a judgment than would an American jury. Riley, *Bhopal Victims' Attorneys Gird for First Hearing*, Nat'l L.J., Feb. 25, 1985, at 9, col. 2.

<sup>254</sup> In *Gilbert*, 330 U.S. at 509, the Court considered the private interests before the public interests. See also *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981), in which the court set forth a four-step process in deciding a forum non conveniens dismissal. Following a determination that the alternative forum is adequate and has jurisdiction over the case, the private interests are weighed. If the balance is not strongly in favor of either party following consideration of private interests, public factors are considered. *Id.* at 784.

<sup>255</sup> See *Forum Shopping*, *supra* note 16, at 50.

<sup>256</sup> See *Piper*, 454 U.S. at 242, in which the Court quoted the lower court decision, *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727 (M.D. Pa. 1979), stating "the courts have been less solicitous when the plaintiff is not an American citizen or resident, and particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States." *Id.*

<sup>257</sup> *Gilbert*, 330 U.S. at 508.

<sup>258</sup> *Piper*, 454 U.S. at 257.

records of the design, manufacture, and testing of the propeller and airplane, while the Scottish forum provided evidence gathered from the site of the accident and from witnesses in Scotland.<sup>259</sup> Thus, evidence relating to separate theories of causation were located in different places.

Analogously, the sources of proof in the Bhopal case also point to the two forums. Proof to support the plaintiffs' allegations of defective design and construction of the Bhopal plant are in the United States.<sup>260</sup> Relevant evidence from witnesses to the accident, from operation and maintenance records of the UCIL plant, and from records of the Madhya Pradesh Government concerning regulations relating to the UCIL plant, is located in India.<sup>261</sup>

Although evidence of causation can be found in both forums, the evidence concerning damages is located in India. This evidence includes medical records, testimony from doctors and nurses treating the victims, and testimony from victims themselves.<sup>262</sup> Because a substantial part of the evidence for the Bhopal litigation is located in India, the plaintiffs may find it difficult to persuade the United States judge to retain jurisdiction over the case based on the ease of access to sources of proof.<sup>263</sup>

## 2. *Witness Availability*

Witness availability is closely related to the interest in ease of access

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<sup>259</sup> Evidence dealing with strict liability could be gathered in the United States, and evidence concerning negligence could be gathered at the Scotland accident site. See Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L.J. 1257, 1265 (1981) [hereinafter cited as *Forum Non Conveniens*], in which the author states that: "courts may find *forum non conveniens* dismissal justified when most of the evidence relating to a strict liability claim is located in the United States but evidence relating to a negligence claim or to damages is more readily available in the foreign forum" (italics in original). *Id.*

<sup>260</sup> Adler, *supra* note 29, at 58.

<sup>261</sup> The police in Bhopal seized all the records at the Bhopal plant after the accident in preparation for an investigation into the catastrophe. Hazarika, *supra* note 44, at A1, col. 3. Bud Holman, attorney for Union Carbide, has argued that broad discovery is unnecessary because the Indian Government has already seized Union Carbide India's documents and "knows all there is to know about the company." Adler, *supra* note 29, at 61.

<sup>262</sup> Adler, *supra* note 29, at 58.

<sup>263</sup> See *Byrne v. Japan Airlines*, 83 Civ. 9162, *slip op.* at 4 (S.D.N.Y. Dec. 17, 1984), in which the district court stated: "If access to proof is far easier in [a foreign forum] than in the United States, dismissal of the action is appropriate." See also *Pain*, 637 F.2d at 788, in which the court stated that the inability of the parties to obtain all relevant foreign evidence would hinder a fair resolution of the dispute.



to sources of proof. The witness availability factor seems to weigh heavily on the side of the defendants in this case because although documents and written testimony could be brought from India to the United States, Indian witnesses cannot be forced to testify in the United States.<sup>264</sup>

The *Gilbert* Court recognized the importance of having witnesses testify at trial when it stated that to force the defendants "to try their cases on deposition, is to create a condition not satisfactory to the court, jury or most litigants."<sup>265</sup> Similarly, other federal courts have considered the inability to subpoena foreign witnesses as an important factor in deciding forum non conveniens motions.<sup>266</sup>

In the Bhopal case, Union Carbide argues that certain potential defendants, such as contractors and subcontractors of the UCIL plant, cannot be joined in the suit if the liability issue is tried in the United States.<sup>267</sup> Conversely, the plaintiffs have asserted that vital witnesses such as the designers and engineers of the UCIL plant are located in the United States.<sup>268</sup> In addition, attorneys for the plaintiffs have proposed that instead of having every plaintiff flown to the United States to testify as to damages,<sup>269</sup> a representative sampling of damage trials could be held on which damage awards could be based for the entire group of plaintiffs.<sup>270</sup> However, because Union Carbide is unlikely to agree to representative damage trials,<sup>271</sup> and because Union Carbide could be greatly inconvenienced without the testimony of certain Indian witnesses substantially connected to the gas leak, the

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<sup>264</sup> See FED. R. CIV. P. 4. The Indian witnesses would not be subject to compulsory process in the United States because under Rule 4 a witness who resides more than 100 miles from the place where the action is commenced is outside the territorial limits of service of process. *Id.*

<sup>265</sup> *Gilbert*, 330 U.S. at 511.

<sup>266</sup> See, e.g., *Schertenleib v. Traum*, 589 F.2d 1156 (2d Cir. 1978); *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499 (2d Cir. 1966); *Domingo v. States Marine Lines*, 340 F. Supp. 811 (S.D.N.Y. 1972).

<sup>267</sup> See *Adler*, *supra* note 29, at 58.

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

<sup>269</sup> Although the witnesses cannot be demanded to come because of Rule 4 of the Federal Rules of Civil Procedure, they can come voluntarily. The practical problem is that because these victims' incomes are so low, they cannot afford to fly to the United States to testify. See *id.* at 28.

<sup>270</sup> See *supra* note 75 and accompanying text for a discussion of the plaintiffs' proposal for representative damage trials.

<sup>271</sup> See *Adler*, *supra* note 29, at 62. Union Carbide attorney Bud Holman has stated that the defendant may refuse to agree to a damage settlement based on representative trials. *Id.* Holman advocated this attitude when he stated, "[w]e litigate to the bitter end when the other side is seeking something unreasonable — that we surrender or that we serve somebody's political purpose." *Id.* at 27.

United States is not an appropriate forum under the witness availability factor.

### 3. *Third-Party Defendants*

The third private interest factor to consider involves Union Carbide's potential inability to implead third-party defendants. If a United States court hears the Bhopal case, Union Carbide may be unable to join as defendants certain responsible parties, including officials of the Madhya Pradesh Government,<sup>272</sup> employers or employees of the UCIL plant,<sup>273</sup> and the consulting firm responsible for the detailed design of the plant.<sup>274</sup> Unless Union Carbide can join these potential defendants in the case, the company may be forced to bring an indemnity or contribution action in India to recover part of its losses from these responsible parties.<sup>275</sup>

The *Piper* Court also considered the inability to implead potential third-party defendants, concluding "that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in [the foreign forum]."<sup>276</sup> Consequently, the plain-

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<sup>272</sup> The purpose of joining the state government as a defendant would be to prove the government negligent in failing to enforce safety regulations and carry out proper inspections at the plant. See text accompanying notes 116-17. However, the state government may not be subject to suit even if the Bhopal case is heard in the foreign forum because of the doctrine of sovereign immunity recognized in India. See *supra* notes 116-18 and accompanying text. But see Bakshi, *supra* note 116, at 343-45, in which the author states that the modern trend in India is for the courts to find that more and more functions of the government are considered as "non-sovereign," thus expanding the scope of governmental liability.

<sup>273</sup> By joining the employers and employees of the Bhopal plant, Union Carbide would attempt to show that these potential defendants were negligent in a variety of acts and omissions, including: (1) violating plant procedures by shutting down a refrigeration unit designed to keep chemicals cool and inhibit violent reactions; (2) failing to repair the leak when it was first discovered; (3) washing out a pipe improperly sealed in violation of plant rules; Diamond, *supra* note 31, at A1, col. 3; (4) failing to hire trained workmen; and (5) failing to transfer MIC in the problem tank to a spare tank as required by standard plant procedures. *Id.* at A6, col. 1.

<sup>274</sup> The consulting firm that provided the detailed designs for three safety devices that failed the morning of the accident, as well as detailed designs for the overall plant, was Humphreys & Glasgow Consultants Pvt., Ltd. of Bombay, a subsidiary of Humphreys & Glasgow, Ltd., a consulting company based in Scotland. The London company was purchased by the Enserch Corporation of Dallas in 1983. *Id.* at A6, col. 3.

<sup>275</sup> See *Piper*, 454 U.S. at 259, in which the Court stated that the defendants could bring an action for contribution and indemnity in Scotland upon a showing that the negligence of the pilot, the plane's owners, or the charter company contributed to the cause of the accident. *Id.*

<sup>276</sup> *Id.*; see also *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975) (held that "[t]he inability to implead other parties directly involved in the controversy is a factor which weighs against the retention of jurisdiction"). *Id.*

tiffs in the Bhopal case have no competing interest which could offset Union Carbide's inability to join additional parties. As a result, this third private interest factor leads to the conclusion that when all of the parties to a suit cannot be brought before the United States court, the balance must lean toward dismissal.

#### 4. *View of the Premises*

The final private interest factor in the *Gilbert* balancing test is whether a view of the accident premises located in the foreign forum would be important to the outcome of the case. In the Bhopal case, where an inspection of the premises would be a prerequisite to determining the cause of the accident,<sup>277</sup> the possibility of dismissal is enhanced because the accident site is located in the foreign forum.<sup>278</sup>

Considering this factor in *Piper*, the Court simply stated that the "[t]rial would be aided by familiarity with Scottish topography, and by easy access to the wreckage."<sup>279</sup> A view of the premises weighs even more heavily, however, in the Bhopal case. A view of the plant and its piping system will in all likelihood be necessary to determine how the chemical leak began. In addition, a view of the premises will be essential to determine whether the accident could have been caused by sabotage.<sup>280</sup>

Following the private interest standards in *Gilbert*, the federal court will likely decide that Union Carbide would be inconvenienced in a United States court; however, these private interest factors by themselves may not conclusively mandate dismissal of the case.<sup>281</sup> There-

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<sup>277</sup> As late as December 2, 1985, the chief investigator for the Indian Central Bureau of Investigation stated that: "[n]o one on the face of this earth knows for certain what [caused the accident]." Weisman, *supra* note 8, at A10, col. 1.

<sup>278</sup> The plant, as well as all of the safety mechanisms that reportedly failed to control the leak, are located in Bhopal. Inside the plant, which has been closed since the accident, 13 tons of residue from the chemical reaction await disposal. *Id.*

<sup>279</sup> *Piper*, 454 U.S. at 242.

<sup>280</sup> Union Carbide has alleged that the accident may have been caused by a group of Sikh extremists known as "Black June." Adler, *supra* note 29, at 59. However, Union Carbide has not yet provided any evidence supporting a claim of sabotage beyond a single newspaper article in which the terrorist group assumed responsibility for the Bhopal disaster. *Id.* Nevertheless, senior Carbide officials also subscribe to the theory that the UCIL plant was sabotaged. See Weisman, *supra* note 8, at A10, col. 2. Union Carbide's chairman Warren Anderson, however, has told a congressional subcommittee that there is "no evidence whatsoever that sabotage was behind the incident at Bhopal." Diamond, *supra* note 29, at D3, col. 2.

<sup>281</sup> Although the private interest factors in *Piper* were sufficient for dismissal, the Supreme Court considered the public interest factors as well. *Piper*, 454 U.S. at 259. Therefore, if the New York federal court finds that the private interest factors in the Bhopal case are sufficient for dismissal, the public interest factors will probably still be considered.

fore, the New York federal court will also consider the following public interest factors in relation to the Bhopal litigation.

### B. Public Interests

Public interests involve the way in which legislative and judicial policy considerations influence the administration of courts in the present forum.<sup>282</sup> The administration of courts in turn determines whether the home forum will accept responsibility for hearing a case.<sup>283</sup> As a result, the public interest factors focus on the convenience of the court in hearing the case rather than on the convenience of the parties before the court.

Originally, courts considered the residence of the parties to be an important public interest factor.<sup>284</sup> A *forum non conveniens* motion usually could be defeated if one of the parties resided within the court's jurisdiction while, on the other hand, cases were often dismissed if neither party resided in the district in which the suit was being heard.<sup>285</sup> However, citizenship is no longer a controlling factor in the *forum non conveniens* balancing test.<sup>286</sup> Indeed, the *Gilbert* Court made no mention of citizenship as a controlling public interest factor in the balancing test it set forth.<sup>287</sup> Therefore, the New York court will not give great weight to the fact that each plaintiff in the Bhopal litigation is Indian.<sup>288</sup>

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<sup>282</sup> See *Forum Shopping*, *supra* note 16, at 50.

<sup>283</sup> In *Piper*, 454 U.S. at 261, after determining that the lower court should have granted the *forum non conveniens* motion, Justice Marshall, writing for the majority, stated that: "[t]he American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." *Id.*

<sup>284</sup> FEDERAL PRACTICE, *supra* note 237, § 3828, at 251.

<sup>285</sup> *Id.*

<sup>286</sup> *Forum Non Conveniens*, *supra* note 259, at 1270; see also Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373, 393 (1980) [hereinafter cited as *American Plaintiffs*]. The author states that: "[t]he legislative history of [the Constitution's grant of jurisdiction] indicates that it was designed to protect the foreigner from the biases of the state courts rather than to protect the American citizen from the biases of foreign courts." *Id.* at 391.

<sup>287</sup> *Gilbert*, 330 U.S. at 508-09.

<sup>288</sup> See *American Plaintiffs*, *supra* note 286, at 393. "Until recently, the federal courts have been unanimous in holding that a defendant has a far greater burden if dismissal will result in sending an American plaintiff suing in his own right abroad to litigate his claim." *Id.* at 379. One theory suggests that a larger burden rested on the defendant when the plaintiff was an American citizen rather than a foreign citizen for two reasons: (1) the premise that American citizens deserve greater protection than aliens in *forum non conveniens* matters; and (2) the premise that

### 1. *Administrative Considerations*

The first public interest factor set forth in *Gilbert* was the backlog of litigation in congested centers.<sup>289</sup> When this factor is applied to the Bhopal case, two considerations arise. First, the case would not cause congestion in American courts as to the resolution of liability. Indeed, the issue of liability as concerning every claimant could be settled in one trial;<sup>290</sup> however, if every plaintiff must bring his own damage suit in the United States,<sup>291</sup> the possibility of significant congestion in American courts would increase exponentially.<sup>292</sup> Furthermore, the language barrier between the Indian plaintiffs and the English-speaking courts and juries would strain American courts.<sup>293</sup> As a result of this language barrier, documents and testimonies would require complete translation before each suit could be heard.

In addition to the problem of congestion in United States courts, the costs of having the parties, witnesses, and hospital records flown to the United States would be enormous.<sup>294</sup> Although the liability issue could probably be tried without great expense in New York,<sup>295</sup> the damage trials would require medical and hospital records, medical

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foreign courts, as a class, are sufficiently likely to be deficient as to justify an absolute or qualified presumption against them. *Id.* at 385.

<sup>289</sup> *Gilbert*, 330 U.S. at 508.

<sup>290</sup> See Riley, *supra* note 72, at 11, col. 2.

<sup>291</sup> Union Carbide attorney Bud Holman was quoted as saying, "[w]e can litigate 100,000 or 200,000 [separate damage trials] if we want to . . . . If we're going to defend ourselves — and we are — if there are 200,000 claimants, the 200,000 claimants are going to have to appear in court . . . . We think it's obvious they should appear in an Indian court, not a U.S. court." Adler, *supra* note 29, at 62. The potential problem of thousands of damage trials in the United States could be solved if the New York federal court decided to hear the Indian Government's single suit as sole representative of all the victims; see *supra* notes 59-61 and accompanying text.

<sup>292</sup> Congestion would especially be heavy in those states in which jurisdiction over Union Carbide has already been established; see *supra* note 184 and accompanying text. The problem of separate liability and damage trials parallels the criticisms raised when mass tort cases are brought as class actions; see *supra* notes 228-31 and accompanying text.

<sup>293</sup> See Memorandum of Law in Support of Union Carbide Corporation's Motion to Dismiss These Actions on the Grounds of Forum Non Conveniens, *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India* in December, 1984, MDL No. 626 (S.D.N.Y. July 31, 1985) [hereinafter referred to as Memorandum]. India has at least 15 major languages and hundreds of regional dialects. Memorandum, *supra* at 43.

<sup>294</sup> See Lewin, *supra* note 90, at 10, col. 3.

<sup>295</sup> In the trial on the liability issue, all the victims would not be required to testify, and much of the documentary evidence in India, such as medical records, would not be needed.

testimony, testimony from each victim as to personal injuries, and testimony from witnesses to the accident.<sup>296</sup> Thus, the costs of producing evidence for the damage trials alone could prohibit successful disposition of the litigation in the United States.

Consequently, administrative considerations also pose a problem in India. Although the language problem and the cost of transporting evidence and witnesses is greatly reduced, the congestion in the Indian courts presents a substantial obstacle to hearing the claims in India.<sup>297</sup> With such a large backlog of cases, India may not provide an adequate alternative forum. Perhaps the ultimate solution would be to try the liability issue in New York and allow a special panel of judges in India to hear all damage claims arising from the accident.<sup>298</sup> This special panel would hear only claims related to the gas leak, thus bypassing the backlog problem in Indian courts.<sup>299</sup>

## 2. Choice of Law

The second public interest factor in the balancing test concerns the possibility that an American court would be forced to apply foreign law. When the *Gilbert* Court considered this interest, it held that the need to apply foreign law points toward dismissal.<sup>300</sup> Similarly, other federal courts have held that the consideration of applying foreign

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<sup>296</sup> Adler, *supra* note 29, at 58.

<sup>297</sup> See Stewart, *supra* note 40, at 1, col. 1, which states that a backlog of one million cases exists, and this backlog may drag unresolved into the 1990's. In 1984 the Supreme Court of India had a backlog of 86,733 cases. Diamond, *supra* note 29, at D3, col. 2. In addition, Indian courts reportedly handle only a small number of personal injury cases, most of which involve motor vehicle accidents. The average decision on these verdicts comes 17.5 years after the event. *Id.*

<sup>298</sup> Diamond, *supra* note 66, at 43, col. 5. Michael Nussbaum, a specialist in international law, has suggested that, although India has less expertise in mass tort litigation, it could establish a special tribunal of judges to hear the Bhopal cases. *Id.* In Bhopal, Judge Yadan has already requested from the state government that 15 judges be assigned to hear the cases; however, no response has been forthcoming. *Victims*, *supra* note 37, at 130.

<sup>299</sup> See *Victims*, *supra* note 37, at 130.

<sup>300</sup> *Gilbert*, 330 U.S. at 511-12. For a discussion of the application of foreign law in United States courts, see Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 VA. J. INT'L L. 619 (1978); Merryman, *Foreign Law as a Problem*, 19 STAN. J. INT'L L. 151 (1983); Saltzburg, *Discovering and Applying Foreign and International Law in Domestic Tribunals*, 18 VA. J. INT'L L. 609 (1978); Sass, *Foreign Law in Federal Courts*, 29 AM. J. COMP. L. 97 (1981); Sprankling & Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 STAN. J. INT'L L. 3 (1983); Yates, *Foreign Law Before Domestic Tribunals*, 18 VA. J. INT'L L. 725 (1978).

law in a case is an important public interest factor favoring dismissal.<sup>301</sup>

In the Bhopal litigation, Indian law will likely apply regardless of the forum.<sup>302</sup> Although Indian damages law may be less favorable to the plaintiffs,<sup>303</sup> to overcome dismissal the plaintiffs must show that "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all."<sup>304</sup> It is highly unlikely, however, that the plaintiffs will be able to overcome dismissal by showing that Indian law offers no remedy at all. Clearly, the doctrinal standards of Indian law would allow complete recovery for each victim. Moreover, any difference in the amount of awards between an Indian and an American forum can be explained on grounds of social and cultural standards, rather than on the basis of legal doctrine.

Furthermore, because both Indian and United States courts will apply Indian law, India is the logical forum to hear the case. Presumptively, Indian courts are better able to apply the doctrines, standards, and values of Indian law. Recognizing that India's doctrinal standards will allow adequate recovery, and that Indian law will no doubt be applied in the case, India would provide the most appropriate forum for the Bhopal litigation.

### 3. *Unfairness to the State's Own Citizens*

The third public interest factor involves forcing the people of a community to bear the burden of extensive litigation when those citizens have no related interest in the litigation.<sup>305</sup> The burden imposed upon American juries hearing the Bhopal litigation would be felt in two ways. The first factor, expenses of administering the case,<sup>306</sup> would be felt in taxpayers' money being used to pay for the juries and other factors necessary for processing the claims. The second

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<sup>301</sup> See, e.g., *Calavo Growers of Cal. v. Belg.*, 632 F.2d 963 (2d Cir. 1980), cert. denied, 449 U.S. 1084 (1981); *Schertenleib*, 589 F.2d at 1156; *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978).

<sup>302</sup> For a discussion of the choice of law in an American court, see *supra* notes 179-94 and accompanying text.

<sup>303</sup> India's damage law may be less favorable because India does not recognize punitive damages. For a discussion of the damage award system in India, see *supra* notes 137-57 and accompanying text.

<sup>304</sup> *Piper*, 454 U.S. at 254.

<sup>305</sup> *Gilbert*, 330 U.S. at 508-09.

<sup>306</sup> Blair, *The Doctrine of Forum Non Conveniens In Anglo-American Law*, 29 COLUM. L. REV. 1, 25 (1929).

consideration is found in the delays of justice caused by the filing of thousands of Bhopal-related suits.<sup>307</sup> Forcing over-burdened American courts to hear these claims would postpone thousands of civil and criminal suits involving United States citizens.<sup>308</sup> Thus, the significant inconvenience that would come to American citizens by the imposition of the Bhopal litigation also weighs in favor of dismissal.

#### 4. *Indian Interests*

The final factor considers which forum has the more substantial interest in hearing the case. This factor was set forth in *Gilbert* when the Court stated, "[i]n cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach."<sup>309</sup> In addition, the Supreme Court considered this localized interest factor in *Piper* and determined that the strong Scottish interests present favored a dismissal based on forum non conveniens.<sup>310</sup>

Consideration of the Bhopal facts leaves little doubt that the case carries substantial Indian interests.<sup>311</sup> All plaintiffs are Indian, and the Indian state government of Madhya Pradesh regulated the plant.<sup>312</sup> As in the Bhopal case, when interests of the plaintiffs' forum so clearly outweigh interests of the defendant's forum, the case should be moved to the plaintiffs' forum for final resolution.<sup>313</sup>

<sup>307</sup> *Id.*

<sup>308</sup> Speiser, *A Solution to the Bhopal Dilemma*, Nat'l L.J., Feb. 3, 1986, at 13, col. 1. The author suggests that a solution to the problems of congestion in American courts and meager compensation in Indian courts would be for the New York district court judge to grant Union Carbide's motion for forum non conveniens on the condition that Union Carbide agree to binding arbitration leading to just compensation for all those injured. *Id.*

<sup>309</sup> *Gilbert*, 330 U.S. at 509. The Court also stated that: "[t]here is a local interest in having localized controversies decided at home." *Id.*

<sup>310</sup> *Piper*, 454 U.S. at 260. The Scottish interests included: (1) the site of the accident; (2) all of the decedents were from Scotland; and (3) all potential plaintiffs and defendants, except for Piper and Hartzell (manufacturer of the plane and propeller, respectively), were Scottish or English. *See also* Dahl v. United Technologies Corp., 632 F.2d 1027 (3d Cir. 1980) (court held that a dismissal should be granted in a case where four Norwegian citizens were killed in a helicopter crash in the North Sea, and that Norway's interest in applying its own laws equaled or exceeded the interest of the United States). *Id.* at 1032-33.

<sup>311</sup> *See* Memorandum, *supra* note 293, at 37-41.

<sup>312</sup> Reinhold, *supra* note 5, at A1, col. 6. The UCIL plant was theoretically monitored by the state government of Madhya Pradesh under four main national laws: the Factories Act of 1948, the Insecticides Act of 1968, the Water Act of 1974, and the Air Act of 1982. Much blame for the accident has been placed on the Madhya Pradesh labor department, which enforces the Factories Act; however, the Act is "aimed mainly at providing safe working conditions for plant workers, rather than protecting the general public." *Id.* at A8, col. 4.

<sup>313</sup> The question might be raised whether the Indian Government can waive its



Strict application of the *Gilbert* balancing test under the Bhopal facts results in the conclusion that Union Carbide's forum non conveniens motion should be granted. The Indian interests in this case are substantial, and federal courts in the United States have generally declined jurisdiction in cases brought by foreign plaintiffs when the foreign forum had a particularly strong interest in hearing the case.<sup>314</sup> In addition, Union Carbide's great inconvenience in litigating the damage claims in the United States favors a dismissal based on forum non conveniens.

## V. CONCLUSION

The MIC gas leak at the UCIL Bhopal plant was one of the worst industrial accidents of all time. Certainly, just compensation should be paid by the party or parties at fault. One question that remains unresolved is which party is at fault—the UCIL plant, the Union Carbide parent company, the Indian Government, or some combination of the three. Regardless of the identity of the party at fault, however, the compensation should be distributed through the Indian legal system.

The substantial Indian interests in the case and the likelihood that Indian law will apply regardless of the forum support the conclusion that the Bhopal litigation should be tried in India. The appropriateness of an Indian forum is underscored by the fact that all the plaintiffs reside in Bhopal, the accident occurred within India's borders, and much of the necessary evidence is located in that country. Moreover, Indian judges are better able to apply not only the legal theories of Indian law, but also the standards and values inherent in their own body of law.

The substantive body of tort law existing in India is doctrinally very similar to United States tort law. Although India has not yet applied strict liability in a mass tort suit, sufficient precedent exists whereby an Indian court could apply this theory to the Bhopal case. Moreover, because filing fees have been waived, the Bhopal claimants have ready access to Indian courts.

The major distinction between the Indian and American legal sys-

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interests in the case in an effort to persuade Judge Keenan that the United States is the proper forum for the Bhopal litigation. However, even if the Indian Government does waive its interests in the case, the other private and public *Gilbert* factors weigh heavily in support of dismissal, see *supra* notes 254-312 and accompanying text.

<sup>314</sup> See, e.g., *In re Disaster at Riyadh Airport, Saudi Arabia*, on August 19, 1980, 540 F. Supp. 1141 (D.D.C. 1982); *Harrison v. Wyeth Laboratories, Etc.*, 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd without op.*, 676 F.2d 685 (3d Cir. 1982).

tems, therefore, is the standard of damages traditionally awarded in tort cases. American tort judgments tend to be high as a result of the value which juries place on human life. Further, the level of income enjoyed by the average American greatly exceeds the average income earned in other countries, including India. Finally, punitive damages are available in certain tort cases. Many American states allow punitive damages, but at least four states have, like India, refused to recognize them.

The distinction in damage awards, therefore, should be explained in terms of the cultural and social standards of the two countries and not in terms of doctrinal differences. The Indian victims can fairly and justly be compensated in their own country according to the cultural standards that ordinarily affect their everyday lives. India has standards of living, wealth, values, and beliefs that are vastly different from those in the United States.<sup>315</sup> In addition, India is faced with distinctly different needs, problems, and resources,<sup>316</sup> and has adopted a system of tort compensation which is uniquely designed to meet the needs, solve the problems, and handle the resources of that country. As a result, fairness to both the plaintiffs and defendants in the Bhopal litigation mandates that these claims be brought in India,<sup>317</sup> and that justice be done according to the legal doctrines and cultural standards of that country.<sup>318</sup>

*Stephen L. Cummings*

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<sup>315</sup> See *Wyeth*, 510 F. Supp at 4.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 5, where the court stated that: "fairness to the defendant mandates that defendant's conduct be judged by the standards of the community affected by its actions" (emphasis in original).

<sup>318</sup> *Non Causus Belli*, *supra* note 157, at 30, col. 2. The author states: Justice can be done in Indian courts. India is not Ruritania. The British left behind a perfectly good legal system — better, in fact, than the U.S. system because contingency fees are outlawed so that only the injured benefit. If Union Carbide was negligent, Indian courts will make sure the company compensates the victims.

*Id.*